From Credit Creation to Claiming Possession – A Critical Analysis of UK Mortgage Finance

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Abstract

This thesis aims to empirically test the Credit Creation Theory of Banking by examining the practices at each stage of UK residential mortgage lending, from the sale of the loan to litigation following default, in order to probe whether banks literally lend money.

In examining this chain of events, I employ a modified variant of Renner's (1949) theory of legal concepts as empty frames. This involves an evaluation of the legal concept of the mortgage based on its origins, juridical content and the related contemporary social, economic and procedural practices.

This evaluation is paired with positive law analysis and an ethnomethodological approach combining a Latourian perspective with that of Lynch and Bogen (1996) to analyse fieldwork observations of possession action litigation.

I find that legislative non-compliance by brokers, lenders and solicitors gave rise to four causes of action for mortgagors which I conclude altered the juridical content of mortgages.

My findings in respect to the Credit Creation Theory are consistent with those of Werner (2014a; 2016), and though I have not established proof positive in support of the theory, I have not found evidence of a pre-existing source for the loaned funds, and contend that the absence of evidence of such an origin point is tentative evidence of its absence. I therefore conclude that the observations are weakly supportive of the Theory. However, the absence of a signed letter of offer in many cases means that a key element of Minsky's (2008[1986]) variant of the theory is absent. An alternative view is speculated upon; that the legally invalid power of attorney universally present in loan terms and conditions is used by the lender to execute such a monetary instrument on behalf of the borrower.

I argue that the findings present a moral imperative wherein possession proceedings are unfairly prejudicial to mortgagors.

Keywords: Credit Creation Theory of Banking, mortgage, loan, Werner, Minsky, mis-selling, void mortgage, loan cancellation, and securitisation.

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Introduction

"The English mortgage is a work of fiction, and it is a fiction of the dishonest kind."
– Prof. Gary Watt (2009, p.130)

This thesis is a critique of the injustice of UK residential mortgage possession actions through a critical examination of the practices involved at each stage of UK residential mortgage lending, from the sale of the loan to the litigation following default. It serves as a test of the Credit Creation Theory of Banking; a theory which presents a challenge to an orthodox view which is so prevalent it is axiomatic: that banks lend money. The theory yields a very different set of facts and moral imperatives than if banks were seen as lenders of pre-existing funds.

The current research aims to extend the findings of Werner (2014a) to the context of residential UK residential mortgages via an ethnographic study of possession hearings as an inflection point by which to understand the steps which give rise to mortgage loans and enable their securitisation, as well as the framing of these processes in litigation. These observations of possession actions are analysed via an approach which combines a Latourian perspective with that of Lynch and Bogen (1996).

Legislative and regulatory non-compliance by lenders and their agents is also examined, showing four causes of action that thereby arise for mortgagors and the implications of such practices for related legal norms as well as the concept of the mortgage itself. These consist of claims for mis-selling, retroactive cancellation of the loan agreement, voiding of the deed, and the negation of the lenders' claim against the borrower as a result of securitisation. These causes of action, as well as being evaluated with reference to positive law, are analysed using a framework based on a variant of Renner's (1949) theory of legal concepts as empty frames.

Alongside these analyses, some numerical data is analysed to determine the prevalence of practices associated with mis-selling as well as to evaluate the effect of a historic court case in disrupting possession actions. This thesis therefore combines qualitative approaches within the sociology of law and finance with economic and positive law analysis, alongside limited quantitative analysis. The first chapter begins with a discussion of the primary theory which the research aims to test.

Chapter 1: Literature review and theoretical framework

1.1.1 The Credit Creation Theory of Banking

The discipline of economics includes orthodox and heterodox schools of thought which are distinct from each other in terms of theory and methodology. The orthodox school's techniques focus on evaluating theories based on mathematical modelling of outcomes and its largest subset has its roots in neoclassical economics; a field characterised by an emphasis on utility maximisation, rationality and equilibrium (Dequech, 2008). Meanwhile, the heterodox school is more diverse and less easily defined, though a commonly shared view is the rejection of mathematical modelling as non-scientific and lacking in empirical validity (Lee, 2012). Such models are critiqued as being fictional representations which over-simplify the world to the point of lacking predictive value. An example of such over-simplification is provided by Keen (2011, pp.257-258); that within the commonly-used 'Dynamic Stochastic General Equilibrium' models, banks, debt and money are entirely absent. One argument for the omission of banks is that they are merely intermediaries. Where banks and money are included in mathematical models, their functions within economies are marginalised, and so competing theories over how banks operate have long coexisted without empirical investigation.

It was only recently that the research of Werner (2014a; 2016) provided the first empirical test of three competing theories of banking; the currently-dominant Financial Intermediation Theory; the Fractional Reserve Theory and the Credit Creation Theory. The Financial Intermediation Theory posits that banks lend out depositors' funds; the Fractional Reserve Theory suggests that banks utilise funds from their own reserves, creating new credit via a networked effect, and the Credit Creation Theory posits that banks individually create money by issuing credit. The Financial Intermediation Theory is the dominant view of banking activities today, whereby banks are seen as receiving deposits and lending these out to borrowers; profiting on the differential in interest rates paid and received, so that a bank acts as an intermediary "channeling money from thousands of depositors and other investors to its loan clients" (Admati and Hellwig 2014, p.50). As this theory of banking doesn't involve a money-creation function and sees banks as intermediaries it is the most consistent with the omission of banks from mathematical models. The proponents of this theory include a range of prominent economists including Keynes (1936, pp.81-85), and Bernanke and Gertler (1995, pp.40-41). The Fractional Reserve Theory also sees banks as intermediaries but posits that funds loaned to one borrower by bank A can become the deposits of bank B, and that money is created through a step-wise progression that sees the total volume of money in an economy increase over time in this manner, limited by the requirements on banks to maintain a portion of deposits on reserve. This process is sometimes referred to as the 'money multiplier', or 'credit multiplier' (Stiglitz and Greenwald 2003, p.246), by which a network of banks can do what an individual bank cannot do - create money.

Contrastingly, the Credit Creation Theory holds that banks individually can and do create money, without first requiring customers' deposits. This view sees support among several heterodox economists and was espoused by Schumpeter (2009, p.1114), who argued in 1954 that it was:

> "*Highly inadvisable to construe bank credit on the model of existing funds; being withdrawn from previous uses by an entirely imaginary act of saving and then lent out by their owners. It is much more realistic to say that the banks 'create credit', that is, that they create deposits in their act of lending, than to say that they lend the deposits that have been entrusted to them.*"

Werner (2014a) reports on a number of other advocates of the theory, including Macleod (1855), Davenport (1913) and Withers (1916). Werner (2016, p.374) points to the actions of Credit Suisse and Barclays in issuing loans used to purchase their own newly-issued share capital as evidence of this mechanism.[1] However, he also conducted an empirical study with a small German bank, wherein by examining the bank's statements of financial position before and after issuing a loan, Werner (2014a) showed evidence consistent with the Credit Creation Theory, and completely incompatible with the other two. The research indicated that, indeed, when banks give what are conventionally termed 'loans', the funds provided are newly created; not pre-existing savings of depositors or reserves held by the bank, but brand-new money. Publications from the Bank of England and IMF have endorsed this view (McLeay, Radia and Thomas, 2014; Benes and Kumhof 2012, p.9), with the then chairman of the Bank of England stating in 2012:

> "*When banks extend loans to their customers, they create money by crediting their customers' accounts.*"
> – Mervyn King (2012, p.3)

This raises questions about the circumstances precipitating the 2008 financial crisis; the rise and fall of the housing bubble, which has been attributed to the securitisation of mortgage loans (Dymski, 2009), lax lending policies (Prager, 2013), inaccurate credit ratings (Blumberg, Wirth and Litsoukov, 2011) as well as moral hazard incentivising risk-taking (Dowd, 2013). Those

[1] It should be noted that the credit creating powers described here are attributed to banks and building societies but not to non-banking financial institutions, some of which are active in the mortgage market, but which do not form part of this current research except in so far as they feature within data analysed in chapter 8.

developments culminated in a wave of defaults by sub-prime mortgagors (Engel and McCoy, 2011), resulting in real estate being seized by banks (Dayen, 2016). While these explanations may be somewhat satisfactory under an orthodox (financial intermediation) view of banking, it is not clear how they can be reconciled with Werner's findings, which indicate that banks don't actually loan money. Such a view seems incompatible with Lord Lindley's classic definition of a mortgage as:

> "*a security for the payment of a debt or the discharge of some other obligation for which it is given.*"
>
> – Santley v Wilde (1899)

This discontinuity between empirical observations of banking practice and the legal concept of a mortgage is what the current research seeks to explore.

1.1.2 Money

> "...'money'... *exists not by nature, but by law (νόμος) and it is in our power to change it and make it useless.*"
>
> – Aristotle (350 B.C.E, book 5)

What constitutes money is not a fixed and immutable matter, but one which shifts over time. These shifts can be slow and often less visible than the magnitude of the change would suggest, as new systems often maintain the appearance of more antiquated forms, ensuring at least the appearance of continuity. Graeber (2011) found a historical shift from systems being based on money of substance (particularly precious metals) towards being based on credit, and back again. This swing between what Graeber held out as diametric opposites is but one aspect of how monetary practices can alter, with the degree of intermediation and the use of technology also impacting upon what money, in practical usage, actually *is*.

The origin of the term for UK currency, 'Sterling', denotes a particular composition of silver, and such precious-metal backing to currency has historically been international practice by which currencies derived their value from their convertibility to the underlying precious metal, for which they stood proxy. While the UK and other countries operated on a bimetallic (gold and silver) standard during the 1700s, from 1821 a gold standard of sorts was used in the UK, with the currency fully convertible to gold from 1844 until 1914 (Bank Charter Act, 1844). After a restoration of convertibility to gold during the inter-war years, this was limited in 1925 (Geva 1987, p.153) and suspended by the Gold Standard (Amendment) Act (1931). This suspension has not been repealed, so that it has been more than three generations since UK money ceased to be a direct proxy for precious metals (Fry, 2001 p.1).

Despite this, the form of the physical currency remains broadly the same.[2] Bank of England notes still carry a "*Promise to pay the bearer on demand the sum of*"; a promise which long ago ceased to have practical effect, as they are merely exchangeable for an identical note, so that from an experiential point of view such a promise is a recursive paradox. However, in practice they have value, and have been recognised as cash at least since 1758.[3] Despite the promise carrying no realistic expectation of being fulfilled, it has the practical effect, in conjunction with other elements of the note, of rendering the paper (or plastic) on which it is printed valuable. Such a note is defined under legislation predating the suspension of the gold standard, section 83(1) of the Bills of Exchange Act (1882) which states that:

> "*A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.*"

Bank of England notes, regardless of whether they stand proxy for any physical metal, or whether the promise can be fulfilled, are cash; they are money. Such a promissory note from an individual, however, does not carry the same status. If someone issues such a promissory note to satisfy a debt, the bearer of it (subject to limitations) should be able to demand the fulfilment of that promise. Should its issuer fail to make good on that promise, they could be sued for non-performance and should they continue to refuse payment, their goods or other property could be levied to realise the value owed.

However, where there is no pre-existing debt, promissory notes, and their close cousins, bonds, are commonly created and sold for value; a routine exercise whereby organisations raise finance. Another similar practice is issuing a cheque, though with a cheque it is not a promise to pay by the maker of it, but rather an instruction to someone else to pay a third party. If a cheque is not marked 'payee only', or similarly restricted, it is generally made payable "to the order of"

[2] Albeit today, notes and coins make up a very small portion of the overall money supply; 3.8% as of July 2019 (Bank of England, 2019b).

[3] In the case of Miller v Race (1758), it was ruled that Bank of England notes were treated as cash by everyone and were as much money as any coin commonly used as cash. They were granted legal tender status by the Bank of England Act (1833) (Geva 1987, p.151).

the payee. That payee can order that the bank lodge the funds in their own account, in which case the funds are drawn from the payor's account, and transferred to the payee's account. Alternatively, they can give a different order: the payee of the cheque can sign the reverse of the document, endorsing it, and so make it transferable or 'negotiable'. By signing it they have removed the restriction, and made it payable to whomever they then hand the cheque to, the recipient then being termed the 'bearer'. When the bearer, who is not necessarily named on the cheque, then cashes it, the endorsement by the originally-named payee serves as the authorisation to the recipient bank, to pay the bearer; it is the 'order' to which the original 'pay to the order of' language refers. If, however, that bearer presents the cheque to the bank and the bank refuses to honour it, he can then return to the original payee, who endorsed the cheque, and ask them to pay him instead. By endorsing the cheque, the original payee took liability for it, and so is obliged to compensate the other party. Having regained possession of the cheque, the original payee can then ask the payor's bank to pay him. If they again refuse to honour it, he has recourse to seek the funds from the original payor. This serves as an analogy for a view of banking espoused by Hyman Minsky.

1.1.3 The Minskian view of bank loans

Minsky (2008[1986]) would contend that a similar mechanism of endorsement operable in respect to cheques is at work when banks accept a promissory note:

> "*Banking is not money lending; to lend, a money lender must have money. The fundamental banking activity is accepting, that is, guaranteeing that some party is creditworthy. A bank, by accepting a debt instrument, agrees to make specified payments if the debtor will not or cannot.*"
>
> – Minsky (2008[1986], p. 256)

Once accepted or endorsed, the note or draft can be sold on, and a bank 'loan' is seen as the equivalent of the bank buying a note that it has accepted (Minsky 2008, Ibid). If a promissory note in the form of a loan agreement is seen in such a way, the scenario looks quite different than orthodox theories would suggest. Under a Minskian view, a borrower creates a financial security in the form of a promissory note, which a lender accepts and 'purchases' by providing credit of its own (Werner, 2014b). This has the potential for the development of a coherent account of mortgage loans that accommodates Werner's (2014a; 2016) findings, whereby financial institutions act as credit creation conduits; increasing the money supply with each ‘loan’ or advance of funds. Such an exchange would not be seen as the transformation of pre-existing purchasing power in one party's possession, but rather:

> *"...the creation of new purchasing power out of nothing – out of nothing even if the credit contract by which the new purchasing power is created is supported by securities which are not themselves circulating media…"*
>
> – Schumpeter (1934, p.73).

As this would not involve the transfer of pre-existing funds, there is a dissonance between Werner's findings and conventional juridical understandings of the nature of such a mortgage, which are considered next.

1.2 Conceptual overview: real estate

Mortgages are versatile instruments with a complex history, and can be utilised for diverse purposes ranging from the deposit of financial instruments as collateral for a loan to the securing of a life assurance policy against a debt (Clark 2002, pp.19-21). Fundamentally they are a means by which someone with an interest in property may provide a creditor with recourse against that property, in case they fail to pay a debt. Rather than mortgages in general, however, this thesis is concerned specifically with the mortgage of residential real estate.

Today, all real estate in the UK (including Northern Ireland) is owned by Queen Elizabeth the Second,[4] or rather is conceptualised as being owned by the corporation sole known as The Crown (Garnett, 1996; Law of Property Act, 1925 s.7; Maitland, 1901), with all other interests in land being based upon a feudal landholding system (Cahill, 2010 p.188-190). That is, any person who holds an interest in UK land does so either directly or indirectly as a tenant of the Queen,[5] in 'fee simple'; a term related to the feudal term 'feoffment' (Garner, 2014), or 'feodum simplex', indicating "a lawfull *[sic]* or pure inheritance" (Coke, 1823 Sect.1), though the term has a complex history (Pollock and Maitland 1899, pp.234-238). The reigning monarch is the only absolute land owner, with other ownership rights being classed as 'legal estates in land'; that is, a bundle of rights and duties regarding a parcel of land or 'interests in land' (a concept examined below); legal estates are of two kinds: either 'freehold' or 'leasehold', both amounting to a

[4] Medieval lawyers would not have considered the monarch as the ‘owner’ of the land; this being a more modern conception (for a detailed account of medieval tenancy see Simpson (1961 pp.44-76).
[5] Land is said to be ‘held of the Queen’ in the case of direct freeholders, while leaseholders ‘hold of’ their landlord, who, if a freeholder, holds ‘of the Queen’. Pollock and Maitland (1899, pp.232-233) describe a chain of such relationships, wherein a tenant exercising control, or ‘demesne’ over land holds it of their immediate landlord, who themselves is a tenant of another, in a continuing sequence up to the person who holds directly of the monarch.

tenancy under the Queen, with the latter being for "a term of years" (Cahill, 2010 p.18, 188). While leasehold estates may be associated with commercial buildings, it is also common for apartment buildings and houses to correspond to this category, with approximately 4 million such dwellings in England (Department for Communities and Local Government, 2014). Approximately 71-74% of homes in England and Wales (and 77.1% of UK households) are freeholds held by those occupying them (Cahill, 2010 p.189). A person who holds freehold title over a property may grant a leasehold, thereby retaining an interest in the property, for which they may charge 'ground rent'; a regular payment by the leaseholder to the freeholder (or superior leaseholder) (Northern Ireland Law Commission, 2013 p.53).[6]

Where a person holds an estate in land (whether freehold or leasehold), they may grant another person interests therein. Interests, therefore, are rights over land which someone else owns. It is in this context that mortgage law is considered in this thesis.

1.2.1 Conceptual overview: mortgage law

Much has been written about the law of mortgage from a juridical perspective, from the days of Blackstone (1765), Coke (1812), Pollock and Maitland (1898) through Clark (2002), as well as Fairest (1980), Gray and Symes (1981) and others. So, too, there is a wealth of literature on mortgage finance concerned with the sale of loans (Pellandini-Simányi et al., 2015; Vargha, 2011) as well as the issuance of mortgage-backed securities (Baig and Choudhry, 2013; Stone and Zissu, 2012), and the resulting consequences that the mispricing of risk had for economies worldwide (Engel and McCoy, 2011). The sociology of such financial ecosystems has been studied by Riles (2011), while Latour (2004) has contributed a sociological study of court systems, similar to those involved in the realisation of mortgagees' security. In more recent times, Dayen (2016) has studied the litigation of mortgages; poignantly illustrating the plight of mortgagors in the US facing David-and-Goliath struggles to defend their homes from foreclosure based on sometimes spurious claims by financial firms. Meanwhile, research has raised ontological questions about the nature of the underlying concepts of real estate and money

[6] This thesis does not distinguish, generally, between freehold or leasehold properties, nor at all between the three sub-sets of each of these categories. Rather, both 'freehold' and 'leasehold' are treated as 'ownership' of real estate; however, while this shorthand is herein generally applied, I return to a consideration of the above points in chapter 2.

(Cahill and McMahon, 2010; Graber, 2011). However, despite this voluminous literature the interface of these various fields has seen comparatively little study, so that there is little synthesis of the elements and processes they comprise. As will be detailed further below, this thesis is situated at the confluence of these fields, combining the sociology of law and finance with economic and positive law analysis, but to begin with the economic aspect described by Werner is returned to.

1.3 Research gaps in respect to the Credit Creation Theory

Werner's (2014a; 2016) findings present persuasive evidence for the Credit Creation Theory of Banking, indicating that the relationship between a customer and bank may need to be redefined. The Minskian view of bank loans presents a starting point for determining how such a relationship can be understood. If, as Werner suggests, a 'loan' starts with a promissory note being provided by the customer to the bank, with this note being accepted by the bank as a credit instrument, before issuing credit in an equal amount to the customer, then from Minsky's arguments it would seem that the relationship is not simply one of a creditor and debtor. This calls into question existing understandings of mortgage loans, but Werner's research was conducted in relation to an unsecured loan issued by a bank for a current account and it is not obvious from his observations alone what additional issues would influence this relationship where a mortgage was involved.

Though Quantitative Easing (a term coined by Werner; see Business Insider, 2010) has popularised the idea that credit can be issued by decree (Joyce et al. 2012), the largest single mechanism by which credit is created within the economy remains the issuance of credit secured by mortgages Given that the outstanding balances from residential mortgage lending in the UK exceeded £1.4 trillion as of July 2019, this accounts for more than 60% of the £2.3 trillion balance for total lending (Bank of England, 2019c), and so in seeking to understand the impact of Werner's findings, mortgage loans present the dominant and most compelling way in which the Credit Creation Theory should be examined.

Both secured and unsecured 'loans' involve the provision of credit, but mortgages secure that credit against a customer's real property, complicating the relationship. There is only so much guidance Werner's work can give on this, as though he enjoyed privileged access to the banks' accounting records, these only covered a short period of time and were limited to organisational-level statements of financial position. The study also took place in Germany and so doesn't provide an indication of whether secured lending in the UK might differ, or how more nuanced practices like securitisation could impact on the treatment of account balances.

In order to investigate these relationships, it is noted that money itself is defined by law, and of course mortgage loans consist of more than just a loan of money. It's likely that the additional element of the mortgage could impact upon the relationship between customer and bank. However, determining what that impact would be isn't as simple as relying upon existing legal accounts of mortgages such as provided by Clark (2002); Fairest (1980) or Gray and Symes (1981), since those are predicated on the assumption that banks lend money, and Werner's findings conflict with that view. Therefore, this shift in perspective on such a foundational aspect of mortgage loans undermines previous accounts so that a fresh analysis of the legal concept of the mortgage is required. Renner's (1949) work provides recommendations in this respect.

Renner (1949, p.54) advocates for cross-domain research, asserting that to develop a full understanding of a legal concept, one must examine each of its three aspects: its origin, juridical content and social function. The latter term is framed quite broadly, as encompassing economic functions such as business activities as well as what might be more commonly labelled 'social'.[7] In this sense, it would apply, as an umbrella term, for most activities connected with mortgages other than the setting of legislation. This theoretical framework provides a broad-based approach which, I suggest, is appropriate to seeking an understanding of how Werner's (2014a; 2016) findings might impact upon the relationship between customer and financial institution. Given that Werner's findings conflict with a conventional legal understanding of the relationship between a customer and bank, it is to be assumed that a strictly legal analysis of the legal concept of a mortgage would not capture all of the impact of Werner's findings. Even in the absence of such a disruptive premise for the research, Whitehouse (2010) advocates for such socio-legal research as necessary for developing a complete understanding of the law. Therefore, what follows is an account of Renner's (1949) theory and how it might be applied in the current research.

[7] A further element to the 'social' aspect of Renner's theory - the role of judges - is considered below.

1.4 Theoretical framework

Renner (1949) saw legal concepts, as so-called 'empty frames'; as 'institutions'[8] serving social and economic functions, wherein if a function is no longer served by one institution, another will take its place, while the former institution may become obsolete and archaic. Under his theory, these functions operate based on legal norms which are created by legislatures as codified rules and proscriptions. Legal norms are the practices and requirements that comprise an institution; its constituent elements and the practices by which it operates. When new legislation is passed, it can have the effect of changing the legal norms of which an institution is comprised. Renner (Ibid, p.76) uses the example of the institution of the bill of exchange; a legal concept which had served the function of a monetary instrument for a long period of time. He notes that legislation had the effect of changing one of its legal norms - that of imprisonment for debt. Following that legislative amendment, the institution maintained its previous function, but now with a change to this legal norm. An aspect of how it operated was altered, but the overall legal concept remained the same and it continued to serve its monetary function. Alternatively, an institution's legal norms might remain broadly the same, while its social function changes. An example of this would be the concept of 'fee simple' described earlier in this chapter. Its origins were as a kind of feudal tenancy, and while it nominally remains so, the social function served by this legal concept has changed from one of tenancy to ownership. As noted above, these two aspects to a law form: its origin and social function are two parts of a trinity by which Renner advocates the study of law; the third aspect being the juridical or legal content of the institution itself.

Renner holds that changes in legislation can cause changes in social (and economic) function, but that more commonly this occurs the other way around. Legislation is seen as reactive to changes in social function; more commonly codifying extant practices rather than pro-actively shaping new ones, though a considerable period can elapse between a change in customary practice and its codification into law. In the example of fee simple, changes in how people were utilising and recognising land tenure saw this kind of tenancy being treated, in practice, more like land ownership; its social function had changed. In time this change was reflected in legislation which recognised a holder of land in fee simple as having ownership rights (Wambaugh, 1903). Here, Pound's (1910, p.15) observations are fitting: that law yields to lay

[8] In this section the terms 'institution' and 'legal concept' are used interchangeably but for the remainder of the thesis, the phrase 'legal concept' is preferred. Where the term 'institution' is used in this manner, in the remainder of the thesis it will generally be as part of a more specific phrase such as 'institution of the mortgage' or a variant thereof, to avoid confusion with the phrase 'financial institution', which designates banks, building societies and specialist lenders.

conduct; actual practice diverges from what legal requirements might dictate so that eventually law must give way. However, it is not such responsiveness of legislation to social changes that Renner is chiefly concerned with. Rather, he focuses primarily upon situations where legislation does not alter legal concepts. He is concerned with the question of how some institutions can retain stable legal norms even while the social function to which they are applied changes. That is, Renner asks how a legal concept can remain unchanged in its juridical content, so that it operates in the same manner and with the same legal effect, while the function it serves changes. To return to the fee simple example, he would be motivated to ask how this legal concept came to take on the attributes of ownership in its social use, while retaining the legal effect of being a tenancy.[9]

Such an approach conceives of legal concepts as somewhat like building blocks whose arrangements may alter with fluctuations in the environment but whose fundamental elements remain unchanged. Kahn-Freund, in the introduction to Renner's (1949, p.38) work, observed that even in the late 1940s, such a rigid conception of legal norms isolated from public law was dated, but that the overall method of analysis itself retained utility. Similarly, Whitehouse (1999, p.395) concluded that this view of the legal concept of mortgages based on Renner's theory was undermined by her findings. While aspects of the legal institution of mortgages remained stable over the period examined, others did not.

Whitehouse (1999) tested the hypothesis that the significance of the law can only be evaluated by reference to the three aspects identified in Renner's (1949) theory: the origin, juridical content and social function. To do so, she examined the legal concept of the mortgage from 1925 to the mid-1990s in the UK and in concluding accepted the hypothesis, stating that any attempt to implement change to the institution of the mortgage should be informed by those 3 aspects of mortgage relationships, and by the potential for the juridical content of the legal concept to effect change in the social context, such as changes in business practices.

Following on from Whitehouse's (1999) work, as well as her subsequent studies, the current research aims to investigate the converse of this: whether changes in understandings of credit issuance have the potential to effect change in the juridical content of the mortgage; particularly the relationship between mortgagor and mortgagee.

[9] As will be shown in the next chapter, the legal norms have not in fact remained stable over time.

1.4.1 Modifying Renner's theory for a common law context

What has been outlined so far forms the basis of the theoretical framework for this research, with the institution, or legal concept, of the mortgage being examined in respect to its origins, juridical content and social/economic functions. However, a modification to Renner's theory is necessary for reasons explained below.

Renner wrote in the context of the Austrian code-law legal system of the early 1900s; a context which differs in several respects from the English common law system. Kahn-Freund (writing in Renner 1949, pp.9-10) notes that in a code-law system, judges largely apply legislation based on the letter of the law without the discretion to deviate from or re-interpret its wording, and that this raises issues with the theory for researchers in common law jurisdictions. Contrastingly, under English common law, courts are capable of adapting legal norms to new functions by effectively 'making' law through re-interpreting existing legislation (Ibid, p.40). Therefore, the powers of common law judges differ from those of most judges in code-based continental systems, where adaptation of the law to changes in the environment requires legislative intervention. As Renner categorised judicial rulings within the 'social' category, of his framework, this presents some difficulty. It is not clear how one would meaningfully distinguish where, under Renner's original conception, a legal norm can be said to have changed within a common law system. By looking only to legislation for these changes in legal norms, the capacity of judges to alter the law would be overlooked, particularly since this is often accomplished by retaining the same words but applying them differently. As Latour (2004, p.93) noted of judges who operate with such powers to construe and interpret legislation, they:

> "*...invariably present their innovations as the expression of a principle that was already in existence, so that even when it is transformed completely the corpus of administrative law is 'even more' the same than it was before.*"

Therefore, Whitehouse's (1999) modification is employed; adapting what was a code-law based approach to an English common law system by treating judicial determinations as being within the 'juridical' rather than 'social' aspect of the theory. An additional alteration is adopted based on Whitehouse's (1999, p.395) findings that contrary to Renner's contention, the legal concept of mortgages is not normatively pure. That is, above, Renner's particular focus was noted as being on scenarios where the juridical content of an institution remains stable over time while their social function changes. Whitehouse found this to be untrue of UK mortgages; that the juridical content did not remain stable in respect to all legal norms. Therefore, she suggests that the judiciary's ability to alter the social meaning of legal institutions might partially explain this, and suggests that further research can build on her findings (Whitehouse, 1999; 2010).

1.4.2 Further modification to the granularity of Renner's theory's

In extending the research of Whitehouse discussed above, her previous findings are taken into account, given that support was not found for Renner's (1949) contention as to the normative purity of the legal concept of a mortgage. Therefore, the current research will utilise a more granular application of Renner's theory. Rather than looking chiefly at the mortgage as a unitary concept, the component legal norms as well as the processes which give rise to mortgages will be examined with respect to their origins, and how changes in social practice, broadly defined, might alter those norms and so alter the juridical content of the institution as a whole. If this examination were confined solely to considering how changes in understandings of credit origination could affect the relationship between customer and bank, it is likely that the question could not be answered fully. This is because, in order to know the impact of this aspect of mortgage loans, as Renner and Whitehouse have convincingly argued, a full picture of the context is required. This means identifying where gaps exist in this area and ensuring that the current study is addressed to these, thereby ensuring that any changes in practices around mortgages are properly accounted for, so as to fully understand how Werner's findings relate to the current context.

1.5 Research gaps in respect to mortgages

Looking at the existing work in this field, Whitehouse's (1999) study, as well as subsequent research (Bright and Whitehouse, 2014; Whitehouse, 2011; Whitehouse and Bright, 2014) involved conducting interviews with judicial officers, legal representatives of mortgage lenders and other members of the legal profession involved in mortgage litigation. However, they did not involve interviews with mortgagors, empirical observation of litigation, or documentary analysis of mortgage-related paperwork. Similarly, other studies in the field (Croucher et al., 2003) tend to rely on secondary data in respect to mortgagors' perspectives and experiences, but a few have solicited their views directly (Davies et al., 2016; Ford, Kempson and Wilson, 1995). However, while one study involved empirical observations of rent arrears cases (Hunter at al. 2005), such studies are rare (Bell, 2016) and direct study of the court hearings by which

UK mortgage possession claims are litigated remains a largely unexplored area. Therefore, gaps are identified in respect to the empirical study of litigation, related documentation and the experiences of mortgagors themselves.

1.6 Data categories

The current research aims to address these gaps by studying the legal concept of mortgages via the inflection point of UK possession actions, as it is at this point that narratives about the relationships and events involved in mortgage origination must be presented. Following Whitehouse's (2011, p.152) call to study mortgages 'in action', as opposed to 'in books', empirical observations will be conducted of such court hearings, with documentary analysis of related paperwork, as well as interviews of mortgagors and use of ancillary data from court listings, a securitisation database and information provided by an extended network of litigants. Therefore, the research questions can be stated as follows:

1.7 Research questions

Adopting Whitehouse's modification, and the above adjustment, a more granular variant of Renner's (1949) theory is employed to examine the following questions:

How might changes in social, economic and procedural practices via which mortgages are constituted contribute towards changes in the juridical content of mortgages?

Are observations consistent with the Credit Creation Theory of Banking and what do they indicate about the relationship between an individual mortgagor and mortgagee financial institution?

1.8 Methodological outline

Renner's (1949) theory provides a theoretical framework for the research, however a methodology is required that aligns with its primary focus on the conduct of litigation. This is provided by the work of Bogen and Lynch (1989) and Lynch and Bogen (1996), while the research draws also on that of Latour (1987; 2004; 2005; 2010) as well as Latour and Woolgar (1979). Lynch and Bogen studied the record-producing work of a public tribunal; a quasi-judicial practice operating through structured hearings that resemble those of a court. This approach is combined with Latour's (2004) study of French Administrative courts (along with his related work, above) as a means of analysing the conduct of such litigation, and how the contention over written documents shapes the developing narrative. In such hearings, interpretations of phrasing are nuanced so that there is a great focus on:

> "*...the manipulation of texts...which are...subjected to a subtle exegesis which seeks to classify them, to criticise them, and to establish their weight and hierarchy, and which for both kinds of practitioner replace the external world, which is in itself unintelligible.*"
>
> -Latour (2004, p.96).

Meanwhile, Lynch and Bogen (1996, p.74-76) note the importance of chronologies for the construction of historical accounts; an observation as true for the senate hearings they focus on, and for litigation generally, as for historiography. In UK possession actions, chronologies are the basis of a large portion of argumentation, and form the backbone of the narratives constructed. This is observed both with the chronologies of facts leading up to the initiation of court proceedings and with reflexive chronologies of court hearings themselves[10]. A typical hearing will begin with the judicial officer asking the financial institution's representative to present their opening statements, which comprise a chronological account of events from the formation of a loan agreement to the borrower's default and any subsequent occurrences. Such chronologies are supported by documentary evidence which is, itself, dated, and such dates are relevant not only to the ordering of events but also to their weighting in respect to other evidence.

This primacy of chronologies is reflected in the structure of this thesis, which begins with a historical account of English mortgages and conveyancing over approximately the last thousand years, before proceeding through each of the stages of a mortgage loan and its subsequent litigation in the chronological order that these stages would occur. This starts with an examination of the sales process, proceeds through the forming of a loan agreement; then the

[10] Indeed, at the outset of a hearing I observed, a lender's legal representative stated that the way they would present their case would be "simply to just go through in chronological order what happened and how we got to where we got to today", by which they were referring both to events prior to litigation and paperwork exchanged thereafter, as well as the hearings of the case prior to that point.

signing of a deed; the securitisation of the loan; the management of the loan account up to and following default, and finally an examination of the court processes by which possession claims are litigated. This is then followed by a conclusion integrating findings from each chapter. Although a chronological structure is followed in this manner both between, and to a certain degree within chapters, discussion within the chapters is not confined to events at their respective stage of the process. Rather, each chapter focuses on analysing the elements from that stage of the process partially through the inflection point of court hearings. So, chapter four, for example, concerns the mortgage loan sales process; both its initial performance and how aspects of this sales process re-emerge to feature within and influence subsequent litigation. Chapter five focuses on the loan agreement, with a positive law analysis of how it could potentially be cancellable. Chapter six, then, examines the origins of legal norms comprising the deed and causes of action which could render it voidable. This fractal structure to the thesis reflects what Lynch and Bogen (1996) describe as the reflexive, iterative manner in which narratives of contentious hearings are written and recursively re-written so that a linear account of events fails to capture the shifting and self-referential nature of the phenomena under examination. Based on this approach, what follows is a brief outline of the stages of the mortgage loan from its sale to a property's repossession.

1.9 Contributions

This thesis contributes to the existing body of knowledge on the practices of mortgage lending, being the first academic research to examine the whole process. This involved tracing each stage from the sale of the loan, through the signing of the deed, to completion of the property purchase, the management of the loan, its securitisation, the borrower's default, the commencement of possession proceedings, the filing of paperwork and litigation in court hearings up to and after the granting of a possession order.

In following this chain of events, along with the production of documentary records they entail, I have found that procedural deficiencies can occur at every stage. Building on these observations, I detail four causes of action open to mortgagors, for mis-selling; cancellation of the loan (and indirectly, the mortgage) for non-disclosure of the 7-day right of cancellation; voiding of the mortgage deed for lack of attestation and writing off of the outstanding loan balance as a result of defects in securitisation practices.

I also utilise an innovative ethnomethodological approach combining Latourian work with that of Lynch and Bogen (1996) to analyse activity which is rarely studied – the litigation process.

More fundamentally, this is the third empirical investigation of the Credit Creation Theory of Banking, and the first to examine secured lending. I have found weak support for the theory, but also identified that the prevalence of unsigned letters of offer constitute a challenge to the Minskian form of the theory.

I have contributed to a better understanding of the inherently legal character of financial transactions, and shown how documentary practices (accounting, signing, registering) are instantiated in legal practice, and so enable the edifice of financial systems to function.

1.10 Research Context

The settings within which the research takes place are not without significance, playing a role in shaping what Schatzki (2010 p.130) terms 'practice-arrangement nexuses'. These settings vary both materially and conceptually, so that the following section provides an introduction to key aspects of the environment.

1.10.1 Court topology and judicial context

Where in England and Wales initial hearings of repossession actions take place in county courts across the country, in Northern Ireland all repossession actions begin (and most end) in a single building; indeed, a single room, in Belfast, within The Royal Courts of Justice. In England and Wales, county courts vary in their architecture and internal design, but many rooms where repossession actions take place are relatively modern in their decor, with furniture and fixtures that, as Latour (2004, p.77) might note, would not be out of place in a recent-build office building. This is true also of some High Court buildings, at least internally, although the building housing the Northern Irish High Court, despite being constructed as late as the 1930s has a distinctly imperial, classical, colonnaded external appearance which is matched internally with high ceilings and dark wood-panelled hallways. The room where all of the province's repossession actions are first heard (room 118) is furnished in a similar fashion, giving an imposing appearance to those 'summonsed' (required to attend) there. In both jurisdictions, the judicial officer typically sits behind a desk of some description, in a fashion resembling a professional consultant in any other field. Those involved and named on the case, the 'parties', typically face the judicial officer, and for initial hearings only the parties themselves will be present, with financial institutions usually represented by a solicitor, and members of the public generally excluded. The judicial officer, in England and Wales, will typically be a District judge, while in Northern Ireland it will be a Master of the High Court; a position just below that of a full High Court Judge, although in both jurisdictions other officers can hear cases for procedural and scheduling reasons. When there is a particularly busy caseload, more junior officers or those from other divisions within a court can be allocated repossession cases. These can include Circuit judges, Family Division judges and Deputy Masters.

These arrangements differ at the next level of judicial operation, where a High Court Judge is the presiding judicial officer. The rooms for such hearings typically follow a more proscribed, esoteric layout with a public gallery, separate seating areas for the claimant/plaintiff and defendant, and a raised seating area for the judicial officer, as well as a separate area for the court clerk. Each area is usually set at a different height, with barriers between the parties to the case and the judge, who sits at a higher level, usually accompanied by one or more assistant who in Northern Ireland is/are known as their tipstaff/tipstaves.

1.10.2 The role of clerks

Although the French and Anglo-Saxon legal systems differ greatly, significant parallels can be drawn between the UK courts which deal with repossession cases and the administrative courts studied by Latour (2010).

Just as with the French administrative courts, there are two major divisions in the workload of a court – the filing and managing of paper records by clerks, and the operationalising of those records by judges. The former are responsible for building a file; a collection of paperwork that constitutes the material body of the case. Just as in Latour's time, there is a computer system which facilitates this but for the most part, the paperwork remains substantially physical, with several systems recording data about it digitally, such as the Case Management System which logs documents filed and the decisions of judges.

Latour laments the under-sung role of clerks; the workhorses of the court system, without whom there could be no files, no cases, and so no role for the court. It is they who have custody of the paperwork. They operate much as accountants, managing accounts into which they file documents from the parties to the case; like bank tellers taking deposits into a joint bank account. That account is the repository, effectively, of the property which is disputed. Although there is not a legal assignment of the property at land registry designating the judges and clerks and custodians of it, the effect is much the same as if they were, for it is the determination of the judge, like an accountant exercising their judgment, which decides into which account the property should be transferred - that of party A or party B.

1.10.3 Court documents

As Latour (1988, p.54) notes, "*The connective quality of written traces is still more visible in the most despised of all ethnographic objects : the file or the record.*". The use of such written documents has a long lineage in social science research, such that they can be considered "*artifacts of modern knowledge practices*" (Riles, 2006 p.2). Latour (2010, pp.128-129) identifies that, in contrast to the fields of science, in the field of law the subject matter is invisible, and the texts 'omnipresent'. This is, indeed, the case; while the discussion in a court room concerns abstract interpretations, these are grounded in the physical - in the documentation that comprises the case file. Documents which are in the file are part of the case, and those which are not cannot be considered unless and until they are added to it (Latour 2004, p.101-102). As Latour (Ibid, p.130) notes

> "*To be or not be 'in the file', that is always the question, because it provides confirmation of whether, in the present case, what is at issue is a mistake made in the process of review (which means that the sub-section has not done its job well) or an ill-conceived reply made by a party which has not prepared its case very well.*"

Similarly, in repossession actions in UK courts the case file is the absolute record that establishes what has and has not occurred, and what it will and will not be possible for the parties to discuss. It serves as a map which delineates, to a degree, the boundaries of the subject matter. The documents comprising the court file reify and manifest the matter in dispute; their materiality (Latour and Porter, 2013; Schatzki, 2010) being both a necessity of recording and precondition for the opening of the case. Before the court clerks will open a case file, documentation must be completed by representatives of the financial institution making the claim.

The classes of documents submitted into these cases are quite wide. This materiality is inseparable from several aspects of the incorporeal agreements and actions that they evidence.

Unlike other classes of agreements, a 'disposition of an interest in land' must be executed in writing;[11] this requirement extending to a mortgage, which while not identical to a sale of land, also grants rights over land to a person other than the proprietor.

In addition to certain court-issued forms and those from other government departments, there are certain classes of documents that clerks can handle, which have a hierarchy of sorts; the most commonly-used of which are:

Applications

Witness Statements / Affidavits

Exhibits

Should a document not fall into one of these or a few other defined categories, it can be unrecognised by clerks and they may refuse to file it by itself.

An application is incomplete without a witness statement or affidavit - which should accompany it or be referenced sufficiently to support it. The former, an application, is a request of the court to take some action. The latter are two forms of written statement. A witness statement is a written statement utilised at the county court level, while an affidavit is used at the high court level, and is a more formal document requiring that the person signing it, the deponent, swear to its truth before a solicitor[12] who 'attests' to their signature by signing and completing a short, formulaic statement at the bottom of the document. These documents serve as evidence in cases. For shorthand, the term 'affidavit' will mostly be used in this thesis to signify both of these kinds of evidentiary statements. Such statements may be complete 'on their face' without other supporting documents, but when other documents are referenced it is usually required that they accompany the affidavit, much as an affidavit accompanies an application. An exhibit serves as evidence of a statement, and in a sense this can be considered a catch-all term for supporting documents; akin to appendices in academic essays. If a document is referenced, and used to support a claim made by a party to a case, then the other party/parties have the right to ask to view that document.

[11] section 53 of the Law of Property Act 1925

[12] Besides a solicitor, there are a few categories of person who can attest an affidavit, known as 'commissioners for oaths', including barristers, justices of the peace, legal executives and licensed conveyancers.

Applications can be verbal or written, so that they can take the form of a formal written document, filed in a case along with supporting evidence, with a fee associated with that filing. Equally, they can be made verbally during a hearing, with a party making a request of the judge.

In principle, applications should specify the legal basis on which they are made, such as by identifying a section (Order, or Part) of the rules of court or Civil Procedure Rules that would empower a judge to make the particular class of ruling being sought. By making a request in this way, the request (application) is confined to the strict ambit of that class of application. Should there be inconsistency between what is asked for in the application and the point of law on which it is requested, the request will not be granted; indeed, a judge is restricted from doing so, although with some discretion to reinterpret an application in some circumstances.

Two other classes of documents which can feature in possession actions are subpoenas and skeleton arguments. A subpoena is an instruction to someone to come to the court to provide evidence. A skeleton argument, meanwhile, is a document which summarises the legal arguments being presented by a party to a case. This does not provide new facts, but rather presents the party's interpretation of those facts in relation to legislation and case law. The facts themselves are presented in the form of affidavits and exhibits. Claims for possession of a mortgaged property therefore are subject to particular evidentiary requirements. These reflect the processes and stages by which mortgages arise, which are outlined next.

1.11 Chronology of Mortgage Loans

This section serves as an introduction to the stages of a mortgage loan agreement, describing the sequence of steps, from start to finish, of the creation, securitisation, administration and litigation of mortgage loan accounts, up to the acquiring of possession over the underlying property. These steps form the basis of the structure for the subsequent Chapters 4 - 9, so that this thesis will proceed according to a similar chronological manner by which facts are presented in court, comparing observations to normative proscriptions.

<u>Loan Application process</u> (see Chapter 4)

A prospective borrower may follow one of two broad routes in applying for a loan. They can approach a lender directly and discuss the loan products offered by that financial institution, or approach a mortgage broker who can discuss a range of offers available from multiple lenders. When a loan product is chosen, an application is completed either by the borrower, or by the mortgage broker with input from the borrower. This application identifies the financial position of the borrower as well as details about their profession and other related information. Documentary records such as payslips may be required by a broker or financial institution as evidence of the details provided in the application.

Exchange of contracts (see Chapter 4)

Where a loan is sought for the purchase of a property (as opposed to a remortgage), following discussions between the prospective purchaser and vendor (the buyer and seller), and a price being agreed upon, a document is drafted expressing the terms of the sale. In practice, the drafting and exchange of documents occurs in almost all instances between solicitors acting for the buyer and seller, known in this role as 'conveyancing solicitors'; the word 'conveyance' being a reference to an instrument by which the exchange of property is effected (historically, a deed). The contracts are made in duplicate, with the purchaser typically signing an undated contract, sending it to the vendor, and the date being added when the vendor counter-signs it (Joseph, 1976 p.155). The contracts will also identify a date of 'completion'; an agreed-upon date for the exchange of title to the property for the purchase price agreed.

Letter of Offer (see Chapter 5)

A document is provided by a lender to a prospective borrower termed a 'letter of offer' describing the proposed loan to be provided, as specified by the Financial Conduct Authority's (FCA) Mortgage Conduct Of Business (MCOB) regulations 6.4 - 6.6 (FCA, 2019a). See Appendix 1 for an example.

Signing of Deed & completion of sale (see Chapter 6)

The completion of the sale, often termed simply 'completion' involves the transfer of funds from the buyer to the vendor, but this is complicated by the fact that in many cases the vendor and buyer will also be buying or selling another property; being those which they are moving to and from, respectively. So, with dates agreed that facilitate this occurring, in order for the buyer to pay the vendor with the funds from the loan, the buyer's solicitor will 'draw down' those funds and transfer them to the vendor's solicitor (Joseph 1976, pp.156-160). The completed mortgage deed in favour of the lender will carry the same date as the date of completion, and this will be provided to the solicitor acting for the lender.

<u>Change of proprietorship at Land Registry</u> (see Chapter 6)

In order to effect the change of 'ownership' for the property being transferred, the vendor will execute a TR1 form, instructing Land Registry to change the name of the proprietor recorded for that folio, to that of the buyer.

<u>Registration of Charge</u> (see Chapter 6)

As security for the loan provided to the purchaser by the financial institution, the solicitor acting for the lender will register a charge at Land Registry, identifying that a mortgage has been granted to them over the property by the proprietor.

As discussed in section 6.2.7, the Land Registration Act 2002 significantly undermined the common law concept of possession as a component of ownership, with the move towards a conclusive electronic record excluding that which is not electronically recorded; the actual physical possession (Panesar, 2004). This also has implications for the charging of real estate, which until the commencement of the 2002 act took effect from the moment of a deed of charge being validly executed (Chan, 2005). The effect of the 2002 act was to shift the point at which a charge is legally recognised as having been made from the deed itself to the registration of the charge at Land Registry.

<u>Securitisation</u> (see Chapter 7)

The term 'securitisation' refers to the sale of mortgage loans by the lender (termed the 'originator' in this context) to another company, via a complex series of agreements. These agreements can vary in their structure, but generally involve the issuance of bonds by the purchasing company, with the payments by borrowers providing the income stream to pay the bond-holders.

Administration of the Loan (see Chapter 8)

Whether the lender has sold the loan or retains ownership of it, they will generally continue to administer the loan, which involves receiving payments, sending account statements to the borrower and managing or varying interest rates on the account.

Arrears and Default (see Chapter 8)

Should a mortgagor cease to make their contracted monthly payments, or fall short of the sums due, the account is described as being 'in arrears'. At this point, a lender can choose to either engage in what are termed 'forbearance' measures and modify the terms of repayment, or proceed to litigate and seek possession of the property.

Initiation of Proceedings (see Chapter 9)

Possession actions begin, as noted above, with the filing of specified documentation; In England and Wales, an N5 claim form and N120 particulars of claim form, while in Northern Ireland a general form of writ of summons, followed by a sworn statement (an affidavit) outlining the claim (see appendices A and B, respectively). It is good practice for an officer of a financial institution to author the claim form, but in practice it is most frequently solicitors who do so.

The mortgagor typically first comes to know about the court case when they receive an envelope, sent by the financial institution's firm of solicitors or the court, containing signed, court-stamped copies of the documents identified above. In England and Wales, this will also include a notice informing the recipient of the date set for the first hearing, the claim number, and the address of the court. In Northern Ireland, this notice is incorporated into the summons form submitted by the financial institution's solicitors firm. The date, time and case number are filled in by clerks; for cases proceeding in the High Court, these clerks would be in the court's chancery office which is the division that handles such cases. At county court level, they would be in the office dealing with civil cases.

Grounding Affidavit/witness statement (see Chapter 9)

Once a case has been initiated in the manner noted above, a witness statement or affidavit is submitted on behalf of the financial institution stating the elements of the claim. Both are statements, with the former used at County Court level and the latter in the High Court and above. In the High Court, this document is often termed a 'grounding affidavit', as it sets out the 'grounds', or the basis, on which the claimant/plaintiff seeks an order from the court. The document identifies the maker of the statement, who in the case of an affidavit is referred to as a 'deponent'; a reference to their swearing as to the accuracy of the information presented. The statement is itemised chronologically, identifying the dates on which the relevant charge was filed at land registry, the folio number and the sum of the loan secured by the charge. It also states the interest rate on the loan, details the extent to which the loan account is in arrears, identifies whether there are other charges on the property, and refers to the service of documents on the defendant; facts usually supported by a separate document stating this, which might be in the form of a witness statement, affidavit or certificate of service. Other documents, known as exhibits, are included with the statement (in legal parlance, they are described as being 'exhibited to the affidavit or witness statement'). These will include copies of the deed of charge and the terms and conditions of the loan.

Hearings (see Chapter 9)

A date is set for the first hearing following the service of the above-referenced documents on the defendant(s). Several months can elapse between the initiation of proceedings and the first hearing of the case. The purpose of the hearing is to review and weigh the evidence, finding facts and applying conclusions of law to determine whether the application made to the court by the claimant/plaintiff should be granted. Where there is any dispute or lack of clarity, supplementary affidavits may be exchanged between the parties and the process of 'discovery' may be followed. The word 'discovery' refers to the provision, by one or more party to a case to the other(s), of documents in their possession. For this to occur, the party requesting it must apply to the judge; that is, submit a written or oral request for the judge to give an order that the other party should provide specific documents. As with (almost) all applications, the other party then has the option of opposing the request, potentially including the provision of a written statement outlining their points of fact and law which form the basis of their objection.

Once discovery has been completed and all disputed matters addressed (within the discretion of the judicial officer), the case proceeds to a final hearing where the parties present their arguments, based on evidence submitted into the court prior to that date. The representative of the financial institution begins, followed by the defendant, and the claimant/plaintiff's representative has a final chance to speak in response to the defendant's arguments.

Judgment (see Chapter 9)

The judicial officer considers the arguments presented at the final hearing and all of the evidence upon which they are based in order to reach a decision. This decision is communicated in the form of an order issued by the court. It can be in the form of a possession order, instructing the defendant to transfer 'vacant possession' to the claimant/plaintiff, or a suspended possession order which similarly grants the claimant/plaintiff the right to possession, but as the name suggests, this right is suspended pending a particular condition such as whether the defendant abides by a particular payment schedule. Should this condition be breached, the claimant/plaintiff would not need to file a new case but simply apply to the court for the suspension of the order to be lifted, and evidence the breach of the condition on which it was suspended. Judges have the discretion, however, to reach a variety of other rulings including striking out the application, which means that the claimant/plaintiff's application is refused, so that if they wished to continue to seek possession of the property they would have to file a new case. A judge may also strike a case out 'with prejudice', ruling against the application on substantive grounds, effectively preventing the claimant/plaintiff from pursuing the claim again.

Appeal (see Chapter 9)

Should either party be dissatisfied with the order given by the judicial officer they can appeal that ruling, which means presenting an application to the court for it to be reconsidered for specific identifiable reasons, which can generally be grouped into 'errors in law' and 'errors in fact', as well as potentially errors in procedure. At different levels of the court system there are differing rules for how, and by when, applications to appeal should be submitted, as well as to which court. A court may require that a party wishing to appeal first apply to the court in which the judgment was made, which is known as applying for "leave to appeal" to a higher court. If this is refused, the party may then proceed and appeal directly to the higher court. The higher court will review the decision reached by the lower court as well as the evidence which had been presented before that court. Usually additional evidence is not permitted at this stage.

Should the court of appeal uphold the ruling of a lower court so that a possession order remains in place, the next step is for the claimant/plaintiff to seek a warrant of possession.

<u>Warrant of possession</u> (see Chapter 9)

Where an outright possession order has been issued, and not complied with by the mortgagor, a mortgagee in England and Wales can submit a form N325, "Request for Warrant of Possession of Land" (see Appendix 2) (in the case of a suspended possession order, form N325A is used). This is usually submitted to the same court which granted the possession order. In Northern Ireland, an application is made to a body known as the 'Enforcements of Judgments Office', which follows a simple judicial process, similar to a court, with a judicial officer known as a 'master' presiding. As in England and Wales, the purpose of a hearing of such an application is to establish whether a possession order has been complied with, or whether it is being appealed, before determining whether a warrant of possession should be granted.

1.12 Outline of thesis

The stages of the mortgage process described above are examined with reference to their most salient elements, with analysis of the origins, juridical content and socio-economic function based on a more granular application of Whitehouse's (1999) modified form of Renner's (1949) theory.

Chapter 2

Chapter two addresses one of Renner's three aspects for studying law: its origin. I provide a history of conveyancing and mortgage law in the UK; starting with the ancient history of mortgages throughout Mesopotamia, Greece and Rome, followed by the medieval origins of UK conveyancing. The chapter shows how the development of mortgage law was intertwined with conveyancing practices and the use of early trusts to avoid taxation. It was also strongly influenced by lending practices of Jewish, and later English merchants, with case law and legislation shaping its evolution throughout the middle ages and up to the present day. I also outline the institution of a system of Land Registration in the 1800s, and the advent of mortgage loan securitisation, as key developments which shaped current practice.

Chapter 3

Chapter three details the method employed in the research, comprising ethnographic observations of possession hearings, semi-structured interviews with mortgagors and use of ancillary data from networks of litigants and the ABSNet Loan Europe database. Analysis of this data draws on the work of Bogen and Lynch (1989); Lynch and Bogen (1996); Latour and Woolgar (1979) and Latour (1987; 2004; 2005 and 2010), as well as to a limited degree that of Baudrillard (1994). These findings are integrated with positive law analysis of legislation and case law. In this manner, throughout the remainder of the thesis, I identify the implications of social, economic and procedural context for the juridical content of mortgages, and analyse these findings in relation to the Credit Creation Theory of Banking.

Chapter 4

Chapter four concerns the sale of mortgage loans as financial products which are subject to regulation via a range of primary and secondary legislation. The chapter begins with a case study of another financial product, Payment Protection Insurance, followed by that of Endowment Mortgages, showing how shortcomings or dishonesty in the sales process can result in large-scale claims by customers for mis-selling.

I explore the role of brokers in the sales process, drawing on data from interviews with mortgagors and a mortgage broker, together with data from the Lewtan ABSNet Loan Europe database to illustrate the propensity for UK lenders (and brokers), to engage in mis-selling prior to 2008. Several indicators of mis-selling are described and regional variations reported.

I suggest that this propensity for mis-selling is likely to have decreased with changes in regulation, though I detail the outstanding liabilities arising from historic practices and the potential for claims from mortgagors. I show that past scandals can serve as a model for how future mis-selling scandals might transpire.

Chapter 5

Chapter five looks at the loan agreement underlying mortgages, with a focus on EU directive 85/577/EEC, which grants a right of cancellation for agreements entered into away from business premises. I find that lenders routinely, if not universally, failed to notify borrowers that they had 7 days to cancel the loan agreements. I identify the case law which extends this period indefinitely up to the point of the lender informing the borrower of the right, at which point the cancellation period begins. However, the existence of the right is not contingent on notice being provided and the research shows that in conjunction with UK regulations, cancellation of a loan under the directive has the effect of retroactively voiding the mortgage as well. Therefore, it would enable a mortgagor to seek rectification of the records at Land Registry to obtain full proprietorship. There are variations in the applicability of the right of cancellation over different time periods, with agreements entered into away from business premises between the 1st of October 2008 and 13th of June 2014 being cancellable regardless of whether the sale was solicited, while before this time only unsolicited sales are explicitly cancellable and after this period, there is a restriction of one year within which the right of cancellation applies.

Despite the existing case law, I report on my empirical observations wherein these rights were not recognised in two UK courts, in what I contend was a misapplication of EU law. I discuss the conflicts which arise between EU law and English common law, both as a result of this directive and directive 93/13/EEC on unfair terms in consumer contracts. I also identify some implications for these rights in respect to Britain's withdrawal from the EU.

I argue that the significance of the right of cancellation is to undermine the 'tripartite agreement' doctrine adhered to by courts (Abbey National Building Society v Cann, 1990). More fundamentally, though, it has altered the juridical content of mortgages (Renner, 1949), from being a binding, irrevocable act by a mortgagor, and cancellable only by the mortgagee, to one which under certain circumstances can be indirectly and retroactively voided by a mortgagor.

Chapter 6

Chapter six focuses on the mortgage deed, and begins by detailing the changes over time in the legal norms which give rise to deeds. I show that changes in social context and conveyancing practice lead these alterations in legal norms, with a tendency towards relaxation of formalities rendering some elements of deeds mere vestiges of former requirements. I identify similar pressures towards commercial expediency as driving recent changes in practice whereby attestation of signatures has not always been correctly performed. Though case law has relaxed this requirement, I identify it as being sufficiently robust that non-compliance with legal requirements has arguably given rise to a cause of action whereby in some circumstances mortgagors can void the mortgage deed and remove the charge at Land Registry. I report a case involving one participant where this occurred and describe the capacity to do so as undermining the fundamental juridical content of the mortgage as an irrevocable grant of security for a debt.

Meanwhile, I also identify widespread non-compliance with the requirements for deeds of power of attorney, wherein lenders typically rely upon clauses in mortgage terms and conditions as a basis for executing their power of sale. I report one case wherein such an appointment was rendered void on this basis.

Chapter 7

Chapter seven presents an explanation of securitisation drawing on documentation and experience in court to illustrate the concealment of significant aspects of such agreements which are of relevance to borrowers. Particularly, I show that a borrower's power of attorney is transferred by proxy to buyers of mortgage loans and from there, to potentially be usable by only tenuously connected parties. It is speculated that the borrower's purported grant of a power of attorney to the lender may be a crucial element of the securitisation architecture, so that the defects in its execution may present a cause of action in respect to securitisation transactions which could write off loan balances. This also arises in part out of the accounting entries by which loans are securitised, examples of which I examine. I consider the implications for the Credit Creation Theory of Banking.

Chapter 8

Chapter eight looks at the management of missed payments ('arrears') by lenders, regulators and courts, with reference to the case of Rea, McGready and Laverty (2014), where malpractice by a lender resulted in a judgment forcing a change in the bank's policy towards arrears management. It also resulted in a nationwide suspension of hearings for possession actions brought by a major lender for a period of one year, and I hypothesise that even after their recommencement, the rate of hearings in Northern Ireland, where the case took place, was disproportionately lower than in England and Wales. I use two quantitative methods to investigate this hypothesis, as well as the time allocated by courts for possession hearings.

The findings are consistent with the above hypothesis, and in respect to the time management practices of courts, consistent with prior findings that possession hearings are often allocated only 5 minutes per hearing.

Chapter 9

This chapter is based primarily on observations of possession hearings, with the data analysed with reference to Latournian views and those of Bogen and Lynch (1989) and Lynch and Bogen (1996). The findings identify three themes in the conduct of lenders and legal representatives: lying, concealment and maintaining plausible deniability. It is shown that the formulaic structure of court processes serves to perpetuate perceptions of legal norms and constrict the scope of proceedings. Use of hearsay evidence and anonymity are shown to be important strategies for law firms to maintain plausible deniability and avoid accountability in respect to misstatements in testimony. However, as a result of the actions of lay litigants, case law and practice directions of judges the scope for reliance on hearsay evidence has been significantly reduced and largely eliminated in Northern Ireland, while not yet in England and Wales.

Chapter 10

Chapter ten presents the conclusions of the thesis. In respect to Chapters four, five, six and seven, the four causes of action available to mortgagors are evaluated, weighed and contrasted both individually and in combination. Their impact is considered in respect to Renner's (1949) theory, with three of the four causes of action identified as altering the juridical content of the mortgage.

My findings in respect to the Credit Creation Theory of Banking are consistent with those of Werner (2014a; 2016), and though the research has not established proof positive in support of the theory, I have not found evidence to the contrary, which I present as comprising weak support for the theory. However, a further finding is superficially inconsistent with the Minskian form of this theory; specifically, the absence of a signed letter of offer in many cases means that a key element of Minsky's (2008[1986]) view of the theory is absent. An alternative view is speculated upon; that the legally invalid power of attorney universally present in UK mortgage loan terms and conditions is used by the lender to execute such a monetary instrument on behalf of the borrower.

1.13 Notes on the scope of the research

Although some chapters present a largely positive-law analysis of aspects of mortgage loans, the thesis is not intended as a comprehensive account of the law or mortgage, nor of the procedural requirements of court process.[13] Rather, it is intended to address those gaps identified in the literature and to present salient features of mortgage loan practices which illustrate a change in socio-economic practices which may impact upon its juridical content. It is also not intended as legal advice to mortgagors unfortunate enough to find themselves in circumstances such as those examined in this research, but it is hoped that the findings will positively contribute towards the dissemination of knowledge in this field.

[13] For this, see Clark et al. (2014)

Chapter 2: History of Mortgages

2.1 Introduction

This chapter is addressed to the first of Renner's (1949) proscriptions for the study of law; that of examining its origins. To this extent, it provides a historical account of mortgages, from ancient records through the medieval period and up to the modern practice of their abstraction into mortgage-backed securities. It begins with an account of the earliest known evidence of mortgage loans based on archaeological records from the time of the Babylonian Empire. From there, I trace the institution of mortgage lending through the successive civilisations of Greek city states and the Roman Empire, showing how the practice of mortgage lending appears to have arrived in medieval England not via the legacy of Roman rule, but in the wake of the later Norman conquest. This is contextualised in relation to the then system of land transfer, and successive changes in these practices over the coming centuries, tracing the developments that lead to modern forms of conveyancing and mortgages. I identify two significant changes in the last century: the enshrining of registers of title as the conclusive record of land tenure and the advent of securitisation.

2.2 Ancient Era

To understand the modern place of mortgages in UK law, it is helpful to trace the origins of the practice; a trail which leads back to ancient Mesopotamia. While it is difficult to say whether loans evident from the earliest Mesopotamian records could be considered to have constituted mortgages (Harris, 1955; 1960; Garfinkle, 2004), the practice of lending money based on the receipt of property upon default has been a feature of organised civilisation at least since the days of the Babylonian empire, being recorded from the 18th century BC within the laws of Hammurabi (Baker, 2014:47), although banking activities had potentially persisted there for thousands of years prior (Bromberg, 1942:77; Dawson, 1928:130). The practice is recorded in later tablets (Stephens, 1945), such as in the era from 658-605 BC (Boscawen, 1876), and some tablets indicate a common interest rate of 20%, which the lender received through use of the mortgaged property, while any excess was payable by the mortgagor (Murison, 1904 p.444). Later, the developing Greek city states had extensive involvement with Babylonian merchants, deriving from them financial support and likely being influenced by their practices (Astle, 2011:55-56).

Although it is a disputed account, some historians suggest that the Athenian lawmaker Solon forbade the granting of mortgages, and returned mortgaged farms to the mortgagors deprived of them (Grote, 2001: 19, 26). Notwithstanding this episode, the practice was evident in later years, so that an inscription at the Temple of Artemis records a transaction whereby an individual mortgaged several villages as security for a loan of 1325 gold staters (Buckler and Robinson, 1912:16). Mortgaging of property continued in Greece under Roman rule (Temin, 2004:721), and indeed was prevalent in the empire during the time of Cicero, when it was largely those foreign to Rome, from Spain and southern Italy, who were involved in (or associated with) such lending, while mortgages continued to be recorded within the Roman empire under Vespasian (Frank, 1927:151, 223).

In the intervening years, Rome conquered large areas of Britain, and although it would seem evident that a continuity of Roman-derived law obtained on the island ever since, there is an argument for suggesting that it did not endure (Scrutton, 1885:2-4). While the supposedly authoritative works of Bracton (written circa 1259) and others suggest that English common law is based upon Roman law (Scrutton, 1885:136-137), the potential error of these assumptions can be better understood if we consider that the approximately 300-400 year impact of Rome upon Britain may have had the character of an occupying army. Rome held fortified positions, around which some trading took place, but which, it is argued, did not leave a permanent mark upon the country's character; indeed, much of the influence may have come from German troops within the army who then joined the local population, into which they were naturally absorbed (Bury, 1911:370; Haverfield, 1915:15-16, 26, 71). As shown by Lord Chief Justice Cockburn, in some respects the assumption of Roman law being the basis of English law is provably false, in favour of an Anglo-Saxon origin (Scrutton, 1885 p.187-188). With the exception of the laws regarding Wills and Charters, which are likely of Roman origin, English common law, from its earliest days, is more likely to have originated in Southern Germany, being brought to Britain by waves of immigration and invasion, and later influenced by European legal practices (Ibid, p.194). Equity, too, although arguably of Roman origin (Scrutton, 1885 p.2; Spence, 1846, p.436), was a later import to England; the development of this is considered in section 2.3.3.

2.3 Medieval period

2.3.1 English land law

The introduction of mortgages to England, during the twelfth and thirteenth centuries, coincided with considerable upheaval in practices around land ownership (Shapiro, 1983; Rabinowitz, 1943), with the following section exploring the practices around the transferring of land during this period.

The origin of land tenure in the UK lies in William the Conqueror's division of the land amongst his followers (Simpson 1961, pp.3-5). The highest, most complete form of landholding under this land system is known as 'fee simple' (Ibid, p.84; Wambaugh 1903, p.1), with the word 'fee' having feudal origins (Pollock and Maitland 1899, pp.234-238). In the twelfth century, title stemmed from 'seisin', which was understood as what today might be called 'actual possession' – the person in obvious occupation of the land (Simpson 1961, p.37). However, this meaning was elaborated over time and (Ibid, pp.38-41). During this period there were two essential elements to the transfer of land: the declaration of the land owner's intention to transfer it, and the actual act of giving possession of the land to the new owner. The person transferring the land was known as the 'feoffor' and the recipient, the 'feoffee', with the act of expressing the intent to transfer land being known as the 'feoffment' (Thorne 1936, p.345). Meanwhile, the actual act of placing the recipient in possession of the land was known as 'livery'. The act of expressing an intention to transfer land was not, in itself, sufficient to convey an interest in that land. Rather, until possession had been granted via the ritualistic practice of 'livery of seisin', ownership was not seen as having transferred (Ibid). Livery of seisin was a process that had to occur physically at the property being conveyed, whereby the grantor would make a declaration as to their intent to transfer the land to the recipient (this being the feoffment). They would then hand the person to whom the land was to be transferred (the feoffee) an item from the land itself, such as a twig or sod of turf; the transfer of which being a physical manifestation of the transfer of the land (Korngold, 2009, p.739). In doing so, they would recite a phrase such as "I deliver these to you in the name of sesin of all the lands and tenements contained in this deed" (Blackstone, 1765 p.315). The new owner would then complete the transaction by 'entering into' the land, for example by jumping over a fence. By this act, livery of seisin was complete and the feoffee was recognised as being lawfully in possession (seised) of the land. Without this act of taking possession, ownership was not considered to have transferred (Noy, 1677 p.162; Thorne 1936, p.361).

The public nature of this transfer was of fundamental importance, so as to preserve a collective memory of the event (Pottage 1994, p.364), although there was also a documentary recording of the transfer known as a 'charter of feoffment' (Thorne 1936, p.350). The word 'charter', deriving from the Latin 'carta', meaning 'a writing', was at the time used to describe a formal document written on parchment and sealed (McBain, 2006a p.16). Charters would often be used alongside livery of seisin, though they were not the active element of the process nor were they necessary to effect the transfer (Simpson, 1961 p.113). These would identify the land itself; the names of the parties; what interest was to be held by the donee (whether fee simple or a lesser holding), along with a statement to the effect that the grantor would 'warrant' (guarantee) the grantee's title and would finish with the grantor's seal and perhaps a list of witnesses (Ibid). Charters would typically be read aloud to the parties and witnesses, and by the thirteenth century typically contained a clause from the donor, such as 'in testimony whereof I have set my seal to this writing' (McBain 2006a, p.21). Such documents, Thorne (1936) asserts, were initially merely to serve as a reminder to the witnesses to the livery of seisin, whose memories of the event served as the ultimate proof of its occurrence. However, there appears to have been a shift in usage from the time of William the Conqueror to the early twelfth century, by which time the document itself had come to be relied upon as the definitive record, so much so that the physical transfer of possession at the site of the land had come to be replaced by a symbolic transfer and documentary recording (Ibid). Consequently, during this period actual possession was, in the eyes of the law, conveyed by symbolic transfer without physical entry onto the property, while in the mid-twelfth century there was a reversion to the older practice, with physical transfer via livery of seisin again taking precedence (Thorne 1936, p.361), and from then until the commencement of the Statute of Uses in 1536, this was the only method by which land could lawfully be transferred (Korngold, 2009, p.739).

2.3.2 Statute of Uses

The medieval legal term 'use' referred to the receipt of the benefit of property without holding legal ownership of it, or what is known today as equitable ownership. In respect to land, there were many motivations for employing uses, including wishing to manage inheritance or to avoid feudal taxation, and the practice was fairly common even in the thirteenth century (Jones 2010, p.273; Hamburger 1983, p.356). The practice was first employed by the church; apparently as early as the beginning of the ninth century, but only became more widespread in the thirteenth century with the arrival of Franciscan friars (Fratcher 1969, p.39). After this point, holding of land via uses became common, particularly 'passive' uses whereby the feoffee to whom the land was granted had no active duties other than to allow the beneficiary to use the land and benefit from it (Simpson, 1961 pp.163-164); they were a sort of nominal holder of legal title. By the 1500s most of the land in England was 'held to uses' (Ibid, p.41), resulting in reduced taxation revenue, which partially motivated the drafting of legislation seeking to mitigate such practices (Hamburger 1983, p.356). There was another consequence of land held through uses, however. As a 'use', much like a trust today, was essentially a private arrangement, it was a countervailing practice to the public system of land ownership based on livery of seisin. Whereas land conveyed by a public display transferred legal title, a beneficial interest in land could be conveyed orally by "bare words" (Goodwin 1894 p.464). This lack of transparency created scope for fraud as well as tax evasion, and so the Statute of Uses, together with the Statute of Enrolments (both passed in 1535, and coming into force in 1536) aimed to combat both of these by transforming use of land into freehold and introducing a requirement that all transfers of land to uses be registered within six months of the transaction (Hamburger 1983, pp.356-357). Significantly, the Statute of Enrolments required that a bargain and sale of land, a written instrument which was a means by which uses could be created, had to be effected "by deed indented and enrolled" (Goodwin 1894 p.465). As the word 'charter' gradually came to refer to documents executed only by the monarch, the word 'deed' (in Latin, 'factum'), replaced it in private use; literally referring to a legal act (that which had been done), and specifically the writing on parchment or paper, executed between private individuals (McBain, 2006a p.16-17). Meanwhile, an 'indenture' referred to "a writing containing a conveyance, baragaine, *[sic]* contract, covenants, or agreements betweene *[sic]* two or more, and is indented in the top or side" (Coke, 1812 Sect. 370). The indenting itself was the process by which the document was cut as a kind of guarantee of authenticity to enable better matching of duplicates (Ibid; Simpson, 1961 p.114). A practice that wasn't widespread was for a method of this kind to be used to create copies in triplicate, with each party receiving one copy while the third was kept in court records (Plucknett 1948, p.580; Simpson, 1961 p.115). Similarly, in more general application the term 'enrolment' referred to sewing great numbers of documents together in a bundle and storing these as records, which took place either in one of the Westminster courts or in the county where the land was located (Hamburger 1983, pp.356-357; McBain 2006a, p.22).

The effect of the Statute of Enrolments, therefore, together with the Statute of uses, was that when a document was executed compliant with this legislation, the legal title would pass as well as the equitable title, making the bargain and sale document a legal conveyance (Bordwell 1926, p.469). This marked the beginning of the end of the preceding practice of land transfer, under which the expressed intent to transfer land, even when delivered in writing or recorded by a charter of feoffment, did not in itself accomplish the transfer of legal ownership, which was conveyed by livery of seisin. A further weakening of the transfer by feoffment came a few years later with the Statute of Wills in 1540 (and 1543), which effectively created a tax-avoidance strategy whereby land could be transferred by a testator's will, enabling much the same function to be served by this document as previously by uses, and leading to uncertainty over land ownership as well as the consequent capacity for fraud in land transactions (Bordwell 1926, p.470; Hamburger 1983, p.357). Apart from these two documentary replacements (in effect) for transfer of land by livery of seisin, the Statute of Uses made a wider contribution to English law; laying the foundations of the modern trust. The seeds of this were already there in the traditional use, with the feoffer who granted the land, the 'feoffee to uses' who held the legal title and the 'cestui que use', the one who received the benefit of it, effectively equating to the terms settlor, trustee and beneficiary, respectively, as recognised today (Fratcher 1969, p.40). Indeed, in 1535, the terms ‘use’ and ‘trust’ were interchangeable (Simpson, 1961 pp.191-192). However, the 1535 legislation recast the relationships into a more modern form, as articulated in the influential case of Dillon v Freine, with the dissenting views of two of the judges expressing the nature of what would inform trust law (Bordwell 1926, p.470). They noted that the Statute of Uses, rather than eradicating uses, had advanced them; that before the passage of the act, a feoffee who held land for the use of another was the owner of the land, while after it, the 'cestui que use' (beneficiary) was the owner. By 1634 English courts recognised a 'use upon a use', known as a 'trust', as not being subject to the requirement to enrol (or record) a transfer, so avoiding the effect of the Statute of Uses (Hamburger 1983, pp.357-358). That is, the terms diverged, with the term ‘use’ referring to those executed under the Statute of Uses and the term ‘trust’ referring to those recognised only in equity (Simpson, 1961 pp.191-192). Consequently, although there were additional causes (Jones, 2010), an act aiming to prevent property from being shielded from taxation through uses inadvertently contributed to the development of trust law; a topic considered further in the discussion of equity courts, in Section 2.3.3, and in considering modern securitisation of mortgage loans in Chapter 7. Following the 1535 legislation, land could be conveyed by the execution of a document as well as by livery of seisin, with these two practices coexisting (Goodwin 1894, p.464; Korngold 2009, p.739), but it was not until the Statute of Frauds in 1677 that land *had to* be conveyed by written document (Crawford 1913, p.285):

> "*And moreover no Leases Estates Interests or Terms of years of in to or out of any Messuages manors Lands Tenements or Hereditaments shall at any time hereafter be Assigned Transferred or Surrendered unless it be by Deed or Note in writing or by Act and operation of Law.*"

After several inroads over the preceding centuries, the Statute of Frauds had the effect of making livery of seisin a redundant practice (Willis 1928, p.436), although it continued to an extent in diminished form, only being finally abolished by the Law of Property Act (1925). Thenceforth, for a transfer of land to be legally effective it had to be performed by a document known as a deed (similar to the earlier 'charter'), which itself had to be sealed and delivered to take legal effect, though attestation by witnesses was not required in the seventeenth century (McBain 2006a, p.16, 24; Turner 1956, p.218-219). The practice of sealing documents had been introduced to England by the Normans, as this was their custom in place of a signature (McBain, 2006a p.25). This often involved dropping molten wax on a document so as to make an impression upon it, although no particular means of doing so was stipulated and the use of wax itself was itself not legally mandated, while the impression could include a tooth mark, a coat of arms, or any shape, size or colour (Ibid, p.26). McBain also notes that it was required that the maker of the impression acknowledge it as their seal, which could be done orally or in writing. This meant that a 'seal' could be an embossed pattern in wax or, equally, an indentation made by biting on the paper. For a discussion of the current status of seals on deeds, see Chapter 6.

Meanwhile, delivery of a deed, in Bracton's view, emerged from the livery of seisin - the physical handing, from the seller to the buyer, of token objects from the land itself (Yale. 1970 p.55). Consequently, deeds in the medieval era would have been sealed with, for example, small pieces of rushes in the wax where a water meadow was being transferred, or a leaf fragment when woodland was being conveyed (Ibid). In this way, the elements of the earlier system of feoffment were conserved, such that livery became delivery (de-livery), the charter of feoffment became the deed; the twigs, sod of turf or other token item from the land became merged with the seal on the deed, and the (witnessed) sealing or signature was the point at which transfer of land was completed, analogous to the public nature of the earlier ritual. Arguably the most stark change (though by no means unprecedented) was the shift from completion of the transfer occurring by actual delivery of seisin at the site of the land to transfer by the execution and physical delivery of a document (Turner 1956, p.219), and so there was a transition towards reliance on documentary records rather than human memory and oral history. It was at this same time (in 1536) that the concept of 'seisin' became split into legal and equitable 'possession' (possibly from 'po-seisin'); claims to property which were viewed differently by courts of law and equity. The origin of the latter jurisdiction, in which matters of trust are adjudicated, is considered next.

2.3.3 Courts of equity

The modern concept of a trust is inextricably intertwined with the equity jurisdiction, and the notion of 'conscience' which historically was seen as the guiding force of this juridical field. The branches of today's courts dealing with matters of trust and equity are known as Chancery Divisions, conserving the name of the medieval Court of Chancery which separated from the broader royal council (*curia regis*) in the fifteenth century, prior to the enactment of the Statute of Uses, although the origins of the English equity jurisdiction are debated to precede the formation of the Court of Chancery by at least two centuries (Barbour 1918, p.835; Tucker 2000, p.794). The head of the Court of Chancery was the Chancellor, historically known as the keeper of the king's conscience, with sanctions being issued by the court for conduct deemed to be "against conscience" (Klinck 2010, p.vii). However, this was not the only court of conscience; the Courts of Requests were provincial courts exercising such a jurisdiction, so much so that they were alternately known as "courts of conscience" or even "the poor man's Court of Chancery" (Winder, 1936 pp.169-170), and there was a degree of equitable jurisdiction operated by the Court of Exchequer (Bryson, 1975) as well as the Welsh Court of Great Sessions (Winder, 1936). Meanwhile, it was a principle of church law (canon law) that where the law of the state did not provide justice, the church (or ecclesiastical) courts should do so (Helmholz 1979, p.1507). It is not surprising, then, given their status as courts of conscience, that church courts enforced early antecedents to modern trusts prior to such cases being recorded elsewhere. Helmholz (1979) shows that feoffments to uses, "ancestor of the modern trust" (p.1503), which were popular even during Edward the Third's reign from 1327-1377, were enforced by at least some church courts prior to this practice in the Court of Chancery, where they were enforced up to 1535 (Simpson, 1961 p.188). These took the form of a trust over land which, while preceding the transformation engendered by the Statute of Uses, would be quite recognisable today, such as where feoffees to uses (trustees) "...had received ten and three quarters of an acre of land, a windmill, and a grange under Roger's instructions that they convey it to his wife Margery after his death." (Ibid, p.1505). The proto-trustees were held accountable for failing to carry out this instruction. There is nothing about the cases examined by Helmholz to suggest these uses were of an ecclesiastical nature, but rather employed by ordinary people, much as today; the only caveat being that they all concerned uses for which the feoffor (the settlor, in today's language) was deceased, and so these could be considered matters of probate, which was a jurisdiction commonly held by ecclesiastical courts at the time (Ibid, p.1506-1507). The remedy granted by these church courts was typically to issue an order against the feoffees to act according to the terms of the feoffment (Helmholz 1979, p.1509), or in today's language, an order to the trustees in breach of the terms of the trust to fulfil them.

2.3.4 Early English mortgages

> "*...in the creation of this lien we employ fictitious statements, and with the resulting obscurity which usually attends upon fictions. A common mortgage deed says one thing; it really means another thing; and yet there cling to the net result certain barnacle features, due to what the writing says but does not mean.*"
> – Chaplin 1890, p.3

As well as changes in how the sale or use of land was executed, the twelfth and thirteenth centuries saw the introduction of new practices around lending linked to property which marked the emergence of early mortgage law in England.

Pledges of land have existed in England since before the time of William the Conqueror and are recorded in the Domesday Book (Simpson, 1961 p.132). Hazeltine (1904, p.549-550) notes that the earlier Germanic practice involved property being advanced under the law of gage. A gage was a pledge of property, so that if someone was buying a house or a farm with a loan, the income from that property may be paid to the lender, reducing the balance of the loan. However, if the borrower stopped paying, the lender did not have a general lien against the borrower, but only against the property. While these gages varied considerably, they generally centred around a forfeiture of the property to the creditor, with the debtor having the future right to redeem the debt and so regain the property forfeited (Ibid, p.553-554; Shapiro 1983, p.1190). These Germanic legal traditions came to operate alongside other practices as a result of political changes in the country.

Jewish merchants who had settled in England in the decades following the conquest by William of Normandy in 1066 (Shapiro 1983, p.1179) brought with them a wealth of knowledge about banking practices, and retained their own banking customs in agreements between each other (Rabinowitz 1943, p.181). This included the use of a "shetar hov"; a document which formalised the obligation of a debtor and gave rise to a general lien encumbering the entirety of the debtor's real property (land), including any property transferred to others after the date of the shetar; a practice which later extended to include moveable property as well (Shapiro 1983, pp.1183-1184). There was a standard form used for shetars, clearly laying out the obligations and identifying the parties, with two witnesses also signing (Ibid). As Talmudic law included an ambiguous proscription in relation to conditional conveyances ('asmakhta'), the Germanic concept of forfeiture was incompatible, and other legal practices had developed which sought to avoid a conditional future conveyance as part of loan agreements (Rabinowitz 1943, p.182, 185). To navigate these restrictions, a practice developed (and was employed in Spain) whereby along with a loan transaction, the borrower would take on an obligation with immediate effect, while the lender would undertake to release the borrower from that obligation should they repay the sum (Ibid). When superimposed on English land law, this took the form of a proto-mortgage, and records show the practice operating in England as early as the twelfth century (Ibid, p.179). Known at the time as a 'Jewish gage' (Shapiro 1983, p.1179), this consisted initially of two documents: a charter of feoffment granting legal ownership of land to the lender, and an instrument of defeasance - a document releasing the borrower from this obligation (Rabinowitz 1943, p.180). These documents were given to a third party to hold, essentially in what would today be considered a kind of escrow, for release to the lender upon default or the borrower upon repayment (Ibid). Christian creditors seeking relief for unpaid debts would not be granted a judgment for the sum owed if the debtor did not come to court, but could be granted possession of land after a debtor failed to attend three successive hearings (Shapiro 1983, p.1190). Jewish creditors, on the other hand, could receive either money or land if the debtor did not attend court, and so were in a privileged position relative to other creditors utilising the court system (Ibid), with a special court, a division of the Exchequer, being utilised for enforcement (Plucknett 1948, p.572). Shapiro (1983, pp.1189-1193) notes that this privilege was due to the king's financial stake in such matters, as Jewish money lenders provided not only a source of credit and tax income, but in a broader sense their precarious status was such that their property was seen as belonging by proxy to the king, so that court cases where they were creditors were of interest to the royal treasury (Ibid, pp.1189-1193).

By the thirteenth century the securing of lending via mortgages was common among both Jews and Christians alike (Hazeltine 1904, p.553), and in 1285 the Statute of Merchants recognised the right of Christians to utilise the same practices previously employed by Jews (Shapiro 1983, p.1198). This involved a debtor acknowledging their debt before the Mayor and a recording clerk, with the latter recording this debt in two rolls kept by the mayor and the clerk. The debtor would affix their seal to a debt instrument and officials would affix the king's seal, with the instrument then being given to the creditor who could later present it to the mayor and the clerks to prove their claim, should the debtor default (Ibid). Should the creditor do so, the statute mandated that the debtor would have three months to pay the debt, and failing this, after a further 3 months the creditor would have the right to seize land and moveable property as security for the payment of the debt, or until the proceeds effected repayment (Ibid, p.1199). As Talmudic law had shaped the formation of the Jewish gage, so Christian proscriptions on the taking of interest on debts shaped its formalisation into English law, so that In addition to reclaiming the sum loaned the lender was entitled to "damages and all necessary and reasonable costs", which Shapiro notes was a convenient way to permit the taking of interest on loans by another name (Ibid).

Notably, in contrast with the earlier Germanic practices, the relief granted to a creditor extended to more than just receipt of the land. With the adoption of the 'mort gage' as common practice, the Germanic concept of forfeiture of property was substituted for the concept of property being security for a debt, while the claim in its entirety was against the gagor (borrower) generally, whose other assets could be claimed. The term itself, meaning 'dead pledge', was explained by Littleton as deriving from the fact that if the feoffer does not pay, "*then the land which is put in pledge upon condition for the payment of the money is taken from him for ever, and so dead to him on condition*." (Plucknett 1948, p.573).

By the middle of the 1300s, the use of two deeds to secure an obligation became standard practice in England and by the fifteenth century these two deeds were merged into a single one (Auerbach 1951, p.24), with an early record of this occurring around the year 1400, sometimes being known as a 'single bond' (Rabinowitz 1943, p.188). From this point, the practice becomes almost recognisable as a modern mortgage, however subsequent legislation and case law would shape it into its current form.

2.4 Later English mortgages

In subsequent centuries, there were a few key developments in mortgage law, one of which was the principle of the 'equity of redemption'; the recognition by courts of equity that the borrower remains the true owner of mortgaged property and retains the right to regain full title to the mortgaged property by paying the debt. The exact origins of this principle are unclear, with several competing explanations such as it emerging from the crystallisation of other equitable doctrines, to it being a means for equity courts to increase their influence in a jurisdictional feud with common-law courts (Waddilove 2018, pp.118-120). However, Waddilove (2018, pp. 140-142) suggests that it developed between 1580 and 1620, and that the logic behind it may have been informed by the social context in which mortgages were generally employed — informally between neighbours or family members, and often with variation or relaxed application of the terms. Whatever the origin, subsequent cases show that courts struck out clauses in mortgage agreements that would restrict this right to redeem the property, such as in the 1681 case of Howard v Harris where a mortgage agreement stated that only the male heirs of the mortgagor could redeem it (Thompson 2012, p.472). In later cases such as Vernon v Bethell (1762) it was held that a mortgagee, despite having a secured interest in a property, cannot unilaterally convert the mortgage into a purchase of the property. The presiding judge, Lord Henley, expressed this succinctly with the words "once a mortgage, always a mortgage". Neither can a mortgagor waive this right to redeem, as any clause purporting to do so would be held to be invalid; even, as noted in the 1791 case of the East India Company v Atkyns, if a mortgagor were to swear an oath that they would not redeem the property, they would still have the right to do so (Wyman 1908, p.460). Such equitable measures have, as noted by Whitehouse (2015 p.166), come in conflict with the more laissez-faire approach of the common law which favoured upholding the contractual rights of a lender, which regained its ascendancy in the 1800s so that since this time courts have tended to take a less interventionist approach, with an emphasis on enforcing mortgagees' contractual rights. An important aspect of this is the lender's 'inherent right to possession'; a doctrine which holds a mortgagee has an immediate right to possession and that they may take it "before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right" (Four-Maids Ltd v Dudley Marshall (Properties) Ltd 1957)[14]. As well as case law, however, legislation has had some impact on practice in the recent era.

It was only with the Law of Property Act 1925 that Livery of Seisin was formally abolished (Bordwell, 1933), though the act had other effects too. Section 73(1) of the 1925 act also made it essential for a deed to be signed, so that in contrast to the prior practice, sealing alone was deemed insufficient (Hoath 1980, pp.415-416). A further change was that prior to 1925, mortgages were usually effected by a conveyance with a clause allowing for redemption, stating that the mortgagor could regain possession or that the conveyance would be voided by repayment by a certain date. This developed into the form of a covenant by the mortgagee to re-convey the property when the debt was repaid. In this way, the mortgagee had a legal estate in the property and this became absolute if the mortgagor did not settle the debt (Clark, 2002).

[14] Wallace (1986, p.357) observes that under the Land Registration Act (NI) 1970, a mortgagee of registered land in that province does not have the inherent common law right to possession, and so if they wish to obtain possession in the absence of a default by the mortgagor, must apply to court for a possession order under Schedule 7, Part I, Paragraph 5(2) of that act. They can, however, appoint a receiver to sell the property under section 19(1) of the Conveyancing Act 1881.

However, the Law of Property Act 1925 changed this, removing the potential for the creation of an absolute conveyance to the mortgagee. Rather, sections 85(1) and 87(1) of the act stipulate two ways in which a legal mortgage can be created; the first being by a demise (conveyance) to the mortgagee for a term (period of time), subject to the mortgagor's equity of redemption. The second is described as a 'charge by deed', sometimes also termed a 'charge by way of legal mortgage'. This method does not have the effect of conveying the property to the mortgagee for a period of time, but rather paradoxically provides the mortgagee with the same rights as if such a demise were made. In practice, the approach of creating a charge by deed is, Whitehouse (1999) notes, less cumbersome and is most often used. It should be noted, however, that this legislation does not apply in Northern Ireland, where the Conveyancing and Law of Property Act 1881 (largely repealed in England and Wales by the 1925 act) is still in force, and the Conveyancing Act (1911) also has some limited effect. Another significant act, which applies in both jurisdictions, is the Administration of Justice Act 1970. Section 36 of this act is more in the equitable tradition of seeking to protect mortgagors from the harshness of the common law. It empowers judges to soften the enforcement of mortgagees' rights in respect to missed payments by mortgagors, if the mortgagor is likely to be able to make up for these missed payments ('arrears') within a reasonable time (as discussed further in Chapter 8). Should the judge take the view that this is possible, they may adjourn (pause) proceedings, or suspend (pause enforcement of) an order for possession.

There is another piece of legislation of relevance which like the 1925 act applies in England and Wales but not Northern Ireland: the Law of Property (Miscellaneous Provisions) Act (1989). This introduced a few requirements, among which that a deed must make clear from its wording that it is a deed, and that the historic requirement for an individual to seal such a document in order for it to be properly executed was abolished. Other implications of this act are discussed in some detail in Chapter 6. A final act of significant effect on mortgage practice, which applies differentially across England and Wales and Northern Ireland, is the Land Registration Act 2002. For context, though, the history of land registration should first be addressed.

2.5 Land registration

A Land register (or registry) is a public register for deeds and rights over real property; across the world, this can take two broad forms - a register of deeds or a register of titles (Larsson, 1991 p. 17-18). A deed, Larsson notes, is a record of a transaction, which does not, in itself, prove the legal right of the parties to the agreement to so transact. That is, someone can purport to sell land that they do not actually own, and a document evidencing such a transaction is not proof of ownership. A register of titles, meanwhile, is considered proof of ownership, while often being insured and guaranteed by the state (Ibid), although rather uniquely in the US this function has long been served by private insurance companies via title insurance, with the first such company formed in 1853 (Burke, 2010 p.1-3 - 1-4).

There were several attempts at creating a national record of English land ownership over the last thousand years, with the Doomsday Book in 1086 (Harvey, 1971), the Statute of Uses together with the Statute of Enrolment in 1536 (Goodwin, 1894), and the initiatives which led to the Statute of Frauds in 1677 (Hamburger 1983, p.365). The motives for the latter were identified by William Leach (1651), as the prevalence of fraudulent conveyancing of property, whereby land owners would purport to sell the same land to multiple purchasers. Several other efforts were made, with some local registries established in 1663 and the early 1700s, but two General Registry Bills failed to pass through parliament in 1740 and 1758 (Mayer 2000, p.5). However, in the latter part of the nineteenth century this objective was taken up again; that of creating a national registry of land ownership (Joseph 1976, p.133). An act was passed in 1862, founding the Land Registry, with further legislation in 1875 but the resulting system was not in great use and the process of extending compulsory registration of land to regions of the country was slow, taking more than a century to be completed (Mayer 2000, pp.9-10). This meant that land registration only became compulsory across the entirety of England and Wales in 1999 (Alcock, 2017 p.67). However, the registration of proprietorship relates only to the sale of land, and so records as to actual land ownership remain incomplete, as contrasted with Scotland and the US, where title deeds have been recorded in county court houses since the seventeenth century (Ibid, p. 9, 67). Consequently, ownership is not recorded for approximately half of England and Wales, since mere ownership of land is not required to be recorded; where land has not been sold since the beginning of mandatory registration in 1925, ownership data is not publicly available (Cahill, 2010 p.189).

Today, there are 3 Land Registries in the UK; a combined organisation for England and Wales, one for Northern Ireland[15] and one for Scotland (Cahill, 2010 p.189). The Land Registry of England and Wales is a non-ministerial government department (HM Land Registry, 2016; Land Registry Act 1862). This maintains a register of title, which holds a record of freehold and

[15] In Northern Ireland, there is both a register of titles ('Land Registry') and a register of deeds ('Registry of Deeds').

leasehold interests and estates in land, as well as charges thereon, while also guaranteeing the title to same on behalf of the Crown. UK land registries record information about the holders of freehold and leasehold using cadastral maps of geographically demarcated properties which are termed 'folios'. The current freeholder is identified as the proprietor by such records. The significance of these records has increased since the commencement of the Land Registration Act 2002, as under that act the entries at Land Registry are deemed to be 'conclusive'. Therefore, it is no longer the signing of a deed which effects the transfer of title or creation of a mortgage; rather, as observed by Chan (2005), and discussed further in Chapter 6, in a radical change to land dealings, the document must be registered in order for it to take effect, and the transferee only obtains the title as it is recorded on the register. When rights to mortgage charges are securitised, however, registration of this sale does not occur. The origins of this process in the UK are discussed below.

2.6 Securitisation

The 1980s saw the advent of 'tranched' securitisation; a risk-weighted approach wherein rights to future revenue are divided through the sale of tiered bonds. While the sale of bonds backed by mortgages was not a new phenomenon, Fannie Mae having done so in the US since 1938 (Green and Wachter 2005, p.96), this innovation began a process of usurpation whereby the markets for home loans, formerly dominated by savings and loan associations in the US and building societies in the UK, were encroached upon by financial institutions (Lilley and Lightfoot 2006, pp.375).

Thiemann (2018) describes the origins of modern securitisation practices as rooted in innovation by American banks attempting to maintain market share during the 1970s and 1980s, often competing with institutions other than commercial banks for customer funds. With statutory capital requirements placed on (internationally operating) commercial banks in 1983, this reduced the profitability of many kinds of lending, but a new market opened up enabling commercial banks to compete with investment banks by underwriting, rather than outright issuing, securities (Ibid, pp.84-87). As a result, in that same year the first Asset Backed Commercial Paper (ABCP) conduit was formed by what was then known as Citicorp. ABCPs are securities with short-term maturity (usually of less than a year) backed by, for example, a company's trade receivables, and provide a means to raise short-term financing particularly for companies unable to raise financing via unsecured commercial paper. For arranging and underwriting this financing for its customers, Citicorp (known as the 'sponsor') collected fees, but was unable to issue the securities themselves. Rather, in a kind of regulatory arbitrage, an orphan company would be created, known as a Special Purpose Entity (SPE), which was nominally the issuer of the ABCP. Thiemann (2018, p.90-91) identifies such off-balance sheet financing as being shaped by the competing pressures of regulators and credit rating agencies. He notes that the distinction that banking regulations (later incorporated into the Basel I banking accords) made between liquidity facilities of less than one year (seen as less risky) and other credit lines exempted such short-term liquidity facilities from capital charges. In practice, this meant that in the evolutionary arms race between regulators and regulated, short term liquidity facilities were a tool that financial institutions utilised in engineering new structures. Credit enhancement, meanwhile, was another such tool but one which was subject to capital charges. Credit enhancement broadly is a kind of assurance to those purchasing asset-backed securities that the stated returns will be provided, even if the underlying loan agreements do not perform fully. It can take the form of insurance, the provision of additional collateral, or guarantees by third parties. Where Citibank was providing credit enhancement to its SPEs, it was effectively retaining that portion of the risk on its own balance sheet, and so regulators required capital to be held in case this risk crystallised. So, in response to demands and limitations of both regulators and credit rating agencies, the early ABCP conduits (SPEs) were provided with 10% credit enhancement by their sponsor (Citicorp) and a 100% liquidity facility, thereby minimising capital requirements for the bank while ensuring strong credit ratings for the ABCPs (Thiemann 2018, p.90-91). Although the SPE would not be recorded on a sponsoring banks' balance sheets (as it does not own the SPE), the bank retains effective liability for the securities issued, agreeing to purchase the assets at face value if the SPE cannot secure funding, so as to pay the principal value of the ABCPs, and to provide additional liquidity to cover interest (Bate, Bushweller and Rutan 2003, pp.62-63). Indeed, while sponsors were prohibited from directly protecting equity investors in SPEs that were not consolidated onto their own balance sheets, the above measures were acceptable to the Security and Exchange Commission, and as long as an outside investor held 3% or more equity in the SPE, consolidation on the sponsor's balance sheet was broadly not required (Hartgraves and Benston 2002, pp.252-253). The organisations which give rise to Mortgage Backed Securities (MBSs) are similarly structured, albeit based on mortgage loans. Indeed, for US Savings and Loan institutions, the off-balance sheet ledgering of some mortgage backed securities derivatives was one of attractions that informed their investment decisions (Lewis 1989, p.163). In a loan agreement secured upon real estate, the primary source of funds to fulfil the terms of the contract is the homeowner's income, while the secondary source is the value of the mortgaged property; the collateral (Minsky 1982, pp.19-20). Both of these play a role in MBSs.

The process of issuing MBSs began in the UK in 1986 (Wainwright 2010, p.5) and France in 1988 (Lazzarato 2007, p.19). There was a shift away from an originate-and-hold home-loan model to an originate-and-sell model, whereby the bank or other financial institution originating a loan transfers its interest, usually via a true sale, to a legal entity known as a Special Purpose Vehicle (Butler 2009, p.517) or Special Purpose Entity. Bonds issued against the securitised assets are offered for sale on the market via a prospectus, with investors effectively 'purchasing' rights to an income stream derived from the payments by borrowers on underlying loans. As of July 2019, 4.12% of residential mortgage loans (by value) are securitised, amounting to a value of almost £60 billion (Bank of England, 2019c). How it works in practice is explored in Chapter 7.

2.7 Summary

In summary, over approximately the last one thousand years, the transfer of land ownership in England has seen a shift from non-documentary to documentary execution more than once. In the period prior to and during the time of William the Conqueror, legal ownership of land could be transferred only by the ritualistic performance of livery of seisin at the site of the land itself. This practice was gradually replaced by a system of transfer by document; by a charter of feoffment, and in the twelfth century the primacy of transfer by livery of seisin was reinstated. This system of transfer by feoffment and livery of seisin was undermined by the Statute of Uses in 1536, and the Statute(s) of Wills in 1540 and 1543, enabling the transfer of land to be executed via a legal document; a practice which then became obligatory with the Statute of Frauds in 1677. Meanwhile the Statute of Merchants in 1285 established procedures by which loans could be secured against land, instituting the 'mort gage', with its origins in Jewish banking practices, as English law (Rabinowitz, 1943; Shapiro, 1983). With this adoption of the 'mort gage' as common practice, the Germanic concept of the forfeiture of specific property was substituted for the concept of property being security for a debt, while the claim itself was against the gagor, whose other assets could also be claimed, should the security be insufficient to offset the debt (Hazeltine 1904, p.549-552). The recognition of a mortgagor's equity of redemption further altered the rights of parties to mortgages, so that a mortgagor could not be deprived of their right to redeem the debt and reclaim the property. Meanwhile, the Land Registration Act 2002 had the effect of altering the status of deeds, from being the actual means by which interests in land are transferred, to being an intermediate step only finalised by the register of that transfer (or charge) at Land Registry. The securitisation of loan accounts secured against real estate adds complexity to these relationships but also may serve to illustrate dynamics not apparent from a positive law analysis alone.

This long evolution leading to the modern mortgage has created a hybrid practice, the logical inconsistencies of which are summarised by Chaplin (1890, p.3), who notes that the mortgage deed states that it vests real estate in the mortgagee, yet the mortgagor remains the proprietor. It also states that upon default by the mortgagor, the mortgagee will have absolute title free from the rights of the mortgagor, yet it really grants the mortgagee a right (once registered) to either enforce payment or seek possession, from the point of default. The mortgage deed, Chaplin continues, claims to leave the mortgagor with only a right of re-entry (equity of redemption), yet they remain the proprietor; the full owner, over a property which is charged with a lien.

Chapter 3: Methodology

Chapter one introduced the Credit Creation Theory of Banking, which I aim to test in this thesis, as well as Renner's (1949) theory of legal concepts as empty frames; a modified variant of which serves as the theoretical framework within which the current research is conducted. Chapter two was addressed to the first aspect of Renner's framework for studying (mortgage) law – an examination of its origins. This chapter outlines the methods utilised throughout much of the remainder of this thesis, drawing on the work of Bogen and Lynch (1989), Lynch and Bogen (1996), Latour and Woolgar (1979), Latour (1987; 2004; 2010) as well as Baudrillard (1994).

3.1 Aims

With this research, I aim to evaluate the Credit Creation Theory of Banking in light of Werner's (2014a; 2016) findings wherein a bank's financial statements were shown to expand by the value of a loan issued without diminution of depositors' or the bank's own funds. This provided the first empirical investigation in the field and ostensibly falsified two competing theories: the Financial Intermediation Theory and the Fractional Reserve Theory. His findings therefore indicate that banks individually create money when they issue a loan. As Werner's study involved an unsecured loan, the current research seeks to test the theory in respect to secured loans; mortgages.

The subject matter therefore is that of UK residential mortgage loans. Given that Werner's findings appear to be inconsistent with conventional understandings of the legal concept of a mortgage, as security for a debt, a re-evaluation is required of this law form in order to properly evaluate its consistency with the Credit Creation Theory.

Therefore, the proximal aim is to conduct a contemporary investigation of the legal concept of the mortgage; to evaluate the relationship between a mortgagor and mortgagee financial institution in light of the Credit Creation Theory, and so ultimately to serve as a test of that theory.

3.2 Literature

This section discusses the informing literature which will be drawn on throughout the thesis, and particularly in relation to mortgage possession actions.

3.2.1 Lynch and Bogen

> "*...the task of theory is to offer up and validate "master narratives" that subsume all partial and contingent narratives to a greater whole.*"
>
> – Bogen and Lynch (1989, p.198).

While each specific case involves a variety of often-idiosyncratic facts, which to a greater or lesser degree can influence outcomes, one thing that all of these cases have in common is that they revolve around what Bogen and Lynch would call a 'master narrative' – that banks lend money. A major aim of this research is to provide an empirical test of this concept, in the form of the Credit Creation Theory of Banking.

This is examined by looking at the inflection point of UK residential mortgage possession actions. Similar to Bogen and Lynch (1989), this research examines how official histories are assembled, through an examination of court proceedings. This assembling inherently gives primacy to the ordering of events. In this respect, Lynch and Bogen (1996, p.74-76) note the importance of chronologies for the construction of historical accounts; an observation as true for the senate hearings they focus on, and for litigation generally, as for historiography.

In possession actions, chronologies are the basis of a large portion of argumentation, and form the backbone of the narrative which is constructed. This is observed both with the subject-matter chronologies and with reflexive chronologies of court hearings themselves. A typical hearing will begin with the judicial officer asking the financial institution's representative to present their opening statements, which comprise a chronological account of events from the formation of a loan agreement to the borrower's default and any subsequent occurrences.

Such chronologies are supported by documentary evidence which is, itself, dated, and such dates are relevant not only to the ordering of events but also to their weighting in respect to other evidence. A charge over a property will generally be subordinate to one which originated at an earlier date; a principle expressed by the maxim 'first in time, first in line'. A loan agreement, meanwhile, might be renegotiated, with the terms altered, or paid by funds from a subsequent loan when a borrower switches to another lender. In such scenarios, a later agreement would have primacy, as the earlier one would have been settled.

The chronology of testimony can also be of great significance, with facts established in statements made early in the proceedings being points of reference which parties can draw on later. Sometimes statements made at a late stage, and not alluded to in earlier testimony, can be held in lower regard by a judicial officer for this reason. Where a party had an opportunity to present certain facts but failed to do so in a timely manner, their later presentation can be viewed as suggestive of dubious veracity, or may be held to be inadmissible for procedural reasons. The latter can particularly be the case where the outcome of a case is appealed to a higher court. Depending on the nature of the appeal, the higher court may limit its reconsideration of the case to the evidence which was placed before the lower court at the time; parties would therefore be prohibited from raising new arguments or submitting new evidence at that stage. The court of appeal then addresses two related chronologies: that of the underlying facts in dispute, and the order of proceedings in the lower court. Indeed, Lynch and Bogen (1989, p.200) note this reflexive character to legal proceedings, with references constantly being made back to what had been previously said, so that court records become 'self-explicating documents', which for each party involves:

> "*...a reading and re-reading of prior testimonies exhibits to elucidate and explicate their place in what happened.*"

So aside from merely establishing a starting position at the beginning of litigation, where there are a series of hearings these too become part of an ever-expanding record, with a case's chronology ever prominent. This enables a logical progression, and so the chronological character to proceedings is therefore reflected in the structuring of this thesis, as will be noted from the outline in Chapter 1. Lynch and Bogen's work is drawn on also to analyse the observations; both spoken and documentary.

Where Lynch and Bogen's work took as their focus the hearings before a Senate committee in relation to the Iran Contra affair, this research focuses on repossession actions, and in this sense it also benefits from the subject matter of Latour's (2010) study as well as his earlier work. Unlike Lynch and Bogen (1989; 1996), whose research was based on recordings of televised proceedings, Latour (2010) had to deal not only with live proceedings where those he was observing were physically present, but also, with the participants' perceptions of his own presence. The value of his work to the current research is discussed next.

3.2.2 A Latourian perspective on court cases

Latour's (2010, p.vii-xi) study of the French Council of State administrative court was described in a similar quasi-illicit sense to his study of scientific labs, which he described as aiming "*...to sneak into the few places where the papers are written and follow the construction of facts in their most intimate details*" (Latour 1987, p.63). The same concern with following the construction of facts, and rendering them anonymously, is attendant in the current research, and though the two realms seem far removed from each other, Latour (2004, p.73-74) draws many parallels between the anthropology of science and that of law (Latour and Woolgar, 1979). Both fields, Latour notes, concern a highly respected and rarefied body of knowledge, whose practitioners are accorded positions as high priests of their respective domains, albeit with different conceptions of their relationship with the public to whom they minister.

Observation of the legal field is open to the public at designated times, at regular intervals in the form of public court hearings, while scientific experimentation is a domain closed to the profane. Both fields utilise an esoteric language which creates barriers to entry for the lay person, and while both the language and 'equipment' is relatively standard within the field of law, scientific equipment and discourse is specialised within each branch; often not comprehended by even those in neighbouring areas of study (Latour 2004, p.75-76). The equipment of a scientific lab is often indispensable and particular to the activities which take place therein, while an inventory of the furniture within a court building would tell little about its activities, as they are largely not essential thereto.

Similarly, while a scientist focuses upon subject matter with which they are well acquainted, administrative judges deal with matters, the particulars of which they are by law required to be unfamiliar with. The manner in which legal and scientific controversies are resolved are quite different, too, with a sober, dispassionate attitude appropriate to the resolution of legal disputes by an administrative judge. This contrasts with the factional and animated nature of many scientific debates; "scientific articles are much more passionate than administrative law texts" (Ibid, p.76-77, 81-83). The subjects of study also enjoy different levels of involvement, with those in scientific experiments largely passive participants, and those in legal affairs deeply engaged and attentive thereto. The outputs of the two categories of institution are said, by Latour (2004, p. 77-78) to be of a different nature, wherein the author (of a journal article) is akin to a legal claimant rather than a judge.

The overall aims of scientific articles differ from those of administrative law texts. While the law tends towards conservatism and minimal novelty, scientific articles aim to report innovation and stimulate new developments (Ibid, p.77-78).

> "*Whereas in science everything is done to ensure that the impact of new information upon a body of established knowledge is as devastating as possible, in law things are arranged in such a way as to ensure that the particular facts are just the external occasion for a change which alters only the law itself, and not the particular facts*"
>
> – Latour (2004, p.105-106)

While both traditions are resistant to paradigm shifts, law is arguably much more so, as each incremental change is typically expressed as a further clarification of existing practices and principles (Ibid, p.93). While science can sustain gaps, the integrity of the law must be maintained with a seamless continuity in its application (Ibid, p.113). Law and science are each laboured, ponderous, lengthy processes, but whereas both French Administrative and English Common Law adhere to the maxim that 'there should be an end to lawsuits; (Ibid, p.94-95), science will, in the face of doubt, quite happily postpone judgment on an issue and delegate the task of determination to future researchers.

Latour (2004, p.78-86) draws several other distinctions between the course of proceedings in science and administrative law, including the use of lay opinions in the legal sphere, and reliance on experts in scientific work as well as differences in the significance of body language and colleagues' opinions. Language is used in very different senses as well, such that there are 'false friends' between the two traditions; one of which being the word 'fact'. A fact in science is essentially a reproducible, observable or measurable phenomenon. In law, a fact is peculiar to a case and while important they do not translate directly from one case to another or give rise to general principles; the form matters more than the substance (Ibid, p.84-87). For both traditions, it is exegesis – the critical, analytical interpretation of texts – that forms their basis (Ibid, p.96).

> "*Both scientists and lawyers have great respect for existing publications - which in both disciplines can be tracked down by a coded scheme of citation and references - and yet both have a certain distance, defiance, or even disrespect for too close a linkage of references.*"
>
> – Latour (2004, p.97).

The references scientists make to previous research is analogous to judicial references to prior judgments, and Latour (2004, p.96-98) suggests that scientists would be surprised to hear their work described as exegesis, while jurists would be much more conscious of this. While both scientific and judicial texts seek to reduce reality to paper documents and draw conclusions there from, there is an inclusivity to scientific approaches which is anathema to the law. While scientific studies will draw from all available relevant sources, excluding only those which prove flawed, judgments are restricted only to what is in the court file, and reference to other sources will be rejected on this basis, regardless of relevance (Latour, 2004 pp.101-102).

3.2.3 The construction of facts

Lawsuits concern the establishing of facts and the application of conclusions of law, both of which are conducted in an esoteric fashion comparable to other professions, with the aim of converting statements of one type into another (Latour and Woolgar 1979, p.81), with pressures to support assertions and counter or reconcile conflicting statements. Facts in a case emerge from the agreement of the parties; statements which, Latour (2010, p.131) terms 'undisputed':

> "*The expression does not mean that it is true, but that the opposing party has not disputed it and that therefore the part of the file which, according to the file, has not been contested by the opposing party can be considered as an established fact.*"

Such a transformation of statements is an aim of a laboratory environment, where one of the key objectives of actors therein is the transformation of statements from one form into another:

> "*The aim of the game was to create as many statements as possible of* type 4 *in the face of a variety of pressures to submerge assertions in modalities such that they become artefacts.*"
>
> – Latour and Woolgar (1979, p.81)

In court, similarly, the aim of participants is to transform statements from type 1 (testimony) into type 2 (agreed or unchallenged facts), in the face of a variety of pressures to support assertions and counter, or reconcile, conflicting statements. In this sense, the narrative in cases arises in an emergent fashion. Repossession actions in court are seen not simply as an inevitable end point of a predetermined set of steps, but as processes '*in the making*' (Latour, 1987; 2010).

3.2.4 Recording and reporting findings

Given the above parallels identified, the current research therefore draws much from Latour's work; not only on law explicitly but also his ethnographic work in other domains. As with any ethnographic study, in order to create an ordered account of what is observed, the first requirement in such work is to ask fundamental questions about the situation; to attempt to suspend one's prejudices on the one hand and put aside prior knowledge, while on the other hand attempting to avoid getting so immersed in the activities themselves as to risk losing one's objectivity (Latour and Woolgar, 1979, p.43-44). The researcher takes the perspective of an observer, noting the behaviour they encounter and attempting to interpret it (Ibid, p.46-49). The distinct culture, or 'paradigm' of the environment will also be ascertained so as to determine the parameters within which the participants view their activities (Latour and Woolgar, 1979 p.55). The particular rarefied language of law presents challenges both in adapting to this culture and in relating the findings.

As attractive as it would be to rely exclusively upon succinct, ethnographically-toned bespoke language for describing the proceedings of a court, as Latour (2005, p.30) notes, this risks confusing two meta-languages; all the more so for the field of Law, which perhaps to a greater degree than other disciplines employs its own particular terminology which sometimes conflicts in meaning with common vernacular as well as academic language. Law involves exegesis of texts; be it evidence submitted, legislation, regulations or judgments in other cases. These are weighed, classified, criticised, and through that lens come to replace the external world, which is rendered unintelligible (Latour 2004, pp.89-90). The performative nature of juristic judgments mean that a judge's decree that property belongs to one of two parties to a dispute has the effect of assigning ownership. In this way, the judgments of jurists, both written and oral, can be seen as tools which objectify or produce the subjects utilising them (Reed 2006, p.158), such that "*In the word, in language, things first come to be and are.*" (Heidegger 1953[2000], p.15).

Therefore, in the interests of fidelity, and following Latour (2010), this research reports, as far as is feasible, by utilising the language employed within the setting, offering a translation of sorts where this seems necessary, so as to strike a balance between the conservation of context and accessibility of the text to the reader, who is not presumed to have a legal background. The use of Lynch and Bogen's work, as well as the research of Latour, will serve to analyse the observations of court cases in a somewhat decontextualised manner so as to draw out the underlying dynamics. So as to relate this to historical developments, however, a final piece of literature will be employed: that of Baudrillard (1994).

3.2.5 Baudrillard's concept of the simulacrum

In examining how mortgages and their constituent elements and concepts change over time, the analysis also draws on the work of Baudrillard (1994), and his concept of the successive phases of representations. Baudrillard saw the development of representations as a process whereby a sign, or signifier, begins by accurately representing its referent, its signified, but that over time the signs by which that meaning is conveyed come to morph and change until they become entirely disconnected from the originating idea; such signifiers, being termed 'simulacra'. He (Ibid, p.6) divided this process into four phases. In the first phase, the sign "is the reflection of a profound reality"; a good representation. In the second phase, it "denatures a profound reality"; represents it in a distorted way. In the third phase, it "masks the absence of a profound reality"; a kind of illusion pretending to be a representation. In the fourth phrase, "it has no relation to any reality whatsoever; it is its own pure simulacrum"; that is, it no longer pretends to represent the original thing itself. At this stage, signs no longer connect to referents, but merely reflect other signs, without basis in reality. Baudrillard's work in this respect serves as a useful analytical tool for demonstrating and analysing the changes seen in practices around mortgages over time. Therefore, it is employed as a way to mobilise Renner's (1949) theory and understand contemporary practice in a historical context.

Integrating this analytical trope with the research discussed above and outlined in Chapter one, the research questions can thusly be stated:

3.3 Research Questions

How might changes in social, economic and procedural practices via which mortgages are constituted contribute towards changes in the juridical content of mortgages?

Are observations consistent with the Credit Creation Theory of Banking and what do they indicate about the relationship between an individual mortgagor and mortgagee financial institution?

3.4 Research Design

To address these research questions, a modified form of Renner's (1949) theoretical framework is employed to evaluate the contemporary legal concept of the mortgage. This involves an evaluation of the concept of the mortgage based on its origins (covered in Chapter two), as well as contemporary social, economic and procedural practices which give rise to them, as a means to evaluate what effect any changes in these might have on the concept's current juridical content.

3.4.1 Data collection methods

In determining how to collect data in relation to mortgage possessions, aspects of the legal realist tradition are considered. As an influential figure in the field, Pound (1910, pp.14-15) coined the distinction between 'law in books' and 'law in action', whereby there is a difference between the rules which purport to govern relations and those which actually govern them. Despite written laws appearing to provide a coherent set of proscriptions, an examination of the law in practice can reveal that "the apparent rules to a great extent are no rules"; that actual practice can diverge significantly from written law, and that where the law is truly to be observed is in the actions of judges and legal officials (Ibid, p.20, 24). Karl Llewellyn continued this tradition and was a prominent scholar, while also formulating policy for judges in making decisions, particularly when judging over appeals (Llewellyn, 1960; Macaulay, 2005 p.370).
Meanwhile, other social scientific approaches to the study of law have been criticised for a lack of relevance to judges and an imbalanced focus on theory at the expense of doctrine and case law (Edwards 1992, pp.34-37). In this context, Macaulay (2005, pp.390-392) called for a study of law from the bottom-up (from lower courts, not merely appellate courts) that goes beyond merely identifying gaps between the law in 'books' and in 'action' and calling for these to be closed. Rather, he advocated for a view of the law as a tool for social improvement that could learn from the perspectives of those lacking power in society. This, Erlanger et al. (2005, p.345) noted would require an understanding of how law is actually practiced on the ground, developed out of social scientific study and with a focus on lived experience rather than orthodoxy. This 'New Legal Realism', Nourse and Shaffer (2009, p.136) described as involving an understanding of interactions between law and behaviour as recursive, responding to and shaping each other, with a reciprocity to the interaction between the law and social and institutional structures.

Empirical studies are seen as essential to advancing such understanding (Nourse and Shaffer, 2009 pp.61-62), and though historically in the field of law such methods have been generally under-utilised (Bell, 2016; Macaulay 2005, p.374-379), a journal dedicated to such research, the Journal of Empirical Legal Studies, has been in existence since 2004. However, only one article therein focussed on mortgages and this was confined largely to a statistical analysis of the benefit of mortgagors retaining legal representation (Poppe, 2016). Such research doesn't satisfy the ideals of the New Legal Realism; to leave the office, to engage with the world and study law in the field, from the bottom up and from the perspective of those lacking power in society (Kruse 2011-2012, p.681). Studies of mortgages in the UK which come closer to these ideals are considered next.

3.4.2 Research gaps

Existing empirical studies of mortgage law are limited in the UK, and based largely around interviews rather than direct observations. Whitehouse's (1999) study, as well as subsequent research (Bright and Whitehouse, 2014; Whitehouse, 2011; Whitehouse and Bright, 2014) involved conducting interviews with judicial officers, legal representatives of mortgage lenders and other members of the legal profession involved in mortgage litigation. However, they did not involve interviews with mortgagors, empirical observation of litigation, or documentary analysis of mortgage-related paperwork. Similarly, other studies in the field (Croucher et al., 2003) tend to rely on secondary data in respect to mortgagors' perspectives and experiences, but a few have solicited their views directly (Davies et al., 2016; Ford, Kempson and Wilson, 1995). However, while one study involved empirical observations of rent arrears cases (Hunter at al. 2005), such studies are rare (Bell, 2016) and direct study of the court hearings by which UK mortgage possession claims are litigated remains an under-explored area. Therefore, gaps are identified in respect to the empirical observation of litigation, related documentation and the experiences of mortgagors themselves.

So, to address these gaps and fulfil the aims of the research, possession hearings themselves are taken as the focus for this study. These serve as a venue where the practices and processes giving rise to mortgages manifest in the form of narratives, chronologies and documentary evidence. Ethnographic observations of hearings are therefore seen as a lens through which to examine the various aspects of mortgages. However, to address the gaps identified above, interviews were employed so as to capture details of mortgagors' experiences and so provide additional data sources so as to triangulate understandings obtained from observation of court hearings (Denzin 1975, p.5). In determining the format of interviews, several techniques were considered including focused, structured, unstructured and semi-structured interviews (Alshenqeeti 2014, p.44; Fontana and Frey 1994, p.362; May 1993, p.93). Focussed interviews were not considered appropriate since this technique presumes a degree of prior understanding and analysis of the subject matter not characteristic of my starting position (Merton, 1990 p.4). Meanwhile, as homogeneity amongst participants' experiences was not expected, structured interviews may be overly restrictive and fail to capture variation. Contrastingly, unstructured interviews might have prevented comparability between participants' responses, and risked following tangents that wouldn't provide sufficiently useful data. Semi-structured interviews were therefore deemed most appropriate, as there were several specific questions, responses to which were considered to be useful to the research (see Appendix 3). However, as potential responses could not be anticipated a degree of flexibility was considered useful, so as to explore avenues as they arise in discussion; enabling interviewees to provide their own narrative of events and detail idiosyncratic developments. This mixture of partial uniformity in questioning coupled with the capacity for interviewees to tell their own story was deemed a suitable complement to the data obtained from empirical observation of possession hearings.

The empirical data collection methodology employed throughout this research is therefore twofold, with a third method applied narrowly within Chapter 5, involving the collection of secondary data. Given that it is isolated to the specific subject matter, its design is reported within that chapter.

The twofold empirical research methodology consists of an ethnographic-documentary study of court cases and related documents, and the conducting of semi-structured interviews. Limited ethnographic observations were also made of the mortgage loan sales process, including discussions between a client and mortgage broker and the completing of various paperwork. These methodologies are motivated by Renner's (1949) contention that for law to be truly understood, a juridical analysis must be supplemented by the study of an institution's social/economic (and procedural) function, as well as an examination of its origins and evolution.

3.4.3 Research location

In selecting the locations for data collection, one part of the UK stood out due to its having experienced a much sharper rise in prices during the last housing bubble, with prices peaking in 2007 and not recovering since then.

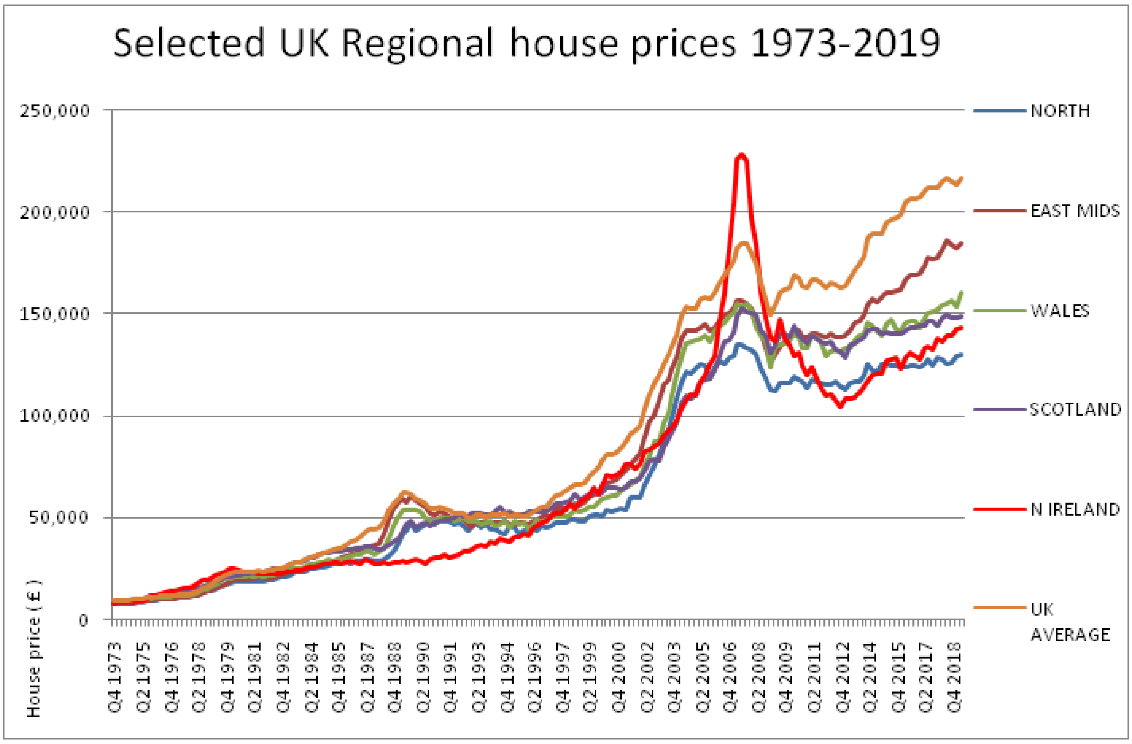

Figure 1: Selected UK regional house prices, 1973 - 2019 (omitting London, Yorkshire, Southern England and other regions to avoid scaling and crowding issues). Data source: Nationwide Building Society (2019)

Many mortgagors who bought real estate in Northern Ireland from 2006 to 2008 were in negative equity in 2013 (where real estate is worth less than the loan secured against it). They remain so until today, with the province seeing the highest UK levels of negative equity prior to the beginning of the research in 2013, at 41%, compared to the next highest rate in the north of England, at 16% (The Consumer Council 2018, p.22). This recent history to the mortgage market in the province suggested that it would have a higher than average prevalence of possession litigation. As of 2015 it was forecast to have the highest repossession rate of UK regions, at close to 0.5%, nearly twice that of any other region and these trends continued so that as of 2016 it had the highest payment shortfall rate (known as 'arrears'), at 6% compared to the next highest rate of 4.5% in the North East of England (The Consumer Council 2018, p.21, 23). As data access was also possible in the province due to my existing connections (discussed further in section 3.6), much of the data collection was targeted there, with the remaining data collection at other sites in England and Wales.

3.5 Data

The principal data comprised ethnographic observations of court hearings, court documents and other relevant records for nine UK mortgage loan possession actions initiated by financial institutions; 2 in England and Wales and 7 in Northern Ireland. In the interests of maintaining anonymity for the parties involved, a distinction is not made between cases this researcher assisted with and those which were merely observed, or in a minority of instances, where extensive documentation and detailed reports of hearings were provided. Non-purposive convenience sampling was the approach taken to obtain data access, due to the inherently personal and sensitive nature of such proceedings and my having existing contacts amongst litigants in this field. Some supporting data was obtained via communications with networks of mortgage litigants.

Data was also collected from semi-structured interviews with 13 participants who either contemporaneously were mortgagors or, in one case, who had recently been. Nine were from Northern Ireland, three from England and Wales and one from the Republic of Ireland. As with the ethnographic component of the research, a mixture of non-purposive convenience sampling and judgment sampling were the means of recruiting participants, for similar reasons as for the ethnographic component. My connections with existing contacts amongst such litigants assisted in generating rapport with participants and eliciting rich responses, while also enabling selection of some participants who were likely to provide unique and insightful perspectives. One further interview was conducted with a mortgage broker known through existing contacts.

Extensive use is additionally made of legislation and case law, while limited use is made of the ABSNet Loan Europe database, comprising details of securitised UK residential mortgage loans, as descriptive data for informing the analysis.

The data were collected between Q3 2015 and Q2 2019.

3.6 Data access

Whitehouse (1999, p.75) noted the difficulties inherent in contacting individual mortgagors involved in possession proceedings, and so chose to rely on secondary data in this respect. However, I have previously assisted defendants in such hearings and been active amongst self-help groups of mortgagors acting as litigants in person, who present their own defences to possession claims by lenders. These connections enabled access to networks of mortgagors involved in ongoing court cases, and so made this research possible. It was not considered feasible to approach litigants outside of existing networks for the ethnographic portion of the research, due to the inherently personal and sensitive nature of such proceedings.

A disclosure should be made, in relation to my own ontological position, as I am exercised by concerns over the structure and operation of financial systems, and share the view expressed by Thomas Jefferson:

> "*And I sincerely believe, with you, that banking establishments are more dangerous than standing armies; and that the principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale.*"
>
> – Jefferson (1816), in a letter to John Taylor.

To this end, I have been active in promoting financial and legal awareness as well as individual assertiveness in the face of institutional pressure. This activity did not begin with this research, and it assisted with data access. I acknowledged that this colours my views somewhat, and may be seen as an ontological bias. However, I suggest that this also adds value to the research, and presents a contrast to much of the other work in the field.

3.7 Ethical considerations and reflections

There is an argument that aspects of the method utilised might be considered unethical, in that it involves a degree of covert observation (Farrimond, 2012). This concern is not taken lightly in the current research, but there are several factors based on which these concerns are, it is argued, substantially mitigated. The first is that the proceedings being observed are by their nature formal in character; indeed, formality is one of the hallmarks of UK mortgage law (Whitehouse, 2011). As such, actors in such a setting were not covertly observed in a relaxed and vulnerable condition; rather, disclosures made are subject to formal and often strategic consideration before being shared. Secondly, there is a record made of such proceedings as a matter of course and it is known to participants that all parties are engaged in record-keeping (defendants, claimants/plaintiffs and judicial officers, as well as clerks or other agents present).

The third mitigating factor is that there is a reasonable expectation that such records, in a non-anonymised form, could potentially be published by the court itself and made accessible to the public in great detail (see Bank of Scotland v Rea, McGready and Laverty (2014) covered in Chapter 8). The discretion of courts to make such details known is contingent, largely, not upon the degree of sensitivity the information might have for parties to cases, but rather upon the public interest served by open access to that information. This has resulted, on occasion, in the revealing of professionally embarrassing details in relation to the conduct of legal representatives, as well as information which is potentially commercially sensitive for financial institutions and compromising personal details.

A fourth (if related) mitigating factor is that I argue that there is a public interest in the current research taking place. Given that it has been a long-standing view of courts in this country that mortgagors are in a somewhat vulnerable position relative to mortgagees (Vernon v Bethel, 1762), and particularly when in default, it is entirely consistent with historic judicial practice that checks and balances should be in place to ensure the fair and reasonable exercise of mortgagees' rights against mortgagors. Though courts arrogate to themselves the role of watchman (and they have an important role in that respect), the absence of independent oversight over this role is a cause for concern and so a form of grassroots oversight arguably serves the public interest, particularly as public funds are utilised in the judicial function. The relatively closed and professionally incestuous social circle of legal professionals is not self-evidently justified in being the sole arbiter of fairness or reasonableness.

A fifth mitigating factor against the empirical research being conducted in a covert fashion is that a considerable effort has been made to anonymise all individuals and institutions featured in the study (Saunders, Kitzinger and Kitzinger, 2015). As noted above, this goes well beyond the standard practice of courts themselves. However, in some cases efforts to anonymise participants are rendered redundant by the actions of either courts or mortgagors. Where this is the case, the extent to which details of cases are reported in a non-anonymised fashion is limited to information substantively already in the public domain.

As to the purpose of this research not being openly notified to the unaware participants, there are two reasons; the first being a matter of practicality and the second one of data integrity. In practical terms, judicial officers have considerable discretion, in possession hearings, to prohibit individuals from serving as assistants to lay litigants, and indeed to expel observers deemed either to be disruptive or whose presence is objected to by one or both of the parties. It is possible that some judicial officers, and indeed mortgagees, would have objected to my presence if details of the research were disclosed. Aside from impacting on data collection, this may have disadvantaged mortgagors where I was providing assistance in court.

The second reason for not giving explicit notice of the research was to ensure a degree of integrity to the observations. There are routes for obtaining permission from courts for research to be conducted, similar to that used by Latour (2010). However, where an academic followed this approach and attended hearings with the formal approval of judicial officers I observed a change in the conduct of the judicial officer. Therefore, to ensure that the research both could practically be conducted, and that observations reflected the experience of mortgagors in possession actions, my role as a researcher remained somewhat covert. A caveat must be stated, that no active attempt was made to conceal the research so that the character of it was published on the university's webpage under my name from its inception. Similarly, my profession as an academic could potentially be known to any participants from a simple online search, and in at least one case this was explicitly known to participants as a judicial officer elicited details of my profession through direct questioning.

Therefore, it is possible that the empirical observations were coloured somewhat by my presence. To control for this, data from interview participants is used to triangulate and obtain a more comprehensive view of how proceedings are conducted (Denzin, 1975).

A final remark is that, not having formal legal training I found this research at times challenging, but also enlightening and I hope that the reader will appreciate that it is intended to both present positive law insights and the perspective of one not native to the field.

3.8 Summary

This chapter outlines the methodology followed throughout the remainder of the thesis, other than for Chapter 8 which utilises a separate methodology detailed therein.

The data consist of ethnographic observations from nine UK court cases, together with documentary records and interview data from 13 semi-structured interviews. Additional use is made of data from the ABSNet Loan Europe database and ancillary information provided from communication with networks of mortgage litigants. This data is analysed with reference to the work of Bogen and Lynch (1989); Lynch and Bogen (1996); Latour and Woolgar (1979) and Latour (1987; 2004; 2005 and 2010), as well as to a limited degree that of Baudrillard (1994). The findings from ethnographic observations and interviews are integrated with positive law analysis to contextualise it in relation to legislation and case law. In this manner, the implications of social, economic and procedural context for the juridical content of mortgages are identified, and analysed in the context of the Credit Creation Theory of Banking.

Chapter 4 - Sale of Loans

This chapter considers the extent to which mis-selling may have taken place in the UK mortgage market prior to, and to some extent after, 2014. It begins with a case study of the Payment Protection Insurance mis-selling scandal, as an analogue for potential mortgage loan mis-selling, including some information on this affair which is not found in the literature. This is followed by discussion, based on interviews conducted, of the role of a mortgage broker as well as the potential for them to engage in mis-selling, both of mortgage loans themselves and associated financial products. The endowment mortgage mis-selling scandal is detailed, as one instance of this, and is discussed with reference to interviewee experiences, while other more recent evidence of potential mis-selling is considered.

The findings are applied to analysing data from the ABSNet Loan Europe database on the sale of mortgage loans in the UK up to and including 2014, to develop estimates of the scale and scope of potential mis-selling in this market.

It is shown that both the quantitative and qualitative data support the view that mis-selling occurred in the UK mortgage market prior to 2014. Incentives for brokers and other sales staff, together with a permissive regulatory attitude, combined to create an environment that enabled a range of dishonest behaviours in the interactions between prospective borrowers and sales agents. These historic behaviours have, I argue, created the potential for future mis-selling scandals.

4.1 Mis-Selling

Financial mis-selling refers to a broad range of behaviours where a customer is financially disadvantaged due to undesired or unknown reasons (Ashton 2015, p.441). This could include the deliberate sale of products to customers which a salesperson knows are not suitable; misuse of data to target vulnerable customers; failure to give advice where needed, or just incompetent or ignorant sales practices such as failing to make comparisons to other products (Black and Nobels 1998, p.793).

Mis-selling of pensions occurred during the 1980s and 1990s as a result of the interaction of multiple factors including government promotion, lack of regulation and changes in the retail environment (Black and Nobels 1998, p.817). This resulted in remediation payments in excess of £10 billion and contributed to the establishment of the FSA as a financial regulator (Ferran, 2012 p.249). This remediation took considerably longer than anticipated and impacted on hundreds of thousands of people (Bennett and Gabriel 2001, pp.387-388). A larger and more recent mis-selling scandal concerned the sale of Payment Protection Insurance (PPI).

4.1.1 Payment Protection Insurance Mis-selling scandal

Payment Protection Insurance is an agreement whereby a borrower pays an insurer a premium either up-front or monthly and receives protection against being unable to make loan repayments due to illness, unemployment or other reasons (McConnell and Blacker 2012, p.79).

There are significant differences between the purchase of PPI and the agreement to a mortgage loan; the former concerns a financial service which is purchased by the customer making periodic or one-off payments, while the latter is a more involved, less arms-length agreement composed of several elements, which are explored further in Chapters 2, 5, and 6. Notwithstanding that PPI can be sold along with mortgage loans, parties to insurance policies such as PPI (and endowments, discussed later in this chapter) are subject to a higher standard of conduct than most other classes of agreement, with a greater expectation with regard to honesty and disclosure such that no pertinent information should be withheld. These requirements are embodied within the doctrine of 'utmost good faith'.

The initial judicial ruling that Payment Protection Insurance had been mis-sold by a UK bank is not identified in the literature but appears to have been delivered in a 1993 court case, that of Price v TSB Bank plc, the judgment of which was then subject to a 10-year non-disclosure agreement (Consumer Action Group, 2015). This judgment, it seems, was then provided to the Office of Fair Trading and Citizen's Advice Bureau (World Heritage Encyclopedia, 2017). Although such a judgment is not publicly available, if the above is indeed so,[16] it was likely the impetus for Citizen's Advice's 2005 super-complaint to the Office of Fair Trading. A super-complaint, under Section 11 of the Enterprise Act 2002 was a complaint, by one of a small number of authorised consumer bodies, to the Office of Fair Trading (OFT) that a "feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers."[17]. The OFT has since been abolished[18]

[16] This suggestion was found on an online discussion board (Consumer Action Group, 2015), identifying the case as occurring in the Bristol County Court, with the case reference 93/10771.
[17] The designated consumer bodies empowered to make such a complaint were identified by the Enterprise Act 2002 (Bodies Designated to make Super-complaints) Order 2004 (SI 2004/1517).
18 The OFT was abolished by section 26 of the Enterprise and Regulatory Reform Act 2013, along with the Competition Commission, and most of their responsibilities transferred to the Competition and Markets Authority.

and responsibilities for Financial Services transferred to the FCA,[19] with the following consumer bodies currently empowered as super-complainants: The Consumers' Association (now known by the same name as that of their consumer magazine, 'Which?'); The Consumer Council Northern Ireland; Citizens Advice, and The Federation of Small Businesses (HM Treasury, 2013). Consequently, were such a super-complaint to be made today it would have to be filed with the FCA by one of those organisations.

Though uptake of PPI in relation to mortgage loans was generally rather low (Pryce 2002, pp. 216-217), mis-selling by lenders in this respect was identified. Citizen Advice's report noted the then lack of a single regulator charged with oversight of the PPI market (partially addressed by the changes noted above), with customers of mortgage payment protection insurance potentially being overcharged by £3 billion per year (Tutton and Hopwood Road, 2005 pp.12,42-43). The report encouraged the then FSA (now FCA) to investigate "whether PPI policies are treating their customers fairly in respect of the product design, price, the extent of risks covered and in particular the operation of exclusion clauses" (Ibid, p.42).

While lessons have arguably been learned from this scandal (Citizens Advice 2014), and a deadline was set for its final resolution (Dunkley and Binham, 2017; FCA, 2017a), at the time of writing that deadline has only recently passed with at least £48 billion in restitution to customers being paid by banks alone (Tew, 2019). This amount has been refunded to customers, frequently including an 8% interest payment, which, known as the 'judgment rate', is the standard level set for the payment of interest in UK court cases (Justice Committee, 2010 Ev16; Ministry of Justice, 2017). This is due over the period of time up to the date of judgment for which any party has held the funds of any other party, in compensation for their lack of access to the funds and the court's inability to provide compound interest (Law Commission, 2004).

4.1.2 Summary regarding PPI:

The PPI mis-selling scandal indicates a few mechanisms by which a mortgage mis-selling scandal could manifest: as the result of a court case, due to a super-complaint by a consumer body, as a consequence of a regulator's self-initiated investigation, or as the outcome of investigation by a parliamentary committee. It also indicates the extended timescales over which resolution of such scandals can occur. The next section considers the channels and practices in the sale of mortgage loans, so as to evaluate the potential for mis-selling of mortgage loans themselves.

19 This transfer of responsibilities to the FCA was effected by section 43 of the Financial Services Act 2012.

4.2 Mortgage Sales Channels

This section examines the manner in which mortgage loans are sold, looking primarily at the most prolific channel by which mortgage loans are sold: via brokers.

4.2.1 Mortgage Brokers

Mortgage brokers are intermediaries whose job primarily consists of matching lenders with borrowers. Prior to the 1980s these were largely unnecessary, in a market then consisting primarily of building societies and with little competition on price (IMLA, 2015). As banks moved into this market in the early 1990s, the range of financial products and complexity thereof multiplied, creating a need for brokers to assist customers in finding the best deals (Ibid, p.4). This can be a cheaper distribution channel for banks than maintaining their own staffed branches, which can be expensive to maintain, as well as yielding relatively low numbers of sales per branch; it can also avoid resources being wasted in dealing with customers who would be unlikely to be approved, as these can be filtered out by brokers (Ibid, pp.6-7).

From October 2004, the sale of mortgage loans in the UK was governed by regulations created by the (then) Financial Services Authority. Known as the Mortgage Conduct of Business Sourcebook (MCOBS), the regulations identified key principles that lenders and intermediaries in this market were expected to abide by (FSA, 2003). Under these rules, the sale of mortgage loans could only be conducted either directly by an FSA-authorised lender, or via an FSA-authorised broker or advisor, who would be accountable for their sales approach and be required to offer customers only products which were suitable for them. Among the several principles outlined within the regulations was the obligation to treat customers fairly. They would also have to ensure that marketing material was clear to the customer and not misleading, and would have to consider the affordability of the loan to the customer. In many ways, this reflected many similar elements to earlier regulations which came into force in 1988, as well as to a limited degree, common law obligations on sellers and brokers (Severn, 2008).

The FSA's 2005 Mortgage Effectiveness Review revealed some issues with compliance, and found that while prime borrowers tended to shop around more and consider the implications of their purchase, sub-prime borrowers (those presenting a greater credit risk to lenders) were more constrained in the choices available. These Sub-prime borrowers tended to rely on brokers to identify suitable products, as well as to explain the properties of those financial products rather than reading the literature themselves, while more broadly they were overly focussed on short-term, rather than long-term costs (FSA, 2005a; 2005b).

As of 2008, approximately 70% of UK mortgage originations were arranged via brokers; figures much higher than for many other countries, including the US, at just over 30%, with only Ireland coming close, at 60% (Lea, 2011 p.8). Despite a 15-20% dip in this figure following the 2008-2009 financial crisis, there was a steady rise again in the proportion of loans arranged by brokers after 2012, so that by 2015 this had returned to its previous levels (IMLA, 2015 p.5). However, while in 2016 75% of first-time buyers used the services of a mortgage broker and 67% of home movers, if internal switching by lenders themselves is included in the calculation (which it usually is not), it can be said that half of all mortgage agreements are made directly and the other half via an intermediary (FCA, 2018a p.15). Overall, the cost of maintaining a network of branches has increased and sales through brokers are increasingly economically preferable, with one source reporting a broker market share as high as 80% in 2017 (Thomas, 2017). The cost of compliance with regulations has become a significant market driver in this respect. As noted by the IMLA (2015, p.7):

> "*For a procuration fee averaging around 40bp (0.4%) the broker takes on the compliance risk associated with making an advised mortgage sale. And the cost of retraining staff to provide advice has encouraged many lenders to de-emphasise direct sales.*"

Nevertheless, as these compliance costs have risen, the job of a mortgage broker has become less financially rewarding, which may influence the future of these trends. A broker interviewed for the current research described a 10-fold increase in their monthly costs between 2004 and 2019, from approximately £70 to £700 per month; changes driven largely by compliance requirements. Although this change is partly due to individual circumstances, the general rise in such costs is a pronounced trend within the industry. The broker remarked that in the 1970s, regulations governing the activity totalled 100 pages, while in 2019 these ran to 60,000. This has resulted in an expansion in the regulatory burden, with brokers in 2019 required to prepare more paperwork and engage in more extensive money laundering checks on clients relative to 2004, when MCOBS was first introduced. The broker commented that these include checks on the origins of paperwork, proof of a deposit and validation of the source of funds. These can be particularly onerous if funds are provided from outside of the EU. Meanwhile, large financial institutions exercise more discretion in this respect and are more likely to be able to waive some requirements in managing clients with circumstances that might raise regulatory issues. In this way, mortgage brokers can lose out on business from some clients. Therefore, the broker was critical of the current regulatory regime, suggesting that it was dysfunctional and turned the primary role of a mortgage broker into that of a money laundering investigator. They did, however, accept that regulations in the period around 2004, and for several years after, had been lax.

4.2.2 The role of a broker

What a mortgage broker does in practice is act as an intermediary between financial institutions offering mortgage loans and clients seeking finance. To do so, they have to be regulated by the FCA (either directly or as part of a network). Authorised persons have access to premium commercial services that provide access to a range of data on available loans. These take the form of databases which according to their respective websites require a monthly subscription of between £18 - £24, such as MortgageBrain Sourcing, Trigold Prospector and Mortgage Source. These databases enable the broker to view the various mortgage loan products available in the UK market. The availability of these products will depend on a prospective borrower's details, so that a broker should take a fairly comprehensive account of their client's financial (and other) circumstances. By filling in these details, the broker can filter the various loan offers to show those which a borrower would be eligible for. The primary criteria that a broker should sort these offers by is the interest rate offered, as this is a major determinant of the cost to the borrower, though other factors are relevant too. It is good practice to then print the ordered list of loans and provide this print-out to a prospective borrower, to enable them to decide between the products offered. However, doing so may disadvantage the broker as there are conflicts of interest inherent within the broker-client relationship.

Brokers are paid a fee by their clients, but also (often) by the lenders for whom they broker sales, and the commissions paid vary considerably. This introduces an inducement to brokers to steer clients towards the deals which will yield the greatest net benefit to themselves. Where prospective borrowers are provided with a comprehensive statement of the available offers, this conflict of interest would be mitigated, however it is not clear how common this practice is. The interviewed broker alluded to knowing of some in the industry who take advantage of the disparity of knowledge to encourage clients to consider offers which maximise their own income.

There are industry publications which prospective borrowers could potentially refer to, to better inform them of the variations in loan offers. As well as being publicly available for sale, such publications may be held by some brokers, and so a borrower who enters into an agreement at a broker's office could better inform themselves by reviewing such literature. However, some brokers (such as the one interviewed) do not have their own office, and rather meet clients in public places such as coffee shops. Another broker, observed as part of this research, would sometimes conduct business at their office but more commonly would meet with clients in their own homes. Though comprehensive data is not available on the prevalence of the sales process occurring away from business premises, amongst the limited dataset for this research overall, of interviewees and observed cases, it seems to have been the predominant practice throughout much of the last 20 years, and may remain so. This point is returned to in Chapter 5. Consequently, interviewees reported that they had little opportunity to evaluate the loans on offer, with one reporting being presented with a single loan offer, which was described by the broker as:

> "*The best offer we can get for you*."

Of the 13 mortgagors interviewed for the current research, nine utilised the services of a broker. Some could recall considerable detail about their dealings with those brokers, and all reported similar experiences, of being presented with a single loan product, without any comparators. Without a record of the alternative offers, interviewees indicated that their ability to decide between offers was restricted if not entirely absent. But it was not just the information provided to individual clients which was inadequate; that provided to lenders was, too.

One interviewee was working part-time when applying for a mortgage loan, and reported the following exchange with a broker:

> "*They asked me how much I was earning. I said between £15 and £20 an hour depending on what I'm doing, and somehow they managed to equate that to £31,000 a year.*"

Later, the interviewee was appointed to a salaried job and updated the broker prior to the application process finishing:

> "*I told them the salary I would be starting on and they still didn't use the information. ... They stuck to the old information that they had created.*"

So, though the broker knew that the customer was earning £25,000 per year, they didn't correct the information they had already submitted stating that the prospective borrower's salary was £31,000. The interviewee speculated that:

> *"What they were worried about, in hindsight, was if they had declared my new earnings it would have been less than what they'd already said I was on. I'm presuming that would have meant the offer would have been lower; from the bank. ... so they didn't change a thing."*

But the inaccuracies went further:

> *"They even made up a company that I was working for. I said I was self-employed but they put me down as working for some company that I've never heard of. ... and I bet they don't even exist."*

Another interviewee reported that their broker had recorded that both themselves and their partner had an income of £45,000 per year, making a household income of £90,000, when the actual figure was approximately a quarter of this. Given that they were applying for a loan of only £60,000, they remarked:

> *"If I was earning that much I wouldn't need a loan!"*

Similarly, in one case I observed, the customer's income was significantly overstated, as £120,000, and they were identified on the application forms as being a medical doctor, when this was a gross misrepresentation of what the customer had conveyed to the broker. In at least two of these three instances, the customer had provided the broker with the contact details of their accountant, and the broker had failed to contact them to verify the details entered. In all three instances, the customers were unaware of the inaccuracies recorded by the brokers until years afterwards. As one of the three interviewees related, they were unaware of the broker's deception until subsequent events motivated them to investigate using data protection laws:

> *"I didn't find this out, though, until* [year] *when the bank basically sent me a letter saying that I'd been took off a tracker mortgage and put on to a standard repayable mortgage and my rate was going to go up by about £140."*

Here, by 'tracker mortgage' they are referring to a kind of loan characterised by a relatively low interest rate, which tracks a benchmark reference rate external to the lender. The interviewee objected to this change, stating that this was not what they believed they had agreed to. In a subsequent phone call an employee of the lender accused the interviewee of submitting a false loan application, which led to the following exchange:

Lender's employee:	*"Well you shouldn't have got this product"*
Borrower:	*"So basically what you're telling me is that it was mis-sold."*

Lender's employee: *"No, no, you filed –"*

Borrower: *"No I didn't. The broker did everything. I was operating on trust that they were doing the right thing. I never read the paperwork 'cause I've not even received it"*

The next section considers a large-scale mis-selling scandal resulting in part from such practices – of brokers and others sales agents steering customers towards products inappropriate for them and giving unrealistic assurances about them. The product in question is a kind of insurance policy which has historically been sold together with mortgage loans as part of a financial package, known was an endowment.

4.3 Endowment mortgages

'Endowment mortgages', as they are known, are mortgage loans with an added life insurance policy. Borrowers pay regular interest on the loans and the endowment policy, upon maturity, is intended to provide a capital sum which can be used to repay the principal on the loan. Such endowment policies share a particular parallel with PPI agreements, as both are a form of insurance contract, and both were sold as part of mortgage loan agreements. As with PPI, the mis-selling of endowment mortgages constituted a large financial scandal resulting in substantial remediation in the early-to-mid 2000s.

These products may be sold by insurance companies directly, by lenders as a package or by financial advisors acting as brokers. Such brokers are often paid commission by the providers of the policy (Edmonds 2015, p.5), with suggestions that this encouraged the inappropriate sale of these products and that lenders' sales staff were similarly incentivised by bonuses (Severn 2008, pp.36, 42). In 1988, 83% of new mortgages were linked to endowments; a figure which had fallen to 23% by the mid-2000s (Edmonds 2015, p.4) and a paltry 27 sales in total between 2011 and 2012 (Peachey, 2013). They appeared particularly attractive during the 1980s and 1990s as they were often sold by reference to the high interest rates of the 1970s, generating projections that the endowment could pay off the balance on a mortgage loan at the end of the term, with excess funds that the mortgagor could retain (The Consumer Council 2018, pp.14-15). These projected returns sadly did not materialise, in part because interest rates did not return to these levels but rather fell from 17% in 1985 to 4% in 2005 (Edmonds 2015, p.4). Therefore, the misleading sales practices came under scrutiny and resulted in legal actions seeking compensation for those customers from the investment provider (often insurance companies).

Though a regulatory regime was in place to ensure disclosure to customers of the risks associated with endowment mortgages and restrictions on their being recommended for sale only to suitable investors, non-compliance with these regulations was widespread prior to 1994 and still evident among some firms in 2007 (Severn 2008, pp.17-18). Regulatory shortcomings included the failure to show that an endowment mortgage was suitable for the customer; lack of evidence that the customer could afford to make premium payments (with some repayment periods stretching into retirement); lack of evidence that the risks had been explained to the customer; lack of evidence that the customer needed life insurance, or even that they understood that they had been sold a life insurance policy (Ibid, pp.20-21). Indeed, more than half of respondents to a survey on endowment mortgages recalled being told, during the sales process, that the policy was 'guaranteed' or 'would definitely' pay off their mortgage, with only 10% recalling a warning that this might not occur (Ibid, pp.32-33). These observations are supported by my current findings, as two interviewees sold such products were not adequately informed, so that after the sales process they were not entirely unaware of what they had agreed to.

Given that the peak of endowment mortgages sales was in 1988, such policies typically sold for periods of 25-years matured in 2013 (Hughes, 2014; Peachey, 2013), with the tail of this distribution maturing in subsequent years (Severn 2008, p.6); during the period of the current research. However, mis-selling claims in respect to the majority of these maturing policies would long since have been time-barred. Limitation periods in relation to financial services mean that customers have only six years from the date of the event to raise a complaint about it, or (if later) three years from when they reasonably could have known about an issue (Severn 2008, p.48). In practice, this meant that borrowers typically received a letter advising them that there would be a shortfall at the end of the endowment term, and that they had three years from this date to make a complaint under the FCA's rule DISP 2.8.2 (Edmonds 2015, p.17; FCA, 2019c). Such complaints, when not resolved by the firms themselves, could be escalated to the Financial Ombudsman Service (FOS). The FOS is an arbitration mechanism which serves as an alternative to small claims court and is funded by a fee for each case, which is levied on the firms whose escalated complaints they handle (Ibid, p.100, 103). A campaign by the consumer association Which? was instrumental in raising the profile of the endowment mortgage mis-selling practices and pushing for wider redress (Ibid, pp.41-43, 46-47, 51). Consequently, between 2002 and 2007, the Financial Ombudsman Service dealt with over 250,000 complaints relating to the sale of mortgage endowment policies (Ibid, p.2). Some firms appeared to make the pragmatic calculation that it was cheaper to routinely reject complaints, knowing that many customers would not take it further, and to then pay the fee to the financial ombudsman, as well as any financial redress, for those few customers who did raise a complaint with the FOS (Ibid, p.100).

Such financial redress would not be calculated in respect to the shortfall between the principal sum due and that actually received at the end of the term. Rather, it was determined by comparing the mortgage interest and premium actually paid by the borrower together with the then-current value of the endowment policy with the amount that would have been paid by a borrower on a comparable principal-repayment mortgage (Edmonds 2015, p.17). This calculation yields a figure as to how much would have been paid off the sum borrowed if the endowment mortgage had been a principal-repayment mortgage. The compensation paid therefore adjusted a borrower's condition to those levels, and was often substantially less than the actual shortfall. The mitigation granted in this way amounted to £3 billion over a 5-year period (Ibid, p.18).

One interviewee, who for the purposes of the current research will be called Bob, was sold several such endowment mortgages by a financial advisor, acting as a broker. This occurred in the mid-2000s, at a stage when the inappropriateness of such sales processes had long been established and a substantial proportion of the numerous claims in this respect already settled. However as will be shown, it was unfortunately not possible for this borrower to obtain redress.

4.3.1 Endowment mortgages of an interviewee

Prior to being sold an endowment mortgage, Bob had obtained a bridging loan; a kind of intermediate, high-interest short-term loan. When they applied directly to the lender to refinance this arrangement via a lower interest mortgage loan, the application was refused. Bob was then approached by a financial advisor who suggested that, acting as a mortgage broker, he could obtain a mortgage loan for them.

Bob was concerned about the state of his finances, and the broker suggested taking out a form of loan sometimes termed a 'part-and-part', wherein the borrower would not make full repayments towards the principal, but rather make monthly payments of the interest due and limited repayments towards the principal which would not completely repay the mortgage over the term of the loan. As the application form required financial information, Bob put the broker in contact with his own accountant, who was to provide details of his income:

"*Because I had no idea what I was earning; I didn't think it was very much.*"

The broker presented the prospective borrower with the blank forms, saying "sign these and I'll fill them in", which Bob did, on the understanding that the broker would then go to his accountant to complete the information. It was only much later, as a result of a Subject Access Request for data from the lender, that Bob discovered the broker had identified his income as being £50,000; a figure significantly above what he was actually receiving, and far beyond what his accountant's records would have indicated. As noted above, findings from other interviewees and observed cases show that, this was a common practice among brokers at the time. Being unaware that this had occurred, initially the borrower felt assured that the broker had provided him with a good deal and came to trust him.

The broker pressured the borrower to take out further loans to purchase investment properties, but the borrower objected to this on the moral grounds that such practices inflate the prices of houses for families. However, the broker kept visiting his home and pressing him to do so, eventually playing to the borrower's sentiments by suggesting that families which had migrated to the region were unable to purchase homes and that by investing in a buy-to-let property, the borrower would be facilitating their having a place to live. The broker also deployed fear as a sales tactic, suggesting that the borrower's children would be unable to afford properties of their own as prices continued to rise. In this manner, he managed to persuade the borrower to purchase an investment property, with an interest-only loan which he recommended should be financed via a kind of insurance policy – an endowment.

In the first sale of such an endowment mortgage, the borrowers asked how the outstanding balance would be paid on an interest only loan. The broker said the endowment would 'cover it', assuring the prospective borrower that when the policy matured it would pay off the principal outstanding on the loan. Discussing the idea, the borrower explicitly asked for other options to consider. However, the broker became indignant, stating words to the effect of:

> " *I've scoured the whole market and this is the best one for you. You can't afford to lose this.*"

Reluctantly, the borrower agreed to apply for the endowment mortgage loan, and upon further pressure from the broker, agreed to obtain two more such loans to purchase a further two properties. Only later did the borrower discover that the broker was then stating his annual income as £70,000 on the loan applications. Most of the endowment policies were arranged with one insurance provider, and alternative options were never provided; indeed, he led the borrower to believe that it had to be done in this manner. At the same time, he insisted that he wasn't receiving commission from this; that he was an entirely 'free agent' without any ties to the lenders or insurance firms, which was untrue.

It later emerged that there were problems with the endowment policies sold. As with many other such policies across the country, despite the broker's assurance, they were not guaranteed to pay off the principal amounts due. One was initially promised to pay out £300,000 upon maturity but one day documentation arrived informing the borrower that it was projected to pay out only £120,000. The policy was also mismatched in time so that the pay-out would not come at the end of the loan's term.

Another was entirely mismatched to the borrower's purposes; a fact concealed from the borrower due to their lack of knowledge of insurance parlance. While the borrower was led to believe that the term 'sum assured' represented some kind of guarantee of payment of the mortgage loan, it was a sum which would only be paid upon the borrower's death. He did not realise he had taken out life insurance, and in his candid words, he "didn't want to die" in order to resolve the matter. Of these misrepresentations on the part of the broker, the interviewee stated:

> "*So he used his expertise to exploit us, and our trust, and lack of knowledge of these things or even how the process is done.*"

The broker behaved similarly with others known to the borrower, obtaining an endowment mortgage for someone who was unemployed but who owned his own residence. This resulted in the person losing their home. Most dramatically, the broker reportedly persuaded one person to take out five mortgage loans before bizarrely convincing them that they should provide deposits for a further five mortgage loans for properties which would be registered in the broker's own name; not that of the borrower. Some of these properties were overseas, and the broker used them for months at a time as holiday accommodation for his own family, even getting that borrower to tend the garden and finance the purchase of furniture on credit cards.

The broker sold inappropriate financial products to many others and solicited money for schemes which never materialised. Ultimately the broker went bankrupt; the funds were untraceable and even the broker's home was in the name of his wife. Even though he had previously worked for a firm which was closed by the FSA for impropriety, there was no public record that might warn prospective borrowers of this and lenders raised no concerns.

Despite these circumstances, the lenders who had provided the funds treated the issues noted above as matters purely between the interviewed borrower and the broker, for which they had no responsibility. The other interviewee in the current research who was sold an endowment mortgage experienced similar treatment by the lender.

Under the FCA's rules, provided that written notice has been provided to a borrower that there will be a shortfall between an endowment and the outstanding balance on a loan, there is only a three year period[20] in which to complain to the FOS, and beyond the kind of redress noted earlier there is no general protection that would sufficiently address a borrower's losses (FCA, 2019c). Therefore, the Consumer Council (2018) sees little scope for resolution for borrowers affected by such mis-selling who have not acted within that 3-year window. They are unable to claim compensation.

In relation to the endowment mortgages described above (for both interviewees), possession proceedings were inevitably brought and the properties seized as a result.

4.3.2 Summary of endowment mortgages

As with PPI, the mis-selling of endowment mortgages constituted a major financial scandal, and although the remediation campaign was largely completed by 2007, the consequences for borrowers continue. The interviewees' experiences are a stark demonstration of the extent to which brokers (as well as other sales agents) can be financially induced to seek personal gain against the interests of borrowers. However, the scope for restitution or compensation in such cases is very limited. The next section considers other forms of potential mis-selling, starting with a product that has some similarities to endowment mortgages: interest-only mortgages.

4.4 Interest only mortgages

Interest-only mortgages are, as the name suggests, those where monthly instalments do not reduce the principal balance due, but rather pay only the interest on the loan. As with endowment mortgages (which were usually also interest-only), such an agreement involves the payment of the principal amount at the end of the loan term. In the absence of an endowment policy being sold with the loan, specific provision is not made at the time of sale for how the principal's repayment might be accomplished. Rather, borrowers are expected to make their

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[20] With a possible 6-month extension depending on the wording of the notice (FCA, 2019c).

own arrangements to ensure the repayment, such as via investments, inheritance or other means.

Of the fourteen interviewees, 6 had obtained interest only loans. Many reported malpractice in the sale of these loans, so that they had little awareness of the long-term financial consequences. In one observed case, the borrower only learned years later that their broker identified in the loan application that the loan would be paid off by the sale of stocks and bonds; assets which the borrower had never owned.

In 2011, there were 2.6 million interest-only mortgages in the UK, falling to 1.7 million by the end of 2015, while the number of part-interest, part-repayment mortgages remained the same at 500,000 (CML, 2016; Experian 2013, p.4). These are projected to reach maturity over the next 30 years, with three peaks to the number maturing over this period (Experian 2013, p.6). The first was in 2017-18, for those sold as part of endowment mortgages. The second wave, starting in 2022, will peak in 2027/28, and comprise loans sold as interest-only mortgages between 2003 and 2009. The third peak will be in 2032, comprising loans sold between 2005 and 2008 and later converted to interest-only status.

As with the mis-selling of endowment mortgages, it is possible that closer to these maturity periods, the impact of these interest-only mortgage loans will become clearer and that some degree of mitigation may be seen. Alternatively, the issue may be addressed via regulatory provisions, as has been seen for borrowers termed 'mortgage prisoners'.

4.5 Mortgage prisoners

A 'mortgage prisoner' is someone who entered a mortgage loan agreement prior to 2008 and met affordability requirements at that time, but would not do so under the subsequent regulatory regime following the 2012 Mortgage Market Review, with the revised rules coming into effect in 2013 (FSA, 2012; FCA, 2014). Consequently, they have been unable to transfer to a new loan agreement and are stuck on higher interest rates which they struggle to afford (The Consumer Council 2018, p.24). Prior to the beginning of the current research, in 2012, 65% of Northern Irish mortgage borrowers were mortgage prisoners, compared to a 40% UK average, and this figure was little changed by 2015 at slightly under 60% (Ibid, pp.24-25).

One interviewee in such a position reported a typical exchange, when they discussed with their lender their wish to refinance their loan at a lower rate. They were told that they could not afford the lower rate, and so would be kept on the higher rate they were then paying (usually a lender's 'standard variable rate'). The absurdity was summarised in parliament by quoting one mortgage prisoner's comments: "How can we not afford to pay less?" (HC Deb, 07 May 2019). While there are regulatory justifications, this kind of backwards logic has ensured that protections intended to benefit some borrowers (here, to prevent the sale of an unaffordable product) have the effect of harming others. One interviewee reported just such an experience, and feeling similarly frustrated at being told by their lender that they could not afford a lower interest rate than they were then paying.

Such experiences are not isolated (Aikman, 2019). The FCA (2019d, pp.30-33) estimated that at least 150,000 borrowers were in this position as of Q1 2019 and revised its affordability checks, so that some mortgage prisoners could avail of options to refinance or 'switch' their mortgage loan and pay a lower interest rate, provided they meet certain criteria, including the account not being in arrears. However, an All Party Parliamentary Group was formed around the issue, calling for further action (House of Commons, 2019) and the FCA issued revised guidance in October 2019, further relaxing affordability checks, requiring lenders to inform their borrowers of their new options (potentially with other lenders), but leaving discretion on whether to actually apply such modified assessment methods with lenders themselves (FCA, 2019e).

Consequently, some opportunity for resolution has been presented to mortgage prisoners, but it is unclear the extent to which this will address the problem.

4.6 Other indicators of mis-selling

As noted above, Which? was instrumental in mobilising borrowers en masse during the endowment mortgage mis-selling scandal, and the organisation currently encourages consumer complaints around mortgage loan mis-selling based on a variety of issues. Some of these bases relate to the fact-finding by sales agents, so that products sold did not match borrowers' financial circumstances or attitudes to risk. The lack of discussion of alternative loan offers and the ultimate means of repayment are other bases suggested for complaints, as is the self-certification of income, where sales agents did not receive independent confirmation of the borrower's stated income. Another basis for complaint is that some mortgage loans run into borrowers' retirement periods, and the feasibility of repayment during this time was sometimes not discussed at the time of sale. Also, being sold a sub-prime loan is suggested as a possible basis for complaint if a borrower might have been eligible for a more favourable (e.g. lower interest) product.

A number of claims management firms now promote their services in handling mortgage mis-selling cases and present even more extensive lists of grounds for litigation. Given the range of possible markers for mis-selling, it is beyond the scope of the current research to provide a comprehensive view of its prevalence in the UK. However, the following section provides an indication of regional variations in certain practices which are potential markers for mis-selling.

4.7 Regional variations in practices associated with mis-selling

This section is based upon analysis of data taken from the ABSNet Loan Europe database, comprising loan-level data for residential mortgage loans securitised in the UK up to Q3 2014. This is data self-reported by lenders to the Bank of England as part of the ECB's Loan Level Initiative (ECB, 2019). There were 13,464,776 residential mortgage loan accounts in the UK in Q3 2014, while securitised loans, according to the Bank of England (2019), comprised 1,062,178 accounts, down from 1,116,388 the previous quarter. Consistent with this, the entries in the dataset utilised numbered 1,102,380 accounts, equating to just over 8% of outstanding residential mortgages at the time. Therefore, a caveat to the analysis which follows is that the data may not be representative all mortgage loans. This is particularly pertinent, as Martin (2011) has found that incentives can exist for lenders to securitise (sell rights to) low quality loans issued to borrowers at greater risk of default. If this were the case with the current dataset, then to the extent that mis-selling markers are predictors of greater risk of default, the dataset would be expected to record practices associated with mis-selling at a greater frequency than in the general set of mortgages. Therefore, the figures shown may overstate the extent of mis-selling if extrapolated to all mortgage loan accounts.

A further caveat about the data itself is its incompleteness, with data missing in varying proportions so that while some fields are complete, on average the dataset analysed is only 68% complete (see tables X and Y in appendix 4 for details).

The database comprises 76 categories indicating the properties of each loan issued and active up to that date, so that redeemed loans or those linked to repossessed properties are excluded. The region for each loan is identified, based on the EU's NUTS territorial designations (See

Appendix 5 for a map indicating these regions). The below tables report analysis of selected data from 6 of these categories deemed to represent markers for potential mis-selling.

Table 1: Percentage of Loans issued by Borrowers' Employment Status			
Region	Unemployed	Student	Pensioner
N.E. England	0.30	0.00	0.90
N.W. England	0.50	0.02	1.07
Yorkshire	0.32	0.01	0.87
East Midlands	0.33	0.01	0.80
West Midlands	0.42	0.01	0.69
East of England	0.37	0.01	0.59
London	0.28	0.00	0.41
S.E. England	0.45	0.01	0.77
S.W. England	0.44	0.01	1.12
Wales	0.43	0.00	1.09
Scotland	0.62	0.05	1.67
Northern Ireland	0.14	0.00	0.34
Data source: ABSNet Loan Europe Database			

Table 1 shows a low prevalence of loans to unemployed borrowers, at less than 1% across all UK regions, with Northern Ireland showing the lowest figures. Loans to students comprise a negligible proportion of those in the set, while the proportion provided to pensioners vary across regions, from almost 1.7% in Scotland to just a third of a percent in Northern Ireland.

Table 2: Percentage of Loans issued by Credit Quality		
Region	Self Cert	Sub Prime
N.E. England	1.66	2.91
N.W. England	1.96	2.08
Yorkshire	1.71	2.01
East Midlands	1.95	1.88
West Midlands	2.23	2.16
East of England	1.48	0.56
London	1.93	1.10
S.E. England	2.81	2.20
S.W. England	2.51	1.15
Wales	2.27	2.07
Scotland	0.78	1.68
Northern Ireland	3.77	6.85
Data source: ABSNet Loan Europe Database		

Table 2 illustrates the variation in reliance on self-certification in relation to a borrower's credit quality as well as the extent to which the borrower might be classed as 'Sub Prime' in this respect. On both metrics, Northern Ireland ranked the highest, while Scotland ranked the lowest in relation to self-certification, and the East of England ranked the lowest in percentage of Sub Prime borrower credit.

Table 3: Percentage of Loans issued by Primary Income Verification Method			
Region	Self Cert	Self Cert & Affordability Check	Not Verified
N.E. England	19.77	3.16	8.74
N.W. England	18.50	3.41	10.37
Yorkshire	21.95	3.16	10.98
East Midlands	17.99	3.08	12.17
West Midlands	22.58	3.54	10.13
East of England	11.86	1.50	16.22
London	16.69	2.82	13.53
S.E. England	13.97	4.67	15.90
S.W. England	14.43	2.39	12.39
Wales	24.47	3.11	10.27
Scotland	15.38	2.11	6.39
Northern Ireland	33.21	5.01	4.65
Data source: ABSNet Loan Europe Database			

Table 3 reports some less than assiduous methods of verifying borrower income. Reliance on borrowers' self-certification of income was greatest in Northern Ireland, with nearly a third of loans in the dataset issued on this basis, while a combination of this with an affordability check was also highest in that province. Conversely, Northern Ireland showed the lowest levels of non-verification of income, while the East of England scored the highest on this metric, potentially suggesting some interaction with the reportedly remarkably low levels of Sub Prime borrower credit recorded there (see Table 2).

Table 4: Percentage of Loans issued by Origination Channel		
Region	Broker	Internet
N.E. England	38.67	0.17
N.W. England	41.98	0.13
Yorkshire	47.39	0.15
East Midlands	47.03	0.22
West Midlands	43.35	0.15
East of England	44.86	0.13
London	50.99	0.19
S.E. England	48.82	0.41
S.W. England	48.27	0.20
Wales	45.39	0.18
Scotland	37.29	0.09
Northern Ireland	53.79	0.00
Data source: ABSNet Loan Europe Database		

Brokers accounted for more than half of the loans originated in both Northern Ireland and London, and only 37% in Scotland. Meanwhile, origination over the internet was universally low, and entirely absent in Northern Ireland which might in part reflect the different market composition in the province, with some lenders active there and not in the rest of the country (See Chapter 8).

Table 5: Percentage of Loans issued by Payment Type				
Region	Bullet	Bullet & Savings deposit	Bullet & Life insurance	Bullet & Investment portfolio
N.E. England	25.54	0.05	0.00	1.05
N.W. England	30.01	0.11	0.00	2.08
Yorkshire	30.40	0.06	0.00	1.21
East Midlands	29.90	0.15	0.00	2.01
West Midlands	28.79	0.10	0.00	1.44
East of England	33.65	0.17	0.00	2.45
London	43.61	0.25	0.00	1.66
S.E. England	42.94	0.16	0.00	1.95
S.W. England	41.38	0.20	0.00	2.25
Wales	32.79	0.11	0.00	1.79
Scotland	24.84	0.02	0.00	2.74
Northern Ireland	35.19	0.00	0.00	0.00
Data source: ABSNet Loan Europe Database				

Bullet loans reported in Table 5 are also known as 'balloon' loans, for requiring ballooning payments, or a large one-off payment, at the end of the loan's term. This requires additional provision to meet the obligation and aside from regional variations, the above numbers indicate a considerable proportion of mortgagors facing financial obligations they may be unprepared for. Even the comparatively small number of mortgagors recorded as having a provision for this payment, above, may be overstated judging by the interviewee's experience reported above, whereby a broker falsely stated that the sale of non-existent stocks and bonds would meet this liability.

Table 6: Percentage of Loans issued by Repayment Method					
Region	Interest Only	Endowment	Pension	Index-Linked	Part & Part
N.E. England	24.94	0.78	0.01	3.01	0.64
N.W. England	32.89	1.69	0.07	0.89	1.19
Yorkshire	32.22	1.06	0.05	0.00	0.91
East Midlands	31.94	1.64	0.08	0.86	1.27
West Midlands	31.64	1.14	0.06	1.14	1.66
East of England	34.91	2.10	0.11	0.88	1.26
London	46.88	1.67	0.13	0.71	0.87
S.E. England	44.85	1.84	0.11	1.32	1.84
S.W. England	43.04	2.02	0.11	0.48	1.87
Wales	35.51	1.43	0.05	0.00	1.34
Scotland	26.79	2.52	0.03	0.00	1.18
Northern Ireland	41.22	0.14	0.00	0.00	0.62
Data source: ABSNet Loan Europe Database					

The category of Interest Only loans overlaps with that of bullet loans in the previous table, both involving large end-of-loan payments. Other data here is consistent with the findings reported earlier in the chapter, showing that endowment mortgages were considerably less popular than at their peak prevalence in the late 1980s, and were least common in Northern Ireland. As in the previous table, London showed the highest rate of interest-only loans.

Given the caveats noted above, the data reported here should be interpreted with caution, and variations across regions would need to be interpreted in light of other economic data. However, the data appears to be consistent with a view that on some metrics, lending practices in Northern Ireland showed comparatively higher markers for potential mis-selling. More generally the findings support the view that interest only mortgages, given their scale at the time, have at least the potential to give rise to problems in future years and may come to echo the endowment mortgage mis-selling scandal. Aside from brokers, which were examined in this section, another role closely connected to the sales process is that of the conveyancing solicitor.

4.8 Solicitors' connections to mortgage loan sales

Just as brokers are often paid by both borrower and lender, conveyancing solicitors are too, as it is common practice for them to work for both parties. The Solicitors Regulation Authority (2019) has recognised that "There is potential for a conflict of interest to arise when acting for more than one party: sellers, buyers and lenders." while also suggesting that there should be parity in the treatment of each; "When acting for lender and borrower the duties owed to both clients are equally important.".

In two observed cases, the mortgagors attempted, after litigation had commenced, to determine what the relationship between the conveyancing solicitors and their lenders was. Some information was provided, confirming that lenders had indeed appointed the same solicitors firms as the borrowers, but those lenders would not provide details on how much the solicitors were paid. The reason given was that this was commercially sensitive information. This use of confidentiality as a defense to disclosure parallels the invocation of national security as a reason for silence on certain issues in the senate hearings examined by Lynch and Bogen (1996). In both instances, there is a protective duty mobilised, ostensibly to maintain the integrity of the organisation they represent and to prevent undefined harm by unspecified persons. In both domains it can also be suspected that there was at least some strategic benefit in doing so.

4.8.1 Solicitors neglecting to get borrowers to sign documents

The solicitor also has a role in ensuring that a mortgage deed is signed by the customer, and that this deed is registered at the Land Registry, which records a charge against the property in favour of the lender identified on the mortgage deed. When completed correctly, this is known as a 'charge by way of legal mortgage', although there are other ways in which a person can have an interest in land; for more on this see Chapter 6. What is notable about these roles is that in one capacity, they act to ensure that the borrower receives legal title (becoming the 'proprietor') to a property that they are purchasing, while in the other they act to ensure that the lender receives legal title to a charge on that property. In this sense, they act as the attorney for both borrower and lender.

In a striking case reported by an interviewee (and discussed also in Chapter 6), a conveyancing solicitor did not ensure that the customer completed a mortgage deed; neither had the customer signed a loan agreement. Consequently, there was no formal legal obligation of the borrower to the lender, but despite this, the lender transferred funds to their account, and these were used to finance the purchase of a house. Without a mortgage deed, there was no charge on the property in favour of the financial institution, and without a loan agreement there were no specific terms under which the customer was obliged to pay back the funds, as was recognised by a court.

It was suggested to me by an individual in an extended network of litigants, that conveyancing solicitors make such mistakes often enough in the course of their work that banks routinely have cause to sue their firms as a result, and that in at least one court, such hearings are usually scheduled on days when mortgage possession hearings do not take place. While this cannot be confirmed by the current research, some findings do support the suggestion. In collecting data which informed the analysis in Chapter 8, I noted that a number of days showed court listings where the only cases being heard in a particular court were between banks as plaintiffs and solicitors' firms as defendants. Consistent with the view suggested, mortgage repossession hearings did not take place on those days.

4.9 Conclusion

The endowment mortgage mis-selling scandal illustrated how complex and temporally extended a campaign of compensation for mis-selling of mortgage loan products can be. What can be learned from that experience, as well as the PPI scandal, and applied to the current findings is that the full extent of such compensation claims tends to be underestimated in the initial stages, and that it is only later in the process; perhaps years after the first such claims are made, that the full scope of the scandal is likely to become evident.

The current findings, based on a limited number of interviews, indicate that sales practices prior to 2008, particularly by brokers, were often dishonest, with incentive structures that rewarded reckless lending practices. At least some brokers failed to inform clients of the range of options available to them and affordability checks were seen more as obstacles to be circumvented than part of a dialogue over product suitability. Participants who checked the financial details the brokers provided to the lender in the loan application sent on their behalf universally found that the brokers had inflated their income. Some found that their job had been misstated, and in one case the borrower had been identified as working for a specific named company that they had never heard of. The result was that many mortgagors found themselves with unsuitable and unserviceable loans.

Vargha (2011, pp.228-229) found that Hungarian household budgets did not pre-exist the mortgage application process, but rather emerged out of discussions with loan advisers, as prospective borrowers did not come prepared with well-formatted financial plans. Meanwhile, she found that the budgets which are drawn up in these interactions are not stress-tested, so that the household's financial resilience in the face of adversity was not adequately considered. Similarly, in the current research none of the interviewees reported having anticipated the difficulties that could arise in the case of a financial crisis like that of 2008-2009, and the budgets that emerged from their discussions with mortgage brokers were frequently unrealistic even under stable financial conditions. More worryingly, several interviewees reported that brokers had grossly overstated their income and failed to perform basic due diligence. These observations appear to be consistent with the loan-level data, showing considerable oversight by lenders and sales staff. However, when interpreted in light of the qualitative findings, it seems likely that the loan-level data does not fully reflect the abusive lending practices that occurred during the period and that the financial position of many borrowers may be more tenuous than the figures indicate.

Together with factors in the wider context, these practices have contributed to creating the potential for a future financial scandal, with the steps taken by regulators in relation to interest-only mortgages echoing the early stages of the endowment mortgage mis-selling scandal (FCA, 2013; 2018b). The chances of there being a similar outcome will depend on whether the liabilities of interest-only mortgagors come due before provision can be made to meet them.

This chapter has shown that there is considerable potential for mis-selling claims by mortgagors based on the dishonest sales practices of mortgage brokers as well as other sales agents prior to 2008. Such claims could be disruptive to possession actions and though unlikely to stop cases entirely, may result in financial remediation by lenders that would likely vary from case to case. Chapter 8 considers a parallel with this; where lenders' mistreatment of arrears on loans resulted in the mass suspension of possession actions as well as financial mitigation.

The next chapter, however, continues on the theme of malpractice by brokers, and how their non-adherence to a regulation has created the potential for some mortgagors to retroactively cancel their loans.

Chapter 5 - Loan Agreement

5.1.1 Introduction

This chapter examines the acceptance of the loan agreement by the borrower and a lender's obligation to inform a borrower of their right to cancel the agreement within a specified period of time. Public records of court cases are relied upon, as well as observations in court and reports from interviewees.

Following on from Chapter 4, this chapter begins by also looking at the role of mortgage brokers, who often conduct sales away from business premises in an unsolicited manner. Under such circumstances, it was held by the European Court of Justice that a right of cancellation extended to a secured credit agreement based on Council Directive 85/577/EEC. It was held that the 7-day cancellation period did not begin counting down if the borrower was not informed of it, and so extended indefinitely. I explore case law and related UK legislation, identifying three regulatory eras; in the first, only the unsolicited sale of loans are cancellable; in the second, both solicited and unsolicited loans are cancellable and in the third, again both solicited and unsolicited loans are cancellable, but only for up to one year. I argue that with the cancellation of a loan, the mortgage and charge would become void retroactively.

However, when this argument was presented to both a lower and higher UK court, on each occasion it was ruled against. Similarly, issues related to the fairness of contractual terms were largely dismissed by judges without much consideration. I explore the reasons given for these, as well as the potential for further challenges to be brought on a similar basis in UK courts. I suggest that UK courts are misapplying the directive and in light of the UK's apparently imminent departure from the EU, the implications for the enforceability of this right are considered. I present conclusions as to relevance of the right for borrowers individually and for the courts and financial system in general.

5.1.2 The 1985 Distance Selling Directive

In 1985, the European Union passed legislation aimed at providing protection to consumers in certain situations where they might otherwise be disadvantaged. Titled the Council Directive 85/577/EEC "to protect the consumer in respect of contracts negotiated away from business premises", it mandated that for the sale of goods and services, other than a few exempt categories including hospitality services, where an unsolicited sale was conducted away from the business premises of the seller of those goods or services, the customer had a seven-day period within which they could cancel the contract. The rationale for this was, in part, that when sales are conducted away from the seller's business premises, a customer is disadvantaged by being deprived of certain aspects of a normal sales process. The directive's preamble identified a general intention that for contracts agreed in this manner, a seven-day cancellation period should be allowed for consumers to assess the obligations arising under that contract, and that notice of their right to do so should be provided to them in writing. The terms used in the directive to refer to the two parties to a contract are 'consumer' and 'trader'. A 'consumer', for the purposes of the directive, is an individual acting outside of their trade or profession, while the term 'trader' refers to an individual or company who "acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.". In this sense, the term would therefore include brokers acting on behalf of lenders (which has been confirmed by case law discussed later in this chapter). Article 1 of the directive states:

> "*1. This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:*
>
> *— during an excursion organized by the trader away from his business premises, or*
>
> *— during a visit by a trader*
>
> *(i) to the consumer's home or to that of another consumer;*
>
> *(ii) to the consumer's place of work;*
>
> *where the visit does not take place at the express request of the consumer.*"

These provisions do not obviously seem to describe the manner in which a mortgage loan is concluded. Unambiguously, where a customer agreed a loan at the premises of a lender, the directive would simply not apply. However, this research has found that this is frequently not how loans are arranged.

5.1.3 Location of sale

Mortgage brokers have become the primary channel by which customers arrange home loans, and have accounted for a growing portion of this market since the early 1990s, accounting for 70% of the market by 2008, with a temporary decline in the figure in subsequent years (Lea, 2011 p.8; IMLA, 2015 p.5). As discussed in Chapter 4, brokers' methods of sale vary, with some consultations being conducted at their own place of business, and others at a variety of sites including cafes and customers' homes. While comprehensive data on these practices are not available, interviewees in the current study reported primarily meeting brokers away from business premises. Even where the available mortgage loans were discussed at a broker's place of business, there may be some ambiguity in the wording of the directive as to whether this constituted the *trader's* place of business, given that the counterparty to such agreements is not the broker who facilitates it, but rather the lender who provides the credit, and whose place of business would be elsewhere. More importantly, such discussions are merely a preliminary stage of arrangements, during which a broker completes a 'fact-find', eliciting financial and other relevant data from the customer and discusses (or advises on) the available loan packages. Should a customer desire one of the loan packages, they will complete an application form, either themselves or with the assistance of a broker. Frequently, this is in the form of a digital rather than physical document, with the broker entering the data on the customer's behalf, as well as on behalf of the lender. Such an application does not, in itself, constitute a credit agreement. Rather, the FCA's Mortgage Conduct of Business Sourcebook, under sections 5, 6, 7 and 9, requires that a lender must provide a prospective borrower with an illustration of the costs and features of a mortgage loan contract, particularly at the offer stage (see MCOB 6.2.1), in the form of an offer document. An example template for this document, taken from the same source, can be found at Appendix 1 (titled 'MCOB 5 Annex 1R'). So, if a lender decides that the customer is eligible for the financial product, they will provide them with a Letter of Offer. It is the customer's acceptance of the terms and conditions referred to in this letter of offer which constitutes the agreement (a point considered further in Chapter 6). Therefore, there is ambiguity over where the contract is 'concluded', as described in article 1 of the directive. This could arguably be where the agreement was accepted by the customer, or where the application was submitted. As will be discussed later in this chapter, if either or both of these took place during a consultation with a broker away from the bank's offices, it would seem that this could be seen as the conclusion of the sale. However, there is a more general caveat to this view; whether the customer requested the visit.

5.1.4 Impetus for a broker's visit

The last line of the directive's article quoted above applies a general condition required for the preceding clauses to be of effect, so that the terms of the directive only apply: "where the visit does not take place at the express request of the consumer.". Restated, this would mean that if a consumer requested the visit of a broker, then any protections afforded by the directive would be void. Based on this alone, it would seem that there would be few instances in which the directive would be of relevance; confined to occasions where a broker or mortgage advisor showed up without prior arrangement and concluded the sale of a loan on the spot. This point is returned to later, but a counterpoint would only be that, if the letter of offer is deemed to be the point at which the agreement is concluded, the actual mechanism by which this letter is provided is relevant.

5.1.5 Letter of Offer

This current research has found that it has for many years been normal practice for lenders to send letters of offer to prospective borrowers by post, whether or not the loan is arranged via a broker. The prospective borrower is commonly asked to sign and return the letter, although as noted in Chapter 4, at least one lender explicitly instructed borrowers that neither the signing nor returning of the letter of offer were necessary. Given that the letter of offer is received at the customer's residence, this would seem to constitute the conclusion of a loan agreement away from the trader's (bank's) place of business, albeit not as a result of a 'visit' by the trader. There are, however, other elements to the process of a loan being issued, and a letter of offer will typically contain a clause specifying that a borrower is "not bound by the terms of this offer document until [they] have signed the legal charge and the funds are released.". Therefore, while the letter of offer is the closest in form to a loan agreement, and on this basis its acceptance could be described as the 'conclusion' of the agreement, it could also be argued that the mortgage deed itself is the point at which the loan agreement is 'concluded'. Alternatively, the conclusion of the agreement could be deemed to be the point at which the funds are released. These issues are considered further later in this chapter. However, there is another point which, more so than any raised so far, would seem to categorically exclude mortgage loans from the protection of the directive.

5.1.6 Immovable property exemption

Added to the above ambiguity, is what appears to be a clear statement of exemption within Article 3, section 2:

> "*2. This Directive shall not apply to:*
>
> *(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.*"

More so than any other points raised so far, this section of the directive would seem to categorically exclude agreements relating to real estate, and so exempt mortgage loans from the scope of the directive entirely, as arguably a loan secured against real estate would qualify as including 'rights relating to immovable property'.

5.1.7 Summary prior to 2001

Therefore, there are overall several points of ambiguity in the wording of the directive which suggest that it may only apply in instances of unsolicited sales, only for a period of 7 days after the sale, and might not apply at all to mortgage loans, while if it did, it would not be evident from its wording by which documents, and by extension therefore *where*, the agreement was 'concluded'.

In the time since the directive became law, its applicability to mortgage loans has been considered by courts, with judgments that present more widely-applicable interpretations that address the ambiguities outlined above.

5.2 Heininger case extends application to secured loans

The 2001 case of Heininger v Bayerische Hypo and Vereinsbank, heard by the European Court of Justice, concerned a borrower's claim to protection under the directive in respect to a residential mortgage loan. The case reconciled some of the points of ambiguity identified above, with the judges noting the following at paragraphs 32, 39 and 40, concerning the applicability of rights arising from the directive to mortgage loan agreements:

> "*32 Second, whilst a secured-credit agreement of the type in question in the main proceedings is linked to a right relating to immovable property, in that the loan must*

be secured by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the doorstep-selling directive.

...

39 Neither the preamble to nor the provisions of the consumer credit directive contain anything to show that the Community legislature intended, in adopting it, to limit the scope of the doorstep-selling directive in order to exclude secured-credit agreements from the specific protection provided by that directive.

40 The answer to the first question must therefore be that the doorstep-selling directive must be interpreted as applying to a secured-credit agreement such as that in point in the main proceedings, with the result that the right of cancellation provided for in Article 5 of that directive is available to a consumer who has entered into a contract of that type in one of the cases specified in Article 1."

This resolves the more general point of whether mortgage loans come within the scope of the directive, so that despite the ambiguity noted in respect to Article 3 of the directive, mortgage loans are subject to it. As has been noted by Twigg-Flesner (2010, p.322), this gives a mortgagor who has entered into a loan agreement away from business premises the right to cancel that loan agreement. However, it was implied by Twigg-Flesner (whether intended or not) that this right was contingent upon the lender notifying the borrower of this fact. As will be seen below, this is not so, and the implications of the directive are more extensive than that earlier author suggested. Part of the rationale given by the court for the directive applying to mortgage loans was that the fact of the loan being secured by a charge on real estate does not reduce the necessity for consumer protection.

In considering the implications of a consumer being unaware of their right of cancellation, the court noted:

"*45 It should next be pointed out that the doorstep-selling directive thus expressly provides that the minimum period of seven days prescribed for cancellation must be calculated from receipt by the consumer of the notice concerning his right of cancellation, and that it is on the trader that the obligation falls to provide that information. Those provisions are explained by the fact that if the consumer is not aware of the existence of the right of cancellation, he will not be able to exercise that right.*"

Therefore, the court did not agree with a suggestion that national governments could pass legislation to limit the period of time during which a consumer could exercise the right of cancellation to one year (a stipulation that, incidentally, was adopted in a subsequent EU directive discussed later in this chapter; 2011/83/EU, which repealed the 1985 85/577/EEC directive). Meanwhile, the court also rejected arguments put forward by the bank as to the legal uncertainty that could arise by the right of cancellation enduring for an indefinite period of time:

> "*47 Finally, as regards the argument that it is essential, for reasons of legal certainty, to restrict the period within which the right of cancellation may be exercised, such reasons cannot prevail since they imply a limitation of the rights expressly conferred on consumers by the doorstep-selling directive in order to protect them against the risks arising from the fact that the credit institutions have chosen to enter into agreements away from their business premises. If those institutions choose such methods in order to market their services, they can easily safeguard both the interests of consumers and their own requirements as to legal certainty by complying with their duty to supply consumers with information.*"

5.2.1 Summary of Heininger case

With the above reasoning, the court held that the burden of complying with the legislation fell upon the trader (in this case the lender), and that in the absence of such compliance a mortgagor had a right to cancel which endured indefinitely (or at least did not begin to expire until they were notified of its existence). The court rejected arguments as to the financial risk this created for financial institutions, ruling that the bank had provided no evidence to support its assertions. Therefore, with borrowers' right of cancellation being established, the question of which party should bear this financial risk was considered by another case, in 2005.

5.2.2 Schulte and Conrads cases on who bears the risk from cancellation

The case of Schulte and Schulte v Deutsche Bauparkasse Badenia AG (2005) concerned a couple who had purchased an apartment as an investment, with funds provided via a broker who discussed the proposed loan agreement with them at their home on three occasions prior to them concluding the agreement. After defaulting on the loan agreement (due to reduced rental income from the property), the couple purported to exercise their right of cancellation over the loan agreement. The bank challenged several aspects of their claim: both that the agreement constituted a distance selling agreement as described by the directive and that the bank was responsible for the failure of the broker to inform the couple of their right to cancel the agreement within 7 days. The bank contended that even if the couple were able to exercise their right of cancellation, they would still have to repay the funds at the agreed contractual rate, and that alternatively, if this was not so, a statutory interest rate should apply. The bank also asserted that it had the right to demand immediate repayment of the funds upon the cancellation of the contract. The German district court before which the case was being heard referred it to the European Court of Justice, as there appeared to be inconsistency between national legislation and the intent of the EU directive, with the former enabling a lender to require the immediate repayment of a cancelled loan, which might result in the borrower being made bankrupt. Consequently, this immediate repayment obligation could dissuade consumers from exercising their right of cancellation under the directive, as doing so would place them in a worse position.

The manner in which conflicts between EU directives and national laws are resolved is addressed in more detail later in this chapter, but while there are aspects of the directive's enforcement that are a matter for individual states to legislate, in applying such legislation the intent of the directive must be followed. Therefore, although the court ruled that national legislation could require the immediate repayment of sums loaned, and the payment of a market rate of interest, that was only so where the trader (bank) had informed the customer of their right of cancellation. Where a bank had not so informed the customer, the bank, and not the customer, should bear the financial consequences of the risks associated with the agreement. This was also the outcome of the case of Crailsheimer Volksbank eG v Klaus Conrads and Others (2005), where similar facts were at issue. This was to ensure that adequate and effective protection was provided to the consumer and so as to maintain consistency with article 4 of the directive (Council Directive 85 /577/EEC) which states that:

> "*...traders shall be required to give consumers written notice of their right of cancellation...*
>
> *Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied.*"

5.2.3 Summary of Schulte and Conrads cases

Therefore, where a bank had failed to inform the customer of their right of cancellation, and the customer then cancelled that loan agreement, in the court's view it would not be consistent with the directive for a bank to demand immediate repayment of the funds or to insist upon a market rate of interest. The manner in which courts would deal with the outstanding funds received by the customer would depend on national legislation, provided that it was consistent with the consumer protection objective of the directive. However, the court did suggest that the risks which should be borne by the financial institution, rather than the customer, include a shortfall in anticipated rental income from a property and the over-valuation of a property at the time of purchase. Meanwhile, the outcome of the Schulte case shows that the involvement of an intermediary or broker in the arrangement of a loan agreement with a lender does not absolve the lender of its obligations arising from the directive, should the intermediary fail to uphold them. This was also the finding in the case of Crailsheimer Volksbank eG v Klaus Conrads and Others (2005). At paragraph 45 in that case, the CJEU (European Court of Justice) held that where an unsolicited sale of a loan agreement is conducted by an intermediary (a broker) away from business premises, the right of the borrower to cancel the resulting agreement does not depend upon the lender being aware that the broker had arranged it via an unsolicited sale. Therefore, a borrower has the right to cancel regardless of whether the lender is aware of how the sale was concluded. This right, as shown in the following section, can even extend beyond the repayment of a loan.

5.2.4 Hamilton case on cancellation of a repaid loan

Given the potential effects on interest (as well as total principal) payable, another consideration would be whether the right of cancellation extends to loans which have already been paid in full. This was the subject of the case of Hamilton v Volksbank Filder EG (2008), where a borrower who had not been correctly informed of their right of cancellation sought to be refunded the interest paid on a loan which they had repaid in full. The court did not rule specifically on the refunding of interest payments, but did uphold the German national law's limitation on the right of cancellation after the performance of a contract in full, so that after the expiry of one month from the final payment of the loan, the contract could not be cancelled. It is not clear, however, that UK courts would follow this rule as this researcher is not aware of UK legislation governing such matters.

5.2.5 Robertson case - on the right to cancel unsolicited agreements in the UK

There is a final question to consider, in relation to the applicability of the directive to mortgage loans; the general clause of article 1 of the directive that it applies only "where the visit does not take place at the express request of the consumer.". For this, the UK Supreme Court case of Robertson v Swift (2014) is instructive. This concerned an agreement whereby a Dr Robertson agreed to pay a sum to Mr Swift for the moving of some furniture and other items. The agreement was made orally, with the document expressing this being sent by email, and including a penalty clause in case of cancellation. Dr Robertson later contacted Mr Swift by phone to cancel this agreement, and Mr Swift reminded him of the cancellation charges, which Dr Robertson agreed to pay. Robertson then confirmed the cancellation in a letter he posted which apparently Mr Swift did not receive. Dr Robertson later determined that he was not in fact liable for the cancellation charges and refused to pay them, so that Mr Swift began litigation. Dr. Robertson counterclaimed, demanding the return of his deposit, as he asserted that he had a right to cancel the agreement under The Cancellation of Contracts made in a Consumer's Home, or Place of Work etc Regulations (2008), which were a later expression of The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations (1987), by which the directive had originally been enacted into UK law. The 2008 regulations stated that:

> "*7.—(1) A consumer has the right to cancel a contract to which these Regulations apply within the cancellation period.*
>
> *(2) The trader must give the consumer a written notice of his right to cancel the contract and such notice must be given at the time the contract is made except in the case of a contract to which regulation 5(c) applies in which case the notice must be given at the time the offer is made by the consumer.*
>
> ...
>
> *(6) A contract to which these Regulations apply shall not be enforceable against the consumer unless the trader has given the consumer a notice of the right to cancel and the information required in accordance with this regulation.*"

Both before the small claims court where it was initially heard and a higher tier of the county court, it was held that because the contract had not been concluded during a single visit to the residence of Dr Robertson, the regulations did not apply. The Court of Appeal overturned this view, and held that the regulations applied if the contract was concluded at the consumer's home regardless of whether there had been previous negotiations, due to regulation 7(6), above. However, it also ruled that as the trader (Mr Swift) had not provided the customer with a notice of that right of cancellation, as required by regulation 7(2), above, that the customer therefore did not have the right of cancellation identified by regulation 7(1). The Supreme Court did not uphold this latter view, stating that:

> "*25. To hold that the consumer did not have the right to cancel because the trader had not served written notice of the right to cancel would run directly counter to the overall purpose of the Directive in ensuring that a consumer has the opportunity to withdraw from a contract without suffering significant adverse consequences.*"

Rather, the Supreme Court took the view that the right being negated where the trader failed to notify the borrower was not consistent with the directive, and so was not an interpretation which should be reached as it violated the intent of providing adequate consumer protection. As to the non-receipt of the notice by Mr Swift, the court accepted that it had been sent, and that under regulation 8(1) and 8(5) of the 2008 regulations, this was sufficient for it to take effect, as actual receipt by the trader is not required:

> "*8.—(1) If the consumer serves a cancellation notice within the cancellation period then the contract is cancelled.*
>
> *...*
>
> *(5) A cancellation notice sent by post is taken to have been served at the time of posting, whether or not it is actually received.*"

The court cited the Heininger, Schulte and Martín cases discussed elsewhere in this chapter, which guided the reasoning by which they reached their conclusion: that Dr Robertson was entitled to cancel the contract, and that the financial risk of his doing so should be borne by the trader, Mr Swift, so that the former could recover his deposit.

5.2.6 Conclusion on the Robertson case

So, the court concluded that a consumer could cancel a contract made in an unsolicited visit away from business premises where they had not been informed of the right to cancel by the trader, and that the risk (or cost) should be borne by the trader. The court identified that even though The Cancellation of Contracts made in a Consumer's Home, or Place of Work etc Regulations (2008) specify that cancellation must be effected within a seven-day cancellation period, this must be broadly interpreted. That is, the court was obliged to interpret the regulations in a manner consistent with the wording as well as the purpose of the directive; that such interpretation of domestic law could depart from a literal understanding of the wording, and did not require that the domestic law contain ambiguity. Therefore, the court interpreted the word 'within' to mean "at any time prior to the expiration of", so that:

> "*...a consumer would have the right to cancel at any time before the end of the cancellation period which would either expire 7 days after the consumer received notice of the right to cancel or, in the event that no such notice was served, would not expire at all so that the consumer could cancel at any time.*"
>
> *– (Robertson v Swift, 2014 at paragraph 31).*

It was also noted that while the directive specified that it applied only to agreements arising out of unsolicited visits by a trader, it also permitted national laws to introduce measures which provided stronger protections to consumers. This is just what the UK did.

5.3 2008 UK regulations broaden the right of cancellation

Via the Consumer's Home, or Place of Work etc Regulations 2008, the UK introduced stronger, more broadly applicable protections for consumers. The preceding (1987) UK regulations were more restrictive in this respect, and largely mirrored the wording of the directive in respect to their scope, stating that they applied to contracts made:

> "*(a) during an unsolicited visit by a trader–*
>
> *(i) to the consumer's home or to the home of another person; or*
>
> *(ii) to the consumer's place of work;*
>
> *...*
>
> *(d) during an excursion organised by the trader away from premises on which he is carrying on any business (whether on a permanent or temporary basis).*

...

(3) In this regulation "unsolicited visit" means a visit by a trader, whether or not he is the trader who supplies the goods or services, which does not take place at the express request of the consumer and includes a visit which takes place after a trader telephones the consumer (otherwise than at his express request) indicating expressly or by implication that he is willing to visit the consumer."

– The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations (1987)

Whereas the requirement that the visit be unsolicited is absent from 2008 regulations, which apply more broadly to contracts made:

"*(a) during a visit by the trader to the consumer's home or place of work, or to the home of another individual;*

(b) during an excursion organised by the trader away from his business premises;"

– The Cancellation of Contracts made in a Consumer's Home, or Place of Work etc Regulations (2008)

Consequently, even though Dr Robertson had requested the visit by Mr Swift, he was still able to avail of protection under the more broadly-applicable 2008 regulations, which were in force at the time the agreement was made. Significantly, there are parallels between the manner in which this contract was agreed and that in which the current research has found that mortgage brokers and lenders jointly engaged in sales of secured loans. As a result, it would appear that from the 1st of October 2008, when these regulations came into force, the same rights and obligations attendant on mortgage loans agreed during unsolicited visits by mortgage brokers also applied to solicited visits. That is, it would seem that a considerable proportion of the 70% of mortgage loans arranged via brokers as of that year would be subject to the regulations (Lea, 2011 p.8). Although the proportion of loans arranged via this channel declined by approximately 20% over subsequent years, alongside absolute declines in the number of mortgage loans issued, this still related to approximately 400,000 loans a year between 2009 and 2012, and considerably more in 2013 and 2014 (IMLA, 2015, pp.5-6), while potentially reaching an 80% market share in 2017 (Thomas, 2017).

5.3.1 UK regulations on repayment of cancelled loans

The effect of a borrower cancelling such an agreement is mandated by the 1985 directive, article 7, to be governed by national law. For UK agreements entered into before the 1st of October 2008, this would be The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations (1987), while those entered into after the 1st of October 2008 are governed by the 2008 regulations.[21] In each instance, the regulations must be interpreted with reference to the 1985 EU directive and existing case law. Regulation 6 of the 1987 regulations and 12 of the 2008 regulations identify that if the outstanding balance of the loan is repaid within a month of the notice of cancellation being served, no interest is due. If it is not repaid within this period, the regulations mandate that the agreement shall continue in force in respect to the repayment of credit and payment of interest. This would mean that, at a literal reading of the regulations, a consumer who cancelled a secured loan agreement would be obliged to continue making the same monthly payments as if the agreement were still in place. However, this requirement would be inconsistent with article 5(2) of the 1985 directive that the effect of cancellation is to release a consumer from any obligations arising from the contract. Similar inconsistency between the directive and national (German) law was considered in the Schulte case,[22] and it was held that in normal instances, such a requirement for repayment must be adhered to provided that a consumer was given notice of the right of cancellation. Conversely, where this notice was not provided to the customer the financial risks they were exposed to as a result of entering into the agreement should be borne by the lender. Therefore, should a consumer find themselves servicing a loan which exceeded the value of their property, it would be inconsistent with the directive as well as existing case law for them to be required to maintain the same payment arrangements as specified by the loan agreement after they had cancelled it. One could speculate that for borrowers whose total loan value does not exceed the value of their property other mitigation might be warranted, such as in instances where it would have been possible for them to make other arrangements if they had been notified of their right to cancel the agreement. One could speculate that these arrangements might have included purchasing the property at a later point in time, when comparable properties were sold for lower values. The exact outcomes in this respect would likely vary from case to case, and it's not certain what view UK courts would take. However, there is another limitation to this within the regulations. Regulation 6(5) of the 1987 regulations and 12(5) of the 2008 regulations stipulate that any repayment obligation upon the borrower would not be enforceable until the lender

[21] The Cancellation of Contracts made in a Consumer's Home, or Place of Work etc Regulations (2008)
[22] Schulte and Schulte v Deutsche Bauparkasse Badenia AG (2005)

had discharged their duty to return the security they held for that purpose. Under the 1987 regulations, this obligation is expressed at paragraph 5(3):

> *"Where any security has been provided in relation to the cancelled contract, the security, so far as it is so provided, shall be treated as never having had effect and any property lodged with the trader solely for the purposes of the security as so provided shall be returned by him forthwith.*"

and under the 2008 regulations at paragraph 10(3):

> "*Where any security has been provided in relation to the cancelled contract, the security shall be treated as never having had effect for that purpose and the trader must immediately return any property lodged with him solely as security for the purposes of the cancelled contract.*"

or 11(2)(d):

> "*any security provided under the related credit agreement shall be treated as never having had effect for that purpose and the creditor must immediately return any property lodged with him solely as security for the purposes of the related credit agreement.*"

As the mortgage itself and the resulting charge, are security for the debt, the lender would be obliged to discharge any related charge at land registry and to return the deed of charge which had given rise to it. The mortgage would be treated as never having had effect; it would be voided retroactively. Until the lender takes the necessary action to effect this, the borrower's obligation to repay the loan would not be actionable by the lender. Should the lender discharge the mortgage as required, they would at best be left with an equitable mortgage, or even less; rights over an unsecured debt, subject to the limitations mentioned above, which might reduce the proportion of the sum that is collectable. Given the retroactive voiding of the mortgage, and that the regulations call for the return of property held as security, it is possible that even repossessed properties could be restored to mortgagors.

Despite the similarities between the two sets of regulations in these respects, there are differing implications for borrowers, as well as lenders, depending which regulations were in force at the time that the loans were issued.

5.3.2 Three eras of UK regulation on cancellation

The 1985 directive on which the regulations were based (85/577/EEC) entered into force on the 20th of January 1986, with a final date for implementation by member states of the 23rd of December 1987. It was repealed by a subsequent directive, 2011/83/EU, as of the 13th of June 2014. The 1985 directive was implemented into UK law by The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations (1987), which came into force on the 1st of July 1988 and which were superseded by The Cancellation of Contracts made in a Consumer's Home, or Place of Work etc Regulations (2008), which came into force on the 1st of October 2008, and which were in turn superseded by The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (2013), which came into force on the 13th of June 2014 (the same date as the 2011 directive). The 2013 regulations abolished the temporally indefinite right of cancellation, replacing it with a maximum period of one year from the conclusion of the agreement. Therefore, in respect to UK consumers' right of cancellation of contracts, three eras can be identified:

From 1st July 1988 - 1st October 2008.

From 1st of October 2008 - 13th June 2014.

From 13th June 2014 onwards.

5.3.3 First Era: 01/07/1988 - 01/10/2008

UK mortgagors who entered into loan agreements during the first era via an unsolicited visit by a broker or mortgage advisor to their home or place of work, and who were not advised of their seven-day right of cancellation, had, and continue to have, the right to cancel it. The starting point of this right is temporally unlimited, up to the theoretical point at which the lender advises them of it, at which point the seven-day period of limitation begins. To exercise this right the borrower should do so in writing, but this does not need to be in a particular form as long as their intent to cancel is clear. As long as such a letter is sent, there is no requirement that it actually be received by the lender. The effect of this cancellation would be to render the security for the debt void, and to oblige the lender to cancel the charge at land registry and return the deed of charge to the borrower. If the borrower were to repay the debt within a month of the contract's cancellation, no interest would be due, although the case law and legislation are silent on whether interest already paid could be refunded. If the borrower were not to repay the sum within one month, a court would be obliged to consider a compromise solution between requiring a borrower to maintain the contractually-stipulated payment schedule (including interest payments) and mitigating the extent to which the borrower thereby bore the materialisation of financial risks. Such a mortgage loan which had already been paid off may be cancellable for up to one month after the final payment, though this is uncertain under UK law, as would be the effect of such cancellation.

Where a mortgage loan was agreed in a manner other than an unsolicited visit to a borrower's home or workplace during the first era, a literal reading would indicate that the directive (and regulations) would not apply, and that the right of cancellation would not be available (though ambiguity in this respect is considered further later in this chapter).

5.3.4 Second Era: 01/10/2008 - 13/06/2014

Borrowers who agreed a mortgage loan during this era away from the business premises of the lender would have the same rights and capacities as outlined for the first era, without the requirement that the sale be conducted as a result of an unsolicited visit. Whether the agreement resulted from a solicited or unsolicited visit, the right of cancellation is available.

5.3.5 Third Era: 13/06/2014 onwards

Borrowers who agreed a mortgage loan away from business premises after this point, whether solicited or unsolicited, could not avail of the right of cancellation indefinitely should the lender fail to inform them of this right. Rather, the right to cancel the agreement would extend to a maximum of one year after the conclusion of the agreement.

5.3.6 Offences by traders under the regulations

An additional difference between the eras is that the 2008 regulations specified a £5,000 fine for a trader failing to give a customer notice of their right of cancellation:

> "*17.—(1) A trader is guilty of an offence if he enters into a contract to which these Regulations apply but fails to give the consumer a notice of the right to cancel in accordance with regulation 7.*

(2) A person who is guilty of an offence under paragraph (1) shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale."

For companies which fail to provide such notice, under regulation 20 of the act, if such failure is due to neglect (or connivance) on the part of a director, manager, secretary or similar officer, then they are guilty of the offence and accordingly liable. This offence was reaffirmed in the 2013 regulations, under article 19, so that it is applicable for the second and third eras but not the first.

5.4 Observed and reported cases on the cancellation of the loan contract

This section describes empirical observations of a UK case where the right of cancellation discussed above was invoked, and details related by an interviewee about similar cases in Ireland.

5.4.1 Presumption of a solicited visit

In one UK case observed by this researcher, a mortgagor raised this same argument, stating that they had cancelled the loan agreement. The agreement had been made in the first era, prior to the effect of 2008 regulations, and so the question of whether the sale was solicited or unsolicited would be relevant to determining the applicability of the directive's protection.

Prior to the final hearing of the case, the mortgagor learned of their right to cancel the underlying loan, and wrote to the lender stating that they were invoking that right. The evidence of this was submitted into the court case, and the mortgagor sought to rely upon it as a defence against the application for possession of their property. A key point in those proceedings occurred early on, where the representative for the financial institution referred to the mortgage broker who had submitted the loan application, noting:

"*So that is the mortgage broker who* [defendant] *approached.*"

This statement, while subtle, is significant. Although there was no documentary evidence to support the view that the defendant had approached the mortgage broker, by asserting it unilaterally the legal professional's statement stood as the only comment on this point. While unfounded, this statement, if left unchallenged, would become a fact (Latour and Woolgar 1979, p.81) in the eyes of the court — that the defendant had initiated the negotiations with the mortgage broker. This was a key point in establishing whether or not the defendant could avail of protections under the regulations, as if the mortgagor had initiated contact with the broker, it would not be construed as an unsolicited sale. This was followed by the statement:

> "*They provided him with the mortgage advice*."

The legal professional then proceeded to read from a copy of the letter of offer, which had been submitted as evidence:

> "'*If you have any queries about this service you should contact* [broker]. [Lender] *is not responsible for the advice and information you have received*'."

This terminology is problematic, as in respect to the right of cancellation, the lender remains responsible if the broker fails to inform the customer of their right of cancellation, as noted in the cases of Crailsheimer Volksbank eG v Klaus Conrads and Others (2005) and Schulte and Schulte v Deutsche Bauparkasse Badenia AG (2005). More broadly, as noted in Chapter 4, a lender has a duty to know their customer, and under MCOBS 2.6.2 (FSA, 2007; FCA, 2019b), they must pay due regard to the interest of their customers, while:

> "*A firm must not, in any written or oral communication, seek to exclude or restrict, or to rely on any exclusion or restriction of, any duty or liability it may have to a customer under the regulatory system.*"

Therefore, for the purposes of the right of cancellation such an exclusion clause would be meaningless.

5.4.2 Cancellation of a loan agreement vs a mortgage

One interviewee from Ireland reported that several mortgagors in default had raised this defence (the cancellation of the loan contract) in court, and that judges broadly reacted in one of two ways. The first was to construe that the mortgagor was seeking to cancel the mortgage, rather than the underlying loan agreement, and the second was to adjourn the proceedings. Where judges construed that a mortgagor was seeking to cancel a mortgage; that is, the charge over the property, as distinct from the loan agreement, they ruled that this was not possible. Such a view would be entirely valid, as the only person who can discharge a mortgage is a mortgagee, and this customarily occurs after settlement of the outstanding balance (Joseph, 1976 p.204). However, the interviewee reported that the frequency with which this response was given by judges had been such that it appeared to be unlikely that this was, in every case, a genuine misunderstanding on the part of the judge. Where mortgagors had been acting on advice from others which they only partly understood, in an attempt to make this argument in court, the interviewee believed that judges found it an expedient tactic to pretend to misconstrue the mortgagor's argument so as to dispatch the case with greater alacrity, by making a judgment against the mortgagor and granting a possession order. Such a tactic has the benefit of maintaining plausible deniability on the part of the judge (Lynch and Bogen, 1996). That is, just as with the hearings examined by Bogen and Lynch (1989, p.200), there is a reflexive and iterative character to possession hearings that extends to judgments issued therein. A judgment given in one hearing might be the subject of re-examination at another, and by differing judicial officers. So, such a judgment, if appealed to a higher court, could potentially be reviewed and found to be erroneous. Therefore, anticipating the inherent possibility of being required to account for the inaccuracy of their ruling, a judge who misstates a defendant's claim and rules accordingly could later claim ignorance and maintain that they had mistaken the mortgagor's argument. This is a superficially credible position, especially where the defendant is a lay litigant, whom any other judicial officer (such as one hearing a subsequent appeal) would expect to express their arguments comparatively incoherently. Better still, if a judge can manage to induce a mortgagor to, themselves, misstate their argument and confirm that they sought to cancel the mortgage rather than the loan agreement, then a judicial officer would be justified in ruling against such an application and their plausible deniability would be quite firmly established.

Believing that a common response of judges was to conveniently misconstrue the argument in the above manner, as a claim to having cancelled the mortgage charge, the mortgagor in the observed UK case pre-empted this by stating explicitly in their written testimony that:

> "*The "secured credit agreement", the subject matter of these proceedings, has been cancelled by notice dated* [date]"

The mortgagor also provided a copy of the notice they had sent, and read from all of this documentation during the hearing:

"*I hereby give notice that I wish to cancel our agreement dated* [date] *which you have referred to using the following reference code account number* [account number]*, mortgage application number* [account number]."

To which the judge responded:

Judge: "*That is the bank account numbers and you are indicating to them that you are cancelling the agreement, yes.*"

Defendant: "*Yes*"

The defendant went on to read the remainder of their notice of cancellation:

Defendant: "*As I don't have the funds to hand to resolve the inequity immediately I shall in good faith pay the most that I can reasonable afford until it is resolved which based on my current income is* [sum] *per calendar month.*"

Judge: "*You are prepared to pay* [sum] *a month?*"

Defendant: "*Yes. And the exhibit is a certificate of service.*"

Judge: "*Of the notice?*"

Defendant: "*Of the notice on* [date]."

Judge: "*Very good, yes, I see that now. Yes, thank you.*"

After a considerable exchange which reviewed points from the case law detailed earlier in this chapter, the judge stated as follows, from the case of Heininger v Bayerische Hypo and Vereinsbank (2001):

Judge: "*I think I have got the point, the fact the credit agreement was secured by a charge on a movable property doesn't render any less necessary the protection which is accorded to the consumer who has entered into that agreement away from the trader's business premises. I think it is the relevant summary, yes.*"

Followed later by the following:

Judge: "*That is really your argument, that this is a doorstep selling and you have now exercised your right to cancel the agreement and you have* *given me a copy of your cancellation agreement or notice and proof that you served it on the bank.*"

5.4.3 Judgement in the observed UK case

Despite the above exchanges, the judge's ruling was the same as that of other judges in Ireland; ruling that it was not possible for a mortgagor to cancel their mortgage:

> "*...the deed of mortgage does not fall within the scope of the EU Directive, which applies to contracts entered into "away from the trader's premises". This deed was entered into at business premises and therefore* [defendant] *cannot avail of the provisions in the Directive.*"

Puzzlingly, they then added that:

> "*...it makes no sense in law or commerce that a person can take out a loan and then unilaterally cancel the agreement without repaying the loan. If such a right existed it would wreak havoc with the established patterns of commercial lending and would prevent creditors lending money with consequent disastrous effect on business and commerce.*"

This ruling was arguably incorrect on several counts, and did not appear to match the judge's own restatement of the defendant's position. The statements of the defendant made clear that it was not the mortgage deed which the defendant sought to cancel, and it was also clear that the defendant was already making attempts to pay down the outstanding balance. However, a counterpoint that could resolve this apparent misstatement is considered below; that in the absence of a written loan agreement, the deed may be arguably seen as the agreement itself. As to the judge's ruling that the deed had been entered into at business premises, there was no evidence submitted by either the defendant or the financial institution to support this view. The evidence was silent as to where the deed had been signed; the financial institution did not specifically make the above claim. These aspects of the judgment were appealed, and a higher court made a similar ruling, focusing on the location where the deed was signed as the relevant test as to whether the loan agreement came under the protection of the directive. This is problematic, as the intent of the directive itself identifies that among its purposes is to remedy the fact that in contracts negotiated away from business premises, "the consumer is often unable to compare the quality and price of the offer with other offers". If, as in this instance, it is ruled that the signing of the deed is when the contract is concluded, and that this occurred at the business premises of a solicitor, it is not clear how that in any way limits the disadvantage to the mortgagor since solicitors are not equipped to advise or educate on the range of loan offers available; that's what brokers do. Given the affirmation of the Supreme Court in Robertson v Swift (2014), that national legislation must be construed in line with the intent of the directive, and not as an exercise in semantics, the court seems to have done exactly the reverse. While the higher court agreed that there was not proof positive that the deed has been signed at business premises, they ruled that there was sufficient evidence for it to be inferred that the deed had not been signed at any of the so-called 'prohibited locations'. By comparison to the investigation reportedly carried out in the case of Crailsheimer Volksbank eG v Klaus Conrads and Others (2005), where judges actively inquired into the facts as to where the agreement was entered into, this suggests that the court did not have regard to its role as an administrator of EU law.

5.4.4 Choosing presumption over evidence

In contrast to the German court, the UK court chose to raise an argument that the financial institution had not actually made, and presume it to be true, despite a submission to the contrary by the defendant. The burden of proof for proving the location at which the agreement was entered into was placed upon the defendant, and even though they provided sworn testimony to the court on this point, the testimony was disallowed due to the court's procedural rules. Other evidence indicating the location at which the agreement was entered into included the copy of the Letter of Offer which had been submitted as an exhibit by the bank. The letter clearly showed that it was addressed to a private residence, and from its content it arguably was the expression of the agreement. This was only pointed out at the hearing itself, which proved a somewhat awkward moment for the bank's representative, as it cast their previous submissions as being poorly informed. Prior to this hearing, the defendant had provided written submissions stating that the agreement had been entered into at that residential address (being a different property to the one that was the subject of the court proceedings). Rather peculiarly, the bank's representative responded by stating that the address was a new one in respect to the proceedings, and that a Google search did not reveal what relevance it might have. The bank's representative therefore appeared somewhat embarrassed in court when it was pointed out that the address specified was the same one which appeared in the bank's own evidence. Nevertheless, the higher court upheld the view that even this document was insufficient evidence as to where the agreement had been entered into. Given that this method of distance selling (sending the letter of offer by post) was standard industry practice at the time (discussed later in this chapter), it should be neither surprising nor questionable to judicial officers familiar with such cases that this should occur. The fact that sworn testimony on that very point was disregarded for procedural reasons seems to indicate a degree of procedural formality that is incompatible with the principle of effectiveness, which requires that national procedural requirements must not have the effect of rendering "practically impossible or excessively difficult the exercise of rights conferred by [Union] law" (Arnuli, 2011 p.2).

5.4.5 Judgment contrary to ECHR ruling

However, a more problematic portion of the court's ruling was its stance on whether a borrower had the right to cancel their loan agreement at all. The judgment stated that as the mortgage deed was plainly a contract "relating to immovable property", as described by Article 2(a) of the 1985 Directive, and a "land mortgage" as described by Regulations 2 and 3 of the 1987 regulations, that the protections of the Directive did not apply. Clearly the first reference included a typographical error, as there is no 'Article 2(a)' of the directive (and Article 2 merely defines 'consumer' and 'trader'), but rather they intended to refer to Article 3(2)(a). As noted earlier in the chapter, this point had already been ruled upon by the European Court of Justice, in the case of Heininger v Bayerische Hypo and Vereinsbank (2001):

> "*32 Second, whilst a secured-credit agreement of the type in question in the main proceedings is linked to a right relating to immovable property, in that the loan must be secured by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the doorstep-selling directive.*"

One potential explanation for the court's ruling, other than it being an error in law, concerns the absence of a separate loan agreement and deed of charge. In the case in question, there was only a mortgage deed purporting to incorporate both the loan agreement and the legal mortgage (a point returned to in Chapter 6). It is possible that, without specifically stating it as such, the court took the view that there was a material difference between the manner in which the secured loan agreement was executed in the Heininger case and in the observed case. That is, the incorporation of all elements of the agreement into a mortgage may be viewed as a shield from the effects of the directive. As a mortgage deed cannot be cancelled under UK common law, this presents a conflict between national law and community law which may not be easily resolved, but general principles on this are considered later in this chapter.

5.5 Adjourning of cases

In the Irish cases reported by an interviewee, the second most common response to mortgagors invoking the right of cancellation was to adjourn proceedings. This was sometimes expressed as a suggestion to the parties that the matter would be best dealt with by them reaching a resolution between themselves. While such a statement might be expected in cases of personal disputes, it seems a peculiar outcome for a possession action where a claimant has a valid legal charge over the property in dispute. In all of the cases observed as part of this research, such behaviour by a judge has never been seen. The implication of such a ruling (or rather, suggestion, as no substantive ruling was given other than an adjournment) is that in such a case, the judge did not view the claimant's application for possession as likely to succeed; they did not feel that they had the power to grant a possession order. Or, it might be a judge’s way of safeguarding the perceived public interest by avoiding setting a precedent and ruling in the mortgagor’s favour on the record, as that could result in wider awareness amongst the public, which could be disruptive to other cases.

5.6 Ambiguity as to solicited vs unsolicited visits in the first era: 1987-2008

As noted above, there are apparent limitations on contracts agreed in the first era, so that the capacity to exercise the right of cancellation is contingent on whether a loan was agreed via an unsolicited visit to the home or workplace of a borrower, as well as applying (according to regulation 3(1)(b) of the 1987 regulations which were in force during this period) where a consumer invited a broker or employee of a lender to their home or place of work for a different purpose, without knowing that the sale of mortgage loans formed part of their business activities. However, there are two points of ambiguity which may widen the scope somewhat. The first is in respect to what is meant by 'unsolicited', while the second concerns the potential meaning of the additional clause referring to agreements concluded "during an excursion organized by the trader away from his business premises".

5.6.1 Definition of the word 'unsolicited'

On the first point, as to the definition of 'unsolicited', this is provided by the 1987 regulations:

> "*(3) In this regulation "unsolicited visit" means a visit by a trader, whether or not he is the trader who supplies the goods or services, which does not take place at the express request of the consumer and includes a visit which takes place after a trader telephones the consumer (otherwise than at his express request) indicating expressly or by implication that he is willing to visit the consumer.*[23]"

Neither the regulation itself nor the enabling legislation (the European Communities Act 1972) or the Interpretation Act (1978) provide a definition of the terms 'express' or 'express request', so that it is unclear whether the above definition excludes all instances in which a consumer initiates contact with a broker or other sales representative. For example, one interviewee reported that their contact with a broker began via a sporting event that they both attended. They then arranged a home visit to discuss potential loans. It is not entirely evident from those facts alone whether this was an 'unsolicited' visit, or whether, for example, a consumer's accession to a broker's request to discuss the matter further would qualify as an 'express request'. If a consumer were to make an inquiry about mortgage loans, but then the broker or sales representative pressed to arrange a home visit, it is not clear whether the 'request' would be deemed to have been made by the broker or consumer. Extending this to the latter portion of the definition, if a consumer reluctantly consented to receive a telephone call regarding mortgage loans which later resulted in a loan agreement being concluded, it would not be clear whether this reluctant consent would qualify as an 'express request'. Overall, if the impetus for further discussion at a place other than their place of business came from the broker, it's not clear that the words 'express request' would adequately describe that kind of consent by a consumer, to what arguably is just the kind of sales technique that the directive was intended to protect against.

[23] The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations (1987), regulation 3(3)

5.6.2 Definition of the word 'excursion'

The second point of ambiguity concerns the definition of the word 'excursion', from the clause contained both in the original directive and the 1987 regulations. While the wording is clear that for this clause to extend the directive's protection to an agreement, the trader (i.e. broker or lender's employee) must 'organize' the excursion, much of the ambiguity discussed in respect to the words 'express request' apply here also. As with the previous point, the terms 'excursion' and 'organized' are not defined in the relevant legislation. Were a consumer to initiate contact upon the expectation that any meeting would be at the offices of the broker or the bank, they may find themselves surprised by the proposal that they instead meet at another location. Consenting to such a meeting where the impetus for the choice of location came from a broker would seem to qualify as an excursion 'organized' by the broker. If the location of that excursion happened to be at the home or office of the consumer, there does not appear to be anything within the regulations or the directive which would exclude that scenario from the protection of the directive. In other words, provided that the home visit were 'organized' by the broker, it would not seem to matter whether the consumer initiated contact to begin with, or whether it would otherwise be considered 'unsolicited'.

5.6.3 Duty of courts to interpret legislation in line with the directive

Ordinarily the above ambiguities would be a matter for conventional jurisprudence, so that a technicality might easily exclude agreements formed in the scenarios described above from protections afforded by the 1987 regulation. However, this is not so in this matter. The UK Supreme Court outlined the reasons why in the case of Robertson v Swift (2014), quoting, and reaffirming, an earlier case of Vodafone 2 v Commissioners for Her Majesty's Revenue and Customs (2010) at paragraphs 21 and 22.

> *" In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the Pickstone case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the Pickstone case, at p 126B and per Lord Nicholls of Birkenhead in Ghaidan's case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in Ghaidan's case, at paras 31 and 35; per Lord Steyn, at paras 48—49; per Lord Rodger of Earlsferry, at paras 110—115); (d) it*

permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the Litster case, at p 577A; per Lord Nicholls in Ghaidan's case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the Pickstone case, at pp 120H—121A; per Lord Oliver in the Litster case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the Pickstone case, at p 112D; per Lord Rodger in Ghaidan's case, at para 122; per Arden LJ in the IDT Card Services case, at para 114)."

...

"The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: see per Lord Nicholls in Ghaidan v Godin-Mendoza [2004] 2 AC 557, para 33; Dyson LJ in Revenue and Customs Comrs v EB Central Services Ltd [2008] STC 2209, para 81 …"

1 "*In terms of policy, as there is domestic vires under section 59 of the 2007 Act in respect of such construction contracts made during solicited visits and since the consultation response has strongly urged the need for cancellation rights in respect of these kinds of construction contracts where vulnerable consumers at home are liable to be significantly disadvantaged, there would be a lacuna if a higher level of protection was afforded to such contracts made during solicited visits while there was none for those made during unsolicited visits. This would not be a consistent approach.*

...

The Government believes that these regulations will make the law simpler and clearer for consumers, businesses and enforcement agencies. Consumers will be less at risk from disreputable traders exploiting the different treatment of solicited and unsolicited visits; businesses will, in general, be able to work with one contract for both unsolicited and solicited visits, reducing ongoing costs in training sales staff; and enforcers will not have to use valuable resources determining whether a visit was solicited or not as the same rules will apply."

So while there is ambiguity, as outlined above, even in its absence there would still be arguable reasons for extending the protection of the directive, and consequently the protection provided under the 1987 UK regulations, to mortgage loan agreements entered into during the first era, to instances outside of a narrow definition of 'unsolicited' sales. I would contend that where borrowers initiated contact with lenders or brokers, but where the impetus for further discussion came from the latter rather than the consumer, and where that further discussion took place away from business premises, that there is very good reason for seeing such scenarios as compatible with the original directive and the consumers as meriting its protection. Similarly, there is a case to be made that even without the sale being unsolicited, the original directive's wording does not exclude solicited sales made during a home visit organised by the trader. If there were any doubt as to this, it should be dispelled by the fact that the legislature saw fit to do exactly this by its implementation of such a measure via the 2008 regulations. The reasons for doing so, as outlined in the explanatory memorandum, were consistent with the above view, noting the role of the Office for Fair Trading in establishing the need for such amendments, based on practices by traders which were disadvantaging consumers. This is certainly supported by the current research, with Chapter 4 detailing dishonest sales practices. While brokers were (and are) obliged to provide prospective borrowers with information on a comprehensive range of potential loan offers, where such a meeting took place at a consumer's home or another location away from a trader's offices, the ability to do this is hindered. In practice, these offers were found to frequently be presented to consumers on a laptop screen, which consumers did not have an opportunity to keep a record of or even fully view. The nature of interactions and limitations on time were not conducive towards consumers making an informed decision, and even if a broker returned for a subsequent visit, in the absence of meaningful records of what was discussed the consumer would be in a disadvantageous position in making their decision. The explanatory memorandum accompanying the 2008 regulations also argued that the amendments were consistent with public policy as revealed by the Consumers, Estate Agents and Redress Act (2007), as well as being pragmatic.

> "*In terms of policy, as there is domestic vires under section 59 of the 2007 Act in respect of such construction contracts made during solicited visits and since the consultation response has strongly urged the need for cancellation rights in respect of these kinds of construction contracts where vulnerable consumers at home are liable to be significantly disadvantaged, there would be a lacuna if a higher level of protection was afforded to such contracts made during solicited visits while there was none for those made during unsolicited visits. This would not be a consistent approach.*

> *...*
>
> *The Government believes that these regulations will make the law simpler and clearer for consumers, businesses and enforcement agencies. Consumers will be less at risk from disreputable traders exploiting the different treatment of solicited and unsolicited visits; businesses will, in general, be able to work with one contract for both unsolicited and solicited visits, reducing ongoing costs in training sales staff; and enforcers will not have to use valuable resources determining whether a visit was solicited or not as the same rules will apply.*"

On the latter point from the above quotation: that enforcers would not have to use valuable resources determining whether a visit was solicited or not, this comment likely concerned regulators such as Trading Standards offices, rather than considering courts. However, it is worth noting that courts in other European countries have deployed resources for exactly this purpose in cases concerning mortgage loans (a point returned to later in this chapter). In the case of Crailsheimer Volksbank eG v Klaus Conrads and Others (2005), the court investigated whether an agreement had been unsolicited, and concluded that it had:

> "*27 On appeal by that borrower against that judgment, the Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen ordered enquiries to establish whether the loan agreement was concluded in a doorstep-selling situation. It was established that the broker approached that borrower on his own initiative and reached agreement with him on his participation in the tax saving scheme of the property development company in a doorstep-selling situation. By judgment of 16 January 2003, the Hanseatisches Oberlandesgericht in Bremen set aside the judgment of the Landgericht Bremen and dismissed the original application.*
>
> *...*
>
> *29 On that point, the referring court declared that the circumstances were those of a doorstep-selling situation.*"[24]

[24] – Explanatory Memorandum to The Cancellation of Contracts Made in A Consumer's Home or Place of Work etc. Regulations (2008, pp.2-4)

5.6.4 Conclusion as to ambiguity of wording in the first era: 1987-2008

Therefore, given the absence of such investigatory functions by UK courts there is a further legal premise supporting the preceding arguments for extending the protections afforded to consumers by the 2008 regulations to those who entered agreements prior to their coming into force. This could be done via the same rationale as employed in the case of Robertson v Swift (2014); by reading the 1987 regulations in a manner consistent with their purpose. In so far as the above suggestions are consistent with the purpose of the directive, UK courts arguably have an obligation to construe the regulations in this or a similar manner. Even if this view were not accepted by courts, however, the right of cancellation extends to a considerable number of mortgage loans agreed between 1987 and 2014, and particularly between 2008 and 2014. The interaction of these rights with conventional common law rights of mortgagors is considered next.

5.7 Conflicts between common law and community law

With the above caveats as to the effect of regulations, case law and the responsibility of courts to interpret legislation to be consistent with EU directives, the ability of mortgagors to cancel the underlying loan agreement upon which the mortgages are based would eliminate all of the terms and conditions of those contracts, as of article 5(2) of the 1985 directive, and article 12 of the 2011 directive. It would also have the effect of voiding the mortgage charge and requiring lenders to return the deed of charge, as noted earlier. However, what follows is a consideration of the impact of cancellation if the clauses outlined above were not given full effect by UK courts. If it was successfully argued by lenders that the security for the loan should not be voided, so that the mortgage charge persisted, alongside an extant debt of the borrower to the lender, but without other terms and conditions associated with the loan, then this would impact on the rights of both parties.

Under the conventional common law view, this would actually leave the borrower with *less* protection than under an extant loan agreement, as noted in Chapter 2. The mortgagee's common law right to possession is such that they would be able to enter into possession immediately upon a mortgage deed being signed but for the limiting conditions of the loan agreement (Four-Maids Ltd v Dudley Marshall (Properties) Ltd 1957). Therefore, upon the cancellation of this agreement it would seem that the mortgagee would have an immediate right to possession. Indeed, a representative of a financial institution stated this much, in a case where the right to cancel was invoked by a defendant:

> Legal Representative: ...[Judge]*, I can tell you paradoxically it suits* [the defendant] *that there are mortgage terms and conditions because otherwise we would be entitled to enter into possession as soon as the ink was dry on the mortgage.*

However, here again EU law comes to the aid of the mortgagor, as the original 1985 directive was intended to provide protection to the consumer, and this was interpreted in the cases of Schulte and Schulte v Deutsche Bauparkasse Badenia AG (2005) and Crailsheimer Volksbank eG v Klaus Conrads and Others (2005) as meaning that a borrower should not be *worse off* after cancelling the agreement than if they had not entered into it, and particularly that the consumer should be able to avoid the materialisation of financial risk arising from such an agreement. Therefore, it would be inconsistent with the directive for the common law rights of a mortgagee to possession to crystallise at the point of the cancellation of the loan.

Were this or any other aspect of consumer rights arising from EU law found to give rise to a conflict between UK and EU law, it would be the latter that would prevail. This is because the supremacy of EU law has long been established, since prior to the UK's accession to the EU, as of the 1964 case of Costa v ENEL. This means that generally, EU legislation supersedes national law, as explained by Lord Denning in the case of Macarthys Ltd v. Smith (1979):

> *Community law is part of our law by our own statute, the European Communities Act 1972. Community law is now part of our law: and whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it.*

This was affirmed again by Lord Bridge in 1991, in the case of *R v. Secretary of State for Transport, ex p. Factortame:*

> *Under the terms of the Act of 1972 it has always been clear that it was the duty of the United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules*

of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

This principle can also be seen at work in the case of Robertson v Swift (2014). This means that arguably even if Regulation 6(5) of the 1987 regulations and 12(5) of the 2008 regulations (on the voiding of any security held against the loan agreement) were ruled by UK courts to not take effect in respect to mortgage charges, via the obligation of judges to interpret domestic law as compatible with EU law, a mortgaged property would still no longer serve as collateral for a loan, once that loan was cancelled.

5.7.1 Possible impact of cancellation upon a loan

In relation to the loan itself, upon cancellation this would become an unsecured debt to the lender, and the exact terms of repayment would be a matter for courts to consider. A borrower might be ordered to complete an income and expenditure form to ascertain their ability to repay the debt, and on the basis of this to negotiate a repayment plan with the lender. If such a repayment plan were agreed, a borrower would be obliged to maintain those payments but failure to do so would not in itself result in a possession action being taken, as the lender would lack the capacity to do so directly. Should a borrower make no attempt whatsoever to repay the funds, however, they would be in a similar position to the borrower considered in Chapter 6 who signed no loan agreement yet obtained a property. As equity would consider a debt to be owed, their persistent non-payment could result in a financial institution applying to a court to place a new, and entirely separate, charge over their property to secure that loan. This would be unrelated to the prior charge and subject to any other charges that might have been placed upon the property in the intervening time. Such a measure – where an unsecured debtor applies to a court to be allowed to place a charge on property to secure their debt – is a relatively standard practice, and can occur even with relatively small debts, as long as the debtor fails to take steps to address the debt.

As to the first mortgage charge placed on the borrower's property, this would, in the first instance, become void and the lender would be unable to act upon it. As noted earlier, the 2008 UK regulations require that security for an agreement be returned and would arguably have the effect of retroactively cancelling a mortgage charge. However, where courts failed to uphold that there was a duty on the lender to return the legal charge under the respective regulations, it would be up to a borrower to press this point. Given that the borrower would be disadvantaged by such a charge remaining on land registry's records, they conceivably could apply to a court for an order that the lender remove that charge from Land Registry's records, or they could apply to the Land Registry itself for rectification of the register. The appropriate venue for such an application would, in the view of this author, be the Land Tribunal of the Land Registry rather than the court system. A similar application by a borrower is described in Chapter 6.

As to the question of interest on the debt, it is conceivable that a financial institution could seek to reinstate interest on the debt via another means, just as they might seek to obtain a new charge over the property should a borrower not make repayments, as noted above. The means by which interest might be reinstated is via Her Majesty's Courts Service's standard rate of interest for judgment debts, of 8% per annum. However, a key requirement for such a rate of interest to be applied is a judgment, or at least a finding of fault by the person owing the debt. In such a case as described here, this condition would certainly not apply. While a court might very well find that the funds received by a borrower were held on constructive (construed) trust by the borrower, on behalf of the lender, and with a corresponding obligation to distribute those funds to the lender, that would not amount to a finding of fault on the part of the borrower. It would need to be considered by the court that the circumstances only arose due to the fault of the *lender* in failing to abide by the terms of the regulation. This was addressed in Heininger v Bayerische Hypo and Vereinsbank (2001), discussed above, wherein the judges noted that the remedy for the bank to avoid such a situation was to have abided by the directive, since this was binding law.

Similarly, if a financial institution were to protest that were a borrower's right to cancel a loan to be recognised, it would cause turmoil for the financial system, in the view of this researcher this, too would be unlikely to succeed as a defence. This argument was considered in the case of Heininger v Bayerische Hypo and Vereinsbank (2001), and dismissed. In this sense, the European Court of Justice has placed greater emphasis upon the rights of consumers than on a perceived obligation to financial markets. Contrastingly, an interviewee reported that a judge once responded to an entirely different kind of argument from a defendant with the words "Yes you are correct, but the mortgage market would collapse overnight if I were to rule in your favour.". In other words, the judge placed more emphasis upon their perceived duty not to disrupt financial markets than upon the defendant's right to justice. This may reflect a disparity between UK courts and the principles informing judgements by the ECHR, so that a UK court may look more favourably on arguments emphasising systemic stability over justice.

5.7.2 Potential impact

A further potential implication of the (2001) Heininger case, were it to be fully recognised by national courts and widely known to mortgagors in default, is that it could result in widescale disruption to repossession actions across the UK (as well as in other EU countries), in a somewhat similar manner to that seen as a result of the Rea, McGready and Laverty (2014) case, as discussed in Chapter 8. The effect for defaulting mortgagors, in principle, would be to remove the mortgage as security for the debt. As a result, where repossession proceedings were underway, the rationale for those proceedings continuing would be removed. The logical step for a judge would be to strike out the mortgagee's application. However, as noted earlier a UK judge must consider more than merely the requirements of justice in that individual case; they must also weigh up the potentially disruptive impact upon society. Even though the EU Court of Justice ruled this out as a reason for refusing to recognise the cancellation of a loan contract, it is possible that UK judges would take a different view in the absence of a clear direction from the EU Court of Justice against this.

A wide-scale invocation of the right of cancellation could see considerable disruption to court processes, potentially in excess of that described in Chapter 8 for the Rea, McGready and Laverty (2014) case, which resulted in the halting of possession actions of the Lloyds Banking Group across the UK for a year, and considerable disruption beyond that timeframe. That arose out of a single court case which established that the standard treatment of arrears by a financial institution was in breach of regulations. The fallout of that judgment affected a considerable portion of then-extant mortgage loans. However, the disruption was largely confined to a single banking group, even if a large one by market share. While this practice was standard within one bank, another practice was ubiquitous across the industry; that is, the sending of loan offers by post. The implications of this for the applicability of the directive are considered next.

5.7.3 Posting of letters of offer may trigger the protection of the directive

Notwithstanding that the observed case reported above showed that judges treated the signing of the deed as the point at which the agreement was entered into for the purposes of the direction, a further point is worth making in respect to the letter of offer. Though this is speculative, if accepted by courts it would expand the application of the directive by a different avenue.

From discussions with interviewees, observations of court cases and communications with those involved in mortgage litigation, it has been a finding of this current research that not a single UK lender was shown to be compliant with the EU directive considered here, in informing customers of their right to cancel their loan agreements. Similarly, it appears that for most mortgage lenders it was common practice to send letters of offer by post and ask for them to be signed and returned (although on this point see Chapter 6 for an example of a lender not requiring the agreement to be signed). Given that an accepted offer gives rise to an agreement, this strongly resembles the kind of circumstance outlined in article 1, paragraph 1 of the directive:

> "*1. This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:*
>
> *— during an excursion organized by the trader away from his business premises, or*
>
> *— during a visit by a trader*
>
> *(i) to the consumer's home or to that of another consumer;*
>
> *(ii) to the consumer's place of work;*
>
> *where the visit does not take place at the express request of the consumer.*"

Particularly when read in conjunction with paragraph 3:

> "*3. This Directive shall also apply to contracts in respect of which an offer was made by the consumer under conditions similar to those described in paragraph 1 or paragraph 2 although the consumer was not bound by that offer before its acceptance by the trader.*"

and the ruling in the Heininger case discussed earlier in the chapter.

That is, as the letter of offer would be received at a prospective borrower's residence, this could be construed as a sale concluded away from business premises. Therefore, if this view is upheld it would appear that a borrower's right to cancel their loan agreement may not be limited to a few rare instances in which UK banks departed from standard practice, but rather to the extent that sending Letters of Offer by post was standard practice (which this current research suggests), the right of cancellation may apply to many, if not most, mortgage loans issued in the second era (from the 1st of October 2008 - 13th June 2014), as well as those in the first era sold in an unsolicited fashion.

5.7.4 Mode of cancellation

Both the directive, and the UK regulations by which it is implemented, identify a simple procedure by which cancellation can be effected (see Appendix 6). It also requires that notice of the right to cancel be provided in writing by the trader to the customer. However, this does not mean that courts wouldn't look to other information to determine whether cancellation had been effected. An interviewee recounted that at least one borrower had written to a lender and threatened to exercise their rights under the directive, without actually doing so. Though the wording of the directive would suggest that this does not satisfy the requirement that the trader provide notice in writing, as also reported by Twigg-Flesner (2010), it does raise a potential problem for such a borrower. Such behaviour could even negate any subsequent attempt to cancel their agreement. This is because by writing to the lender and showing an awareness of their right to cancel, they may be providing evidence that the lender could use to suggest that they had been given notice of that right, and so argue in court that the seven-day cancellation period should be construed to start from when the borrower posted the letter, if not before.

5.7.5 Impact on the scope of hearings

Court proceedings for repossession of property are usually restricted in scope to consideration of whether a valid legal mortgage, or alternatively equitable mortgage, is in place. If a mortgage deed has been signed, and the defendant does not challenge this, then effectively all other arguments are considered to be irrelevant (See section 6.6 for an example of how proceedings can hinge upon the acknowledgement by a borrower of their signature on a deed). As noted by Whitehouse (1999, p.269), where a mortgagee wishes to exercise its inherent right to possession in response to a mortgagor's default, they are effectively guaranteed that a court will grant them an order for possession; the court only has the discretion to suspend its execution to allow time for the arrears to be cleared.

So, aside from other material changes noted above, the ability of a mortgagor to cancel the underlying loan agreement potentially opens up other potential avenues for the mortgage and loan to be challenged. While a mortgagee with a valid legal charge does not generally have to prove that money was loaned, or enter into discussions about the source of the funds, after cancellation an unsecured creditor without an actionable legal charge over the debtor's property would not be able to bring the same action for possession. Consequently, where a lender sought to litigate with a borrower who had cancelled their loan agreement, the nature of proceedings would be different and a debtor conceivably would be able to make differing demands of the creditor. This could include some scope for inquiring into the source of the alleged funds, or at the very least requiring a greater standard of proof than the limited degree generally provided in most possession actions (an affidavit by a solicitor claiming to be a witness to computerised records relating to an account) (see Chapter 7 for an example of concealment in bank's monthly statements to customers).

5.8.1 Summary of the right of cancellation

The above sections have shown that EU Council Directive 85/577/EEC gives rise to a 7-day right of cancellation of agreements entered into away from business premises. Despite an apparent exclusion of agreements relating to real estate, the case of Heininger v Bayerische Hypo and Vereinsbank (2001) resulted in its extension to secured loans, and confirmation that where consumers are not informed of the right, the 7-day cancellation period does not begin running until they are informed by the trader. In subsequent case law it has been held that the financial consequences of a loan's cancellation should be borne by the lender, irrespective of whether a broker was involved, and regardless of whether the lender was aware of the broker's failure to inform the consumer of the right.[25] It has also been held that, in Germany at least, the right of cancellation can be invoked up to a month after repaying a loan.[26] Meanwhile, the right of cancellation has been recognised in UK courts and the principle acknowledged that UK legislation must be interpreted in a manner consistent with the directive.[27] There were two versions of the UK regulations enacting the directive's provisions; the first in 1987[28] and the

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[25] Schulte and Schulte v Deutsche Bauparkasse Badenia AG (2005);
Crailsheimer Volksbank eG v Klaus Conrads and Others (2005)

[26] Hamilton v Volksbank Filder EG (2008)

[27] Robertson v Swift (2014)

[28] The Consumer Protection (The Cancellation of Contracts concluded away from Business Premises) Regulations (1987)

second in 2008,[29] with newer regulations in 2013[30] enacting an update to the directive itself in 2011[31]. This gives rise to three eras of UK regulation for the right of cancellation; the first from 01/07/1988 - 01/10/2008; the second from 01/10/2008 - 13/06/2014 and the third from 13/06/2014 onwards. Therefore, mortgagors who entered into loan agreements without being informed of the right of cancellation would be able to avail of that right as follows:

During the first era, an agreement via a solicited visit or meeting away from business premises would not be cancellable while one resulting from an unsolicited sale would be.

During the second era, an agreement via either a solicited or unsolicited sale would cancellable.

During the third era, an agreement via either a solicited or unsolicited sale would cancellable but only up to a maximum of one year from its formation.

The most extensive application of this right would be if courts recognised the point at which the loan agreement was made as being the accepting of the letter of offer. However, empirical observations showed that a court treated the signing of the deed, and not the receipt of the letter of offer as the date on which the agreement was formed. As UK common law does not permit the cancellation of deeds by their maker, this presents an obstacle to UK mortgagors exercising the right of cancellation. It is suggested that this is an inappropriate interpretation of the directive, and that where EU and UK law conflict, EU law should prevail. Meanwhile, some cases reported from Irish courts appear to indicate recognition by judges that the right of cancellation at least presents an obstacle to the granting of possession orders (See below).

If recognised in UK courts, the impact would be most extensive for loans arranged in the period from 01/10/2008 – 13/06/2014, and the relevant UK regulations would mandate that upon the cancellation of the loan, the security for that loan – the mortgage – would be voided retroactively, as if it never existed. This would reduce the debt to an equitable mortgage at best, or even an unsecured debt, and would require the rectification of Land Registry's records to remove the charge. For real estate seized by lenders as collateral, it may even be possible for

[29] The Cancellation of Contracts made in a Consumer’s Home, or Place of Work etc Regulations (2008)
[30] The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations (2013
[31] Directive 2011/83/EU

mortgagors to reclaim it by restoring their status as proprietors at Land Registry; a cause of action considered further, on different grounds, in Chapter 6.

5.8.2 Conclusions on the right of cancellation

In conclusion, the right of a borrower to cancel the loan which is secured by a legal mortgage causes a substantive ontological alteration to the nature of the agreement. Without this right, a loan agreement and legal mortgage might be considered a single agreement, and these arguably could even be construed to be merged with the contract of sale and conveyance of the property from the vendor, as a tripartite agreement (See Chapter 6) (Abbey National Building Society v Cann, 1990). The right of cancellation, when invoked, retroactively unravels the ties between these transactions so as to cleave the transfer of credit from lender to borrower from the mortgage securing that loan, leaving the former an unsecured debt (or equitable mortgage) and the latter inoperable, with the resultant charge voidable. Meanwhile, the contract of sale and conveyance of the property would have no further tie to either the now-cancelled loan or potentially-voidable legal charge. These, too, would be separated from the loan and mortgage. Consequently, the ‘Tripartite agreement’ interpretation of UK mortgage loans to fund the purchase of a property is not compatible with this EU directive. As long as a borrower has the potential right to cancel a loan agreement, the contract of sale, conveyance and mortgage charge are not inherently inseparable transactions. They are only ‘inseparable’ in so far as the borrower does not exercise their right of cancellation, and so their inherent inseparability is better stated as a conditional inseparability, which in any case weakens the postulation and suggests that Lady Hale’s critiques of the doctrine are sound; that: "it cannot, in my view, be extrapolated into a general proposition applicable to all ordinary domestic conveyancing transactions" (Scott v Southern Pacific Mortgages & Others (2014) at para 121).

More fundamentally, from Renner's (1949) perspective, the directive discussed in this chapter presents the potential for a considerable change in the juridical content of mortgages, arising as a result of changes in social context; the practices of lenders and mortgage brokers. As noted in Chapter 2, under common law a mortgage has always been a binding act by the mortgagor, so that historically the only person who could cancel a mortgage has been the mortgagee. However, the introduction of the right of cancellation and its extension to transactions in land has opened up the possibility that under certain circumstances a mortgagor could indirectly and retroactively cancel a mortgage.

5.9.1 Application of the EU directive on the right of cancellation

It would appear that, based on limited data, the UK and Irish courts are currently not correctly applying the 1985 directive. Further, it is suggested that if or when the existence of this right becomes more widely known amongst mortgagors, particularly those in default, that it may result in both wide-scale disruption to possession actions as well as considerable financial remediation by lenders on a scale comparable to that resulting from the PPI mis-selling scandal (see Chapter 4). If this were to occur, the remediation would be expected to be both in the form of a significant writing down of outstanding balances for those at an advanced stage of repayment, and in a minority of cases, potentially some kind of rebate for those who have settled the outstanding balances. While this research has looked primarily at the UK market, and to a limited degree to that of Ireland, it is tentatively suggested that in principle these findings could apply to all countries of the EU, with variation based on national laws.

5.9.2 Application of the EU directive on unfair terms in consumer contracts

A similar observation - that national courts are not correctly applying EU law - has been made by Edmund Honohan, Master of the Dublin High Court. Honohan was referring to a different directive 93/13/EEC on unfair terms in consumer contracts. Speaking on RTE radio on the 3rd of January 2017, Honohan, in reference to mortgage loan agreements, stated that "the question is whether or not the terms of such contracts contain a term which is unfair.". He noted that although EU law applies to all states within the union, there is a difference in the role of judges in common law countries compared with those based on the Napoleonic Code. In the latter jurisdictions, the judges have a more investigative function; one which is treated as foreign by judges in common law countries such as the UK and Ireland. However, under EU law this is a function which judges are required to exercise, and yet are failing to do so:

> "*So we have a county registrar sitting in wherever... and she is now an agent of the EU. She is obliged, of her own motion i.e. without the defendant present, to look at the mortgage contract and see if it's fair. Does she have the skills to do that? No. Is there any case law to help her? No. Does she have any idea what she is doing? No. So what is happening is she sees there is no defendant in court and makes the order.*"
>
> – Master Honohan (Holland, 2017)

The phrase 'of its own motion', in this context, comes from a 2013 case before the European Court of Justice (Aziz v Caixa d'Estalvis de Catalunya), where at paragraph 41 it was held that in possession proceedings, a court had a duty to examine the contractual terms to determine whether they were unfair, and that this duty fell upon the court even where a party to the case did not ask the court to do so. Therefore, Master Honohan observes that:

> "*of its own motion, the court is supposed to investigate whether there is an unfair term. Now I'm not saying that nine cases out of ten you're going to find the mortgage deed contains an unfair term but there may be cases in which a particular type of mortgage might be regarded as being unfairly burdensome on the borrower.*"
> – Master Honohan, January 3rd 2017 (News at One, 2017)

The findings of the current research are consistent with Master' Honohan's comments. The following exchange from an observed case reflects the typical conduct of judicial officers in respect to this obligation:

Judge:	"*The terms and conditions, are they attached then?*"
Legal Representative:	"*They are, they are appendixed to the mortgage thereafter that is - sorry, that is the mortgage offer terms and conditions,* [judge]*, which you don't need to look at.*"
Judge:	"*Yes, very good. Right.*"

The discussion then promptly moved on to other matters without examining what the terms and conditions actually were. Similarly, when it was explicitly alleged that there are unfair terms in such agreements, there was no exploration of whether this was the case. While in respect to the fairness of a contract, judges are obliged to intervene without being asked to by a defendant, in relation to a consumer's right of cancellation, they have the capacity (though not the obligation) to similarly intervene and void contracts without a defendant submitting an application to that effect. This was a finding from the EU Court of Justice's consideration of the case of Martín v EDP Editores SL (2009). While this was not a mortgage loan case, and concerned the purchase of goods, the Spanish court which had previously heard the case invoked the same directive considered above concerning a customer's right to a seven-day period of cancellation (Council Directive 85 /577/EEC). This was contrary to the general practice of courts in such matters, where similar to the UK, in civil cases judges do not assess motions, facts or evidence which the parties to the case do not, themselves, raise. However, the EU Court of Justice held that the directive afforded the necessary discretion to national authorities as to how the directive would be enforced, provided that this was carried out in a manner consistent with its objectives. It ruled that where a consumer was unaware of their rights arising from the directive, provided that the consumer themselves did not oppose the motion, courts could invoke it without parties to the case raising it, and so declare an agreement void. While this is not a requirement of national courts, it ruled that such a positive intervention by national courts would be in the public interest "in order to compensate for the imbalance between the consumer and the trader in the context of contracts concluded away from business premises." (Martín v EDP Editores SL, 2009 at paragraph 28).

Therefore, in addition to the potential for a consumer-led campaign invoking the right to cancel secured loan agreements, it is possible (albeit unlikely) that the impetus for this could come from the judiciary, or from public policy that pressures them to so act.

5.9.3 Brexit

A caveat to the above predictions is that at the time of writing there is considerable uncertainty over the future legal status of the UK in respect to the EU, and so by extension to its judicial institutions. Should the UK proceed with plans to leave the European Union, the future applicability of EU directives would be in doubt (notwithstanding the proposal to adopt extant EU law as national law at the time of leaving). The repeal of the European Communities Act (1972) would remove the basis on which EU law would be applicable in the UK, as clarified by section 18 of the European Union Act (2011):

> "*Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.*"

As the 1985 directive was valid UK law at the time for mortgage loans issued prior to 2011, in principle this should not affect the rights of mortgagors from this period. However, this is complicated by the manner in which EU law has conventionally been recognised in the UK; that is, through the enactment of national legislation transposing the elements of EU directives and regulations. Where these are in conflict, as in this instance, this is resolved through deferral to the supremacy of EU law, such that when a domestic court is considering provisions of national laws which were enacted to transpose obligations of an EU directive, they must interpret the entire body of national laws such that the outcome is consistent with the objective sought by the directive (Pfeiffer and Others, 2004 at paragraph 120). Where rulings of the European Court of Justice expose conflicts in this, the UK parliament has historically amended national legislation to correct this conflict. In a scenario wherein the UK had left the EU, and was no longer bound by rulings of the European Court of Justice, it is difficult to see how a historical conflict between these laws would be resolved. In the absence of a ruling from the European Court of Justice triggering recognition of the conflict identified herein occurring while it still holds supremacy over UK courts, it may be that future UK cases raising this argument will be heard as if governed solely by national legislation. If so, mortgagors' right of retroactive cancellation may be abrogated.

However, at the time of writing this remains speculative. Statements from the UK government on the future status of the European Court of Justice have been inconsistent, but it appears that there will at least be a transition period wherein the Court's jurisdiction will remain largely unchanged until the end of December 2020 (BBC, 2018). Article 82 of the March 2018 draft agreement on the UK's withdrawal from the EU goes further, stating that this jurisdiction will apply to all stages of proceedings, including appeals and that claims can still be initiated until the end of that period, and will be treated as valid "if the document initiating the proceedings has been registered by the registry of the Court of Justice or the General Court, as the case may be, before the end of the transition period" (European Commission, 2018).

5.9.4 Conclusions on the application of EU law by UK courts

UK courts appear to be misapplying EU law, both in relation to the right of cancellation and the duty to examine the fairness of loan contracts 'of their own motion'.

Therefore, in the event that UK courts continued to apply the directive on cancellation as in the observed case, it would seem that at the time of writing there remains at least a window of opportunity for UK mortgagors whose loans were issued during the period from 1985 - 2011 to assert their right to cancel the underlying loan agreements, given that doing so may require an appeal to the European Court of Justice. Were such a case to be initiated prior to the end of December 2020, notwithstanding the vagaries of the UK's withdrawal process altering the proposed terms, then such a right would likely come to be recognised by UK courts. The consequence, this author would speculate, would be both disruption to repossession actions across the country on a larger scale than seen in the wake of the Rea, McGready and Laverty (2014) case, as well as a PPI-style campaign of financial remediation and loan write-downs.

Chapter 6 - Deeds

6.1.1 Outline

Earlier in the thesis I looked at the history of mortgages and a cause of action arising from mis-selling in the sales process. In the previous chapter, based on my observations of cases and study of case law, I detailed a second cause of action: mortgagors' right of cancellation arising from non-compliance by lenders with consumer regulations. This applies specifically to the loan agreement, although it has a secondary impact of retroactively cancelling the deed.

It is on the mortgage deed itself that I focus in this chapter, showing a third cause of action with a similar outcome - the voiding of a mortgage deed. Based on my observations of hearings as well as interviews and case law, I show that where a deed is not properly witnessed (attested), courts can declare them to be void retroactively. Based on an interview and ground-breaking case law, I report one example where this resulted in charges at Land Registry being removed. Discussing an observed case where similar arguments were raised without evidence, I note that this did not have the same result.

The chapter also details the importance of a power of attorney clause ubiquitous in mortgage loan terms and conditions. Based on interviews and legislation, I show, however, that a valid power of attorney does not arise from this practice. The consequences of this are explored further in Chapter seven, with implications for Minsky's account of the Credit Creation Theory of Banking.

6.1.2 Introduction

This chapter first examines the changing requirements over time for a document to take effect as a legal deed, and shows how changes in social practice (here, chiefly conveyancing practice) largely preceded responsive changes in the juridical content of deeds, though to some extent the reverse can also be seen (Renner, 1949).

The loan agreements looked at in Chapter 5 conventionally would be expressed in the form of a contract signed by lender and borrower (even if that isn't always the practice of lenders today). Unlike a contract, a deed does not need to be signed by the party who is the beneficiary of it; it is unilateral in effect, and binding on the maker even if the other party has not provided anything in return (Yale, 1970 p.52). Further differing from a contract, it is not, however, binding upon the grantee, as no-one is obliged to accept such a grant, just as no-one is required to accept a gift (Re Gulbenkian's Trusts (No. 2), 1969).

Though historically the validity of a deed was said to be predicated on it being 'signed, sealed and delivered', the significance and substance of these requirements has varied over time, and other elements have also been present, such as the need for attestation by witnesses. This chapter begins with a consideration of the performative elements that give rise to a deed, in an order which reflects their historical import; looking first at the practice of sealing, then delivery, followed by signing and finally attestation. It is shown that changes in the social function of these elements within conveyancing practice influenced the juridical content of the law in relation to deeds, and vice versa, which impacts on the current treatment of deeds in observed cases.

As with the former two categories, in relation to the signing and attestation of deeds, there has been a departure of conveyancing practice from the juridical content of the law, so that signing by mortgagors and attestation by purported witnesses often does not occur at the same time or place. These issues have given rise to a cause of action whereby one mortgagor obtained a court's recognition that their mortgage deed was not validly executed, and subsequently, they were able to rectify records at Land Registry to remove charges.

Another issue is also considered; that a power of attorney clause within mortgage loan terms and conditions does not meet legislative requirements to grant a power of attorney, which can invalidate the appointment of receivers to execute a mortgagee's power of sale.

6.2 The requirements of a deed

6.2.1 Preamble

In one observed case, the following exchange took place, whereby a judge and legal representative of a lender discussed an element of all modern mortgage deeds:

Judge:	"*Do you see the* [small] *round circle with LS, is that the seal?*"
Legal Representative:	"*Yes, that mark on it 'LS' is the actual, I forget* [judge]*, what the 'LS' stands for but there is a decision of* [a more senior judge]. "

Judge:	"*It is, that is what rings a bell but I think that is the equivalent of the seal, in the old days it was done with wax but now it is...*"
Legal Representative:	"*Yes, indeed, putting the letters 'LS' is the actual sealing.* "

This shows a degree of uncertainty over one of a deed's constituent elements; the seal. Starting first by looking at sealing, this section examines these various elements, showing the historic developments which have given rise to the current legal concept of a deed and the requirements for its valid execution; elements whose continued relevance to possession cases will be examined later in the chapter.

6.2.1 Sealing of deeds

The practice of sealing deeds has undergone changes over the years, as discussed in Chapter 2. From the end of the 13th century, free men commonly would possess their own seal, or if not, could borrow one where necessary; however, any means of making an impression on paper would suffice (Yale 1970, p54). Charters of feoffment from this time would often contain wording such as:

> "*...I have appended to this present writing my seal (or the seal of E. F. because I have not one of my own.)*"
>
> – Plucknett (1948, p.578).

For centuries, it has been common for documents that were to be executed as deeds to contain a circle with the letters 'L.S.', meaning 'locus sigili', the purpose of which was to indicate the place where a seal would then be affixed, or made (Hoath 1980, p.420). Although wax was often used to seal documents in earlier periods, from the 1840s a more common practice developed whereby mass-produced wafers were placed for this purpose; not by the grantor of the deed, but by the typist (Ibid, p.415; McBain 2006a, p.26). In time, the affixing of wax fell out of practice, and the case of First National Securities Ltd. v Jones (1978) showed a further relaxation in the requirement to seal documents, so that even without a wafer seal, signing over a pre-printed circle marked with the letters 'L.S.' was, itself, deemed to be sufficient to execute the deed. One of the judges in that case, David Cairns, remarked of this practice:

"*I have no doubt that it is now regarded by most business people and ordinary members of the public as constituting the seal itself. I am sure that many documents intended by all parties to be deeds are now executed without any further formality than the signature opposite the words 'Signed, sealed and delivered', usually in the presence of a witness, and I think it would be lamentable if the validity of documents so executed could be successfully challenged.*"

– First National Securities Ltd. v Jones (1978)

This reflects the significance, as per Renner (1949), of social function to an understanding of mortgage law, as here the juridical view of the document was influenced by the weight afforded by judges to their perception of changing business practice. However, Hoath (1980, p.421), in criticising the decision, contended that the judges were mistaken in this view and that rather, the use of wafers to seal documents remained an established conveyancing practice at the time. He also suggested that this ruling would enable further erosion of the practice of sealing, so that the judges' motivation towards commercial expediency had an arguably capricious outcome. As predicted, the requirement to seal deeds was further relaxed so that in Commercial Services v Knowles (1978), the words 'signed sealed and delivered' were deemed to suffice as a seal. A few years later, in the case of TCB Ltd v Gray (1986), a deed of power of attorney had not been sealed, as was legally required, but as there was a declaration in the deed that it had been sealed, it was still held to take effect as a deed on the rationale that the parties intended to rely upon it as such a document. Three years later, legislation was passed formally abolishing the requirement for deeds to be sealed.[32]

Considering these changes over time, the practice of transferring land has arguably moved from the domain of the real into what might be understood as that of simulacra (Baudrillard, 1994). Such an analysis could begin with reference to livery of seisin, which as discussed in Chapter 2, involved physically handing over a sod of turf or bundle of twigs, from the seller to the buyer, at the site of the land itself. In the Baudrillardian view, this representation was a good reflection of the land. Elements of this older conveyancing method were conserved in a second stage of the transition, when there was a practice of embedding bits of leaves, sod or twigs in the wax of a seal on a written deed which effected the transfer. This could be seen as a mask; an unfaithful copy of the land itself, which is represented in the act of transferring the deed but in a denatured, altered form. Then, the widespread use of wafer seals, affixed to a deed by someone other than the grantor, served as an illusion; a substitute pretending to be an unfaithful copy. Finally, since the case of First National Securities Ltd. v Jones (1978), this aspect

[32] The Law of Property (Miscellaneous Provisions) Act (1989), Section 1, or later in Northern Ireland, via The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order (2005), Section 3.

of conveyancing has entered the realm of pure simulacra, where what has replaced the illusory seal is an indication of where it would be placed; the letters 'L.S.' or 'seal' in a circle (Holmes, 1993) – a mere simulacrum which does not even pretend to bear similarity to the purpose or nature of the ceremony of livery of seisin or the land itself. It has no relationship to underlying reality or to the formality that is a hallmark of English land law. What once required an explicit physical act by the grantor has now become a presumption, pre-printed on a document that the grantor has no input into.

Therefore, legislation governing the execution of deeds over this period effected changes in juridical content, and these changes were as a reaction to social context (Renner, 1949); particularly the practices of conveyancers and rates of literacy (McBain, 2006b). However, as Hoath (1980) notes, at least part of this reaction was due to judges' ignorance of the typical conduct of conveyancers at the time. Therefore, as well as legislation being reactionary to social changes as Renner suggests (which doubtless was the case for the 1989 act), this instance provides an example of changes in juridical content apparently being pre-emptive. That is, the judges' reaction in First National Securities Ltd. v Jones (1978) seems to have misconstrued the extent of social change, and in seeking to respond, actually provoked or at least accelerated it. It would seem that a similar diminution of formality has been seen, and continues to occur, with other aspects of how deeds are executed, and partly for the same reason suggested by Hoath (1980) – that of judges emphasising commercial expediency.

6.2.2 Delivery of deeds

As noted in Chapter 2, the delivery of a charter of feoffment in Norman England was not the basis of land transfer, which occurred by livery of seisin and the physical handing of a sod of turf or other representation of the land from seller to buyer. Pollock and Maitland (1898, pp. 86-87) trace the concept of the delivery of a deed to such symbolic transfer of a sod of turf. Where charters were delivered, the date of delivery was inscribed on the document and this was deemed to be the time at which they became operative (McBain 2006a, p.22), even if only for evidentiary purposes (Yale 1970, p53). However, from the Statute of Frauds in 1677 when land transfer by deed became mandatory, actual delivery of the deed was required for it to take effect; that is, it was only when the deed was handed to the grantee that the transfer of land was complete (McBain 2006a, p.29). In this sense, just as elements of the physical symbol (turf, twigs) were merged into the act of sealing a deed, as detailed above, the necessity to physically hand it to the other party became a requirement for the deed to be perfected. This was expressed in a 1520 law dictionary with the words "After a deed is written and sealed, if it be not delivered, all the rest is to no purpose" (Yale 1970, p.54). Yale (1970, pp.56-57) notes the conundrums this gave rise to in the fifteenth century, given the various permutations of events that could occur surrounding the transfer of deeds to an escrow agent; complications partly resolved in the sixteenth century by deeming a transfer to an escrow agent to be irrevocable. McBain (Ibid, p.23, 29) observes that confusion continued but that it was reconciled with the development of the concept of 'constructive delivery' in the eighteenth century and then in the nineteenth century, by the placing of emphasis upon the intent of the grantor. Consequently, in the case of Xenos v Wickham (1867), the acts or words of a grantor were deemed sufficient to indicate delivery. In the modern era, the case of Vincent v Premi Enterprises ltd (1969) provides a similar definition of delivery, as "an act done so as to evince an intention to be bound". This necessitates that the grantor intended to be bound by the deed, as shown by outward signs, and not merely whether the document has been provided to its intended beneficiary (Beale 2012, p.88). This, McBain (2006a, p.29) sees as a nominal legal fiction which has outlived its usefulness, and which through various presumptions introduced by courts over the years has diminished to a shadow of what it was. Yale (1970, pp.73-74) observes that the legal content of the term has changed; remarking rather poetically that "The wine has been changed (for better or for worse) but the bottle bears the same label". From Renner's (1949) perspective, much as with the sealing of deeds, the juridical content of their delivery has not remained stable from its origin to the present day, with changes in social function playing a role. Though it might be suggested that the concept of 'delivery' is now arguably no more than a legal fiction (McBain 2006a, p.29), it continues to have an impact on the execution of deeds, as will be shown later in this chapter, in the case of Shah v Shah (2002).

6.2.3 Signing of deeds

The concept of signing was known in England even in the 7th century (McBain, 2006a p.16), though illiteracy was common in the medieval period so that those who could not write their name would frequently sign by drawing a cross; a symbol that even the literate would frequently add after their signature (Blackstone 1765, p.305). Signing of deeds was rare in the 1300s (Dixon, 1826 p.10); indeed, prior to the sixteenth century signatures on deeds were not common (Plucknett 1948, p.578), as illustrated by the definition of a mortgage used in a case at the time:

> "*There are but three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery*."
>
> – Goddard v Denton (1584)

This definition continued to be applied throughout the seventeenth century, as well as the eighteenth centuries (McBain 2006a, pp.16-17). In the nineteenth century it was said to be "an additional security and convenience, with regard to the proof of the execution, which ought never to be dispensed with" (Dixon 1826, p.565). However, it was not until the Law of Property Act (1925)[33] that a signature was expressly required to execute a deed. This remains the case, and though there is a move towards the recognition of electronic signatures the law is currently opaque on this, but in respect to their potential use on deeds in the future the main obstacle would be the requirement for witnessing, and attestation of the signature (Law Commission, 2018).

6.2.4 Witnessing

Witnessing of land transfer has been a feature of English conveyancing for more than two thousand years, having been an integral part of the livery of seisin (Korngold, 2009), as well as earlier practices. However, as noted in Chapter 2, use of charters to record land transfer was not ubiquitous and even where such written documents were used, there was no obligation on witnesses to sign with their names. Rather, due in large part to the prevalence of illiteracy, their names, if written, were added by scribes (McBain 2006a, p.20). Therefore, a charter of feoffment in the thirteenth century would sometimes state that the document was executed "in the presence of these witnesses...", with their names subscribed below (Plucknett 1948, p.578). McBain (2006a) suggests that at least two witnesses were required, and that those so recorded were likely witnesses to both the livery of seisin and to the charter, which would be read aloud to them. However, even in the fourteenth century it was rare for the names of witnesses to be found on deeds (Dixon, 1826 p.10). It wasn't until approximately the first half of the sixteenth century when the wider prevalence of literacy led to witnesses signing to attest to the signature of the grantor of the deed (Blackstone 1765, p.308). Nevertheless, attestation by witnesses only became a legislative requirement with the Law of Property (Miscellaneous

[33] With section 73 of that act stating that " Where an individual executes a deed, he shall either sign or place his mark upon the same and sealing alone shall not be deemed sufficient."

Provisions) Act 1989.[34] With increasing use of electronic signatures, there are suggestions that in future witnessing of a digital signature by video link will be acceptable even for deeds (Law Commission, 2018).

6.2.5 Dating of deeds

Though dates were sometimes affixed to charters of feoffment, and though it was an ancient custom from prior to Norman times (Dixon, 1826 p.553), it fell out of practice and was rare in the 9th-12th centuries; where it occurred it was for evidentiary purposes rather than effecting the actual transfer (McBain 2006a, p.22, 31; Yale 1970, p53). Indeed, prior to the fourteenth century, dating of deeds was rare (Dixon, 1826 p.10), and even at that time a deed was still considered 'sufficient' without a date, though it was customary to add a date upon delivery (Perkins 1827, pp.24-25). Nevertheless, Coke (1853, 6a) notes that dates were commonly added to deeds during the reigns of Edward the second and third (in the early fourteenth century), and ever since. Dixon (1826, pp.553-554) reports that in his time, the early nineteenth century, all deeds were dated.

6.2.6 Modern deed practices

Today, the requirements for executing a deed differ depending on the kind of legal person doing so, but for an individual there are essentially four requirements. Firstly, it must make clear from its wording that it is a deed, while it must also be signed, attested and delivered (McBain 2006a, p.17). Section 1 of the Law of Property (Miscellaneous Provisions) Act, (1989)[35] specifies that the signing of a deed may be done by the individual themselves, or at their direction. In the former case, a witness must be present, while in the latter, two witnesses are required. The witness(es) must then attest the signature, meaning that they must subscribe their names as witnesses to the signature itself. Variations in the practices of signing and attesting signatures have developed in recent years, with differing impacts on mortgage deeds themselves. These changes, however, should be understood in the context of the system of land registration.

[34] Section 3 reading in pertinent part: "An instrument is validly executed as a deed by an individual if, and only if... it is signed... by him in the presence of a witness who attests the signature.". In Northern Ireland, the relevant clause is within the The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order (2005), Section 3.

[35] As with the earlier point, this legislation is in force in England and Wales but not Northern Ireland. In the latter, the same requirements are stipulated in The Law Reform (Miscellaneous Provisions) (Northern Ireland) Order (2005), Section 3.

6.2.7 Land Registration

As noted in Chapter 2, the development of a system of land registration in England and Wales (as well as Northern Ireland) was a long process, only finalised within approximately the last two decades. This changed the social function that deeds served, as in periods prior to the existence of the Land Registry, the process of verifying the ownership of land involved the laborious task of checking a series of conveyances by deed through a chain of title going back generations (Joseph, 1976). With the advent of centralised registration of title, a deed was no longer the only reference point for authenticating someone's claim to holding title to real estate. However, a further change occurred with the Land Registration Act 2002, so that with its commencement the records of the Land Registry became the conclusive evidence of title. Whereas in prior times, a deed properly executed in the manner described earlier in this chapter had the effect of conveying title to land, this is no longer the case. Now, a person only obtains proprietorship of real estate once the transfer has been recorded on the register (Chan, 2005), such as via a TR1 form (shown in Appendix 7). If a mistake is made on the register and someone has suffered a loss as a result, they have a right to be indemnified for that loss, based on the state's guarantee of title (Harpum and Bignell 2004, p.293). This can be done either directly by the registrar even without an application by the affected person, or by means of a court order (Ibid, p.294).

6.3 The tripartite view of mortgages

As noted in Section 2.3.4, early mortgages in England took the form of two documents executed simultaneously; one charging the property in favour of the lender (a charter of feoffment) and the other discharging this obligation (an instrument of defeasance) (Rabinowitz 1943, p.180). These documents were held by a third party and released upon default to the lender or upon repayment of the debt, to the borrower. This and similar later practices had the effect of giving legal force to an arrangement that otherwise would not be enforceable; that is, creating a conditional charge over the real estate. If the borrower defaulted, the third party 'escrow' agent would release the charter of feoffment to the lender, who could present that as proof of their interest in the property (Rabinowitz 1943, p.182,185; Shapiro 1983, p.1198-1199). On repayment of the loan, the borrower would receive that charter of feoffment, along with the instrument of defeasance, and their title to the property would remain their own. While the modern practice differs from this, there are parallels.

Although modern UK law does give legal effect to a conditional legal charge over property (what we know as a mortgage), there are still practical difficulties in preparing the paperwork to ensure that the borrower receives funds from the lender, and that the lender receives a charge over the property as security for that loan. Should a lender advance funds to a borrower without receiving some security, they could be in a position of having a claim against the borrower themselves for the funds paid but not directly against the borrower's property (See Section 6.7, below, for discussion of a rare example of this happening in recent years). This would reduce a lender's bargaining power and increase the risk that the debt would not be fully repaid, especially if another creditor did obtain a charge over the property. However, mitigating this risk is not as simple as the lender obtaining that security (the mortgage) from the borrower prior to issuing the loan. To grant a charge over property, one must be its proprietor. Where a borrower seeks the funds to purchase a property they did not previously own, they are unable to grant such a security before this point in time (Scott v Southern Pacific Mortgages, 2014), as they cannot give what they do not have (Abbey National Building Society v Cann, 1990). Nor would a contract to create a mortgage at a future date have the same effect as creating a mortgage over the property, as such a contract would be insufficient to, itself, give rise to a charge (see Helden v Strathmore, 2011).

This creates a somewhat paradoxical situation wherein the borrower cannot purchase the property they wish to buy because they do not have the funds, and the lender cannot issue the funds because they do not have security for the loan. Recourse is made to a similar practice to that employed by the early Jewish merchants. A third party (a solicitor) takes custody of a document analogous to a charter of feoffment – a mortgage deed signed by the borrower – and holds it until such time as the sale of the property is finalised and the funds are released by the lender; a process known in the conveyancing industry as 'completion'. At completion, the lender transfers the borrowed funds to the seller of the property; the seller transfers title of the property to the purchaser and the purchaser grants a charge over the property to the lender (Joseph, 1976). All of this theoretically occurs simultaneously; at least, that is what the documentary record reflects. The documents effecting these processes carry the same date and give no indication that time passed between any of the steps occurring. For this reason, a legal doctrine has emerged wherein these three processes are viewed as a 'tripartite agreement' (one agreement between vendor, purchaser and lender). That is, courts have applied an understanding which holds that the sale/purchase agreement for a property, the conveyance of the property, and the deed of mortgage charging the property in favour of the lender funding the transaction all comprise a single agreement (Abbey National Building Society v Cann, 1990).

For this to hold true, there are several assumptions; including that these agreements are executed on the same day, and consequently that there is no point in time when the purchaser of real estate owns it outright without that real estate being the subject of a charge in favour of the lender who financed its purchase. This view was questioned by Lady Hale in Scott v Southern Pacific Mortgages & Others, (2014), and is undermined where evidence exists that the documents were not executed on the same day, as in the case of Universal Permanent Building Society v Cooke (1952). However, as Ooi (2015, pp.44-45) notes, the fact that the loan giving rise to the charge in that case was not required to finance the purchase indicates that the facts in the case distinguish it from the more common scenario around which the rule is based. This doctrine will be returned to after evaluating a mortgagor's arguments reported later in this chapter. Those arguments relate to the attesting of mortgage deeds, in relation to which the case of Shah v Shah (2002) is pertinent.

6.4 Shah v Shah

The case of Shah v Shah (2002) indicated a considerable departure from prior practice in relation to the attestation of a signature. In that case, a purported witness had attested a signature even though they were not present when the document was signed, which was contrary to section 1 of the Law of Property (Miscellaneous Provisions) Act (1989). There was considerable debate in that case, as to how far the wording of the legislation mandated that the attestation was integral to the requirement for a signature to be valid, and what social benefits there were to the requirement for attestation, such as providing certainty over the execution of the document and evidence in the case of disputes. A judge reasoned that:

> "*The attestation is at one stage removed from the imperative out of which the need for formality arises. It is not fundamental to the public interest, which is in the requirement for a signature.*"
>
> ...
>
> "*It should not permit a person to escape the consequence of an apparently valid deed he has signed, representing that he has done so in the presence of an attesting witness, merely by claiming that in fact the attesting witness was not present at the time of signature.*"

A key factor in the judges' reasoning that the document took effect as a deed was based upon its subsequently being delivered, stating:

> "*The delivery of the document constituted an unambiguous representation of fact that it was a deed.*"

That is, the beneficiary of the deed was entitled to rely on its appearing to be signed and attested, when it was provided to him by those who had signed it, as that act of delivery represented to the recipient that it was a validly executed deed. The court also looked at other aspects of the parties' conduct, suggesting based on their behaviour that the signatories at the time would have corrected any defects if they had been pointed out.

This judgment contrasts with that in the more recent case of Bank of Scotland v Waugh (2014), which an interviewee for the current research had a role in, and which is discussed next.

6.5 Bank of Scotland v Waugh

6.5.1 Introduction to Bank of Scotland v Waugh

In Bank of Scotland v Waugh (2014), similar issues were raised as in Shah v Shah (2002), in that a deed appeared on its face to have been validly executed, with an attested signature and a date which matched the date of completion. However, there were several key differences in respect to the elapse of time between the signing by the grantor and the signature's attestation, as well as the connection between the grantor and witness and the manner of delivery of the deed.

6.5.2 Legal mortgage arguments

In this case, the conveyancing solicitor had sent a mortgage deed form to the prospective borrower, along with written instructions (which the prospective borrower retained) to 'sign but don't date' the deed, and to return it by post. It was only after the solicitors firm received the deed that someone working at the law firm added their signature. This is similar to the facts in Shah v Shah (2002), but what distinguished these circumstances was that, firstly, the purported witness was not known to the signatory whereas in Shah v Shah, the witness was an accountant working for the mortgagors' company and knew them well. A second distinction is that the signatories did not deliver the deed to the beneficiary (the lender); rather, it was provided to the lender by the firm of solicitors who had purported to witness it. On the face of it, this appears to be a weak distinction, as the Law of Property (Miscellaneous Provisions) Act 1989 1(1)(c) states that:

"*(1)Any rule of law which—*

> *(c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed, is abolished.*"

So, given the changes in the meaning of delivery discussed earlier in the chapter (section 6.2.2), it would seem that by signing a document identified as a deed and sending it to solicitors on the understanding that it would then be provided to the lender, would sufficiently show an intent to be bound by the document. Therefore, the would-be mortgagor's act of posting the document could be seen as 'delivery' within the current definition. However, in Shah v Shah the importance of delivery being a binding act was that at the point of the mortgagors in that case parting with it, their signatures appeared to be validly attested, and so the act of delivering it represented to the recipient of it that it was what it appeared to be. In Bank of Scotland v Waugh, when the would-be mortgagor parted with it, it was not complete on its face; there was no witness's attestation. Therefore, delivery would not cause it to take effect as a deed and in posting the document, the signatory was not representing to the beneficiary of the 'deed' that it was valid.

The subsequent addition of a false attestation did not have the effect of rendering the document a valid deed, as it did not satisfy the following legislative provisions:

> "*52 (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.*"
>
> – Law of Property Act (1925)

> "*(3)An instrument is validly executed as a deed by an individual if, and only if—*
>
> *(a) it is signed—*
>
> *(i) by him in the presence of a witness who attests the signature; or*
>
> *(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and*
>
> *(b) it is delivered as a deed*"
>
> – Law of Property (Miscellaneous Provisions) Act (1989)

Therefore, the document could not take effect as a deed, and so as to its later being sent to the lender, the judge administering the case had the following to say:

"*I cannot, for my part, see that the fact that "the deed" is subsequently sent to a third party by a person acting for that third party and the other party to the deed makes any difference.*"

That is, since the deed was not validly executed, its purported delivery was ineffectual, unlike in the Shah case. Therefore, the court ruled that the deed was invalid. The judge also noted the dual role of the solicitors firm; acting both for the would-be mortgagor and mortgagee.

The consequence of the judgment was that a legal mortgage was not in place. The court took the view, however, that an equitable mortgage would result:

"*A document, which for some defect of form (but which is otherwise valid) fails to take effect as a legal mortgage will (subject to section 2 of the 1989 Act) be a good equitable mortgage. The basis of this is the court's power specifically to perform a contract to create a legal interest in land.*"

6.5.3 Equitable mortgage arguments

That is, the court ruled that despite the deed not giving rise to a valid legal mortgage, the lender should still be seen as having an interest in the property as security for the loan. However, this interest would be subject to the following legislative provision (abridged for clarity):

"*2 Contracts for sale etc. of land to be made by signed writing.*

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract. "

– Law of Property (Miscellaneous Provisions) Act (1989)

What this requires, therefore, for an equitable mortgage to exist in substitute for a legal mortgage, is that there be a document setting out (or referencing) the terms and conditions of the agreement between the parties. If there was a loan contract between the parties, signed by both that could potentially substitute, but that document didn't exist either. It had not been signed on behalf of the lender. This is not unusual in general lending practice, as noted in

Chapter 5, the standard practice of UK lenders has been to send a letter of offer by post. Some lenders request that it be signed and returned, while others actually state on the letter of offer that:

"*Signed acceptance of the offer is not necessary*"

The interviewee connected with the case reported that when a dispute arose over the lack of a signature from the bank on the loan contract, the bank's representative suggested that, even though they could not present a contract signed by both parties, one might exist. The inference of this was taken to be that this could be fabricated and provided at a later date. This could be seen as the inverse of the documentary fabrication described by Lynch and Bogen (1996). Whereas the protagonist in Lynch and Bogen's work engaged in secret, pre-emptive fabrication of evidence, the representative in Bank of Scotland v Waugh openly insinuated their intention to engage in post-hoc fabrication of evidence.

At this point, the defendant, Mr Waugh, stood up, holding the document in their hand and there was an exchange which reportedly went approximately as follows:

Mr Waugh:	"*Sir, THIS is the document in question. THAT is the space for a signature by the bank. It is an empty space, sir. It will always be an empty space. It can never be anything else except a blank space, sir.*"
Judge:	"*Quite, quite, Mr Waugh, yes, yes I accept that.*"
Representative:	"*But this isn't enough; it's not enough to say that the mortgage is void because there isn't a signature. I mean, your solicitor did this, Mr Waugh. You can't blame the bank, here.*"
Judge:	"*It was the bank's mistake,* [representative]*. They created the document.*"
Representative:	"*Yes sir, I didn't mean to advise.*"
	...
Mr Waugh:	"*Sir, is it not the case that under section two of the 1989 act that there is no valid mortgage contract and the mortgage is void*?"
Judge:	"*Oh, I'll have to think about that*."

Mr Waugh: "*Sir, the mortgage deed - ... it's got no spaces for witnesses. There are no witnesses on it. As we've been arguing, it's void under section one.*"

Judge: "*Well, it's a difficult one isn't it? We'll have an adjournment and come back after lunch*."

The judgment then given after that adjournment acknowledged that the 1989[36] act did apply and that the deed was not compliant with section 1(3) for lack of witnesses. This was a landmark ruling, as previously the act had been ruled to not apply to mortgages.

However, to understand the remainder of the judgment it should be noted that there was a peculiarity to the deed, in that despite not being witnessed, it had been signed on behalf of the bank. This is contrary to normal practice, and against the very essence of a deed. As has been noted throughout this chapter, a deed is a unilateral document granting something from one party to another. The recipient party is not required to sign it. But someone acting for the bank did, perhaps in lieu of an attestation. But of course, without having witnessed the grantor's signature this did have any bearing on requirements of section 1(3) of the 1989 act – it was still not a valid deed.

As for section 2 of the same act, this related to the loan contract, which had not been signed on behalf of the bank as would be required in order for the bank to rely upon it as a contract. Again, a contract, unlike a deed, is not unilateral and the act specifies that signatures of both parties are required. So, this was an odd situation where a document that didn't need to be signed by the bank to take effect had been and one which did need to be signed by the bank hadn't been.

Previous case law on this point can be seen in United Bank of Kuwait v Sahib (1996), wherein the absence of a contract signed by both parties meant that an equitable mortgage was held to not exist. However, in respect to Bank of Scotland v Waugh, the judge ruled that since the deed was signed by both parties, it amounted to a contract under section 2 of the 1989 act. This was a bizarre ruling which conflicted with pre-existing case law[37] and ultimately hasn't remained in effect.

The result was that there was effectively no legal or (valid) equitable mortgage, but there was still a charge registered at Land Registry over the property identified in the 'deed'. The mortgagor had previously applied to the Land Registry seeking the removal of this and other

[36] The Law of Property (Miscellaneous Provisions) Act (1989)
[37] Keay and Another v Morris Homes (West Midlands) Ltd (2012)

charges, and that application had been refused. Some months after the judgement in Bank of Scotland v Waugh was given, and following an application to the Land Registry's internal court (the Property Chamber), that earlier decision was overruled and the charge on the property was removed. An officer at the Land Registry even apologised for the delay in doing so, and explained that no-one knew how to cancel a void mortgage and so they had had to consult with professors who were better informed.

Years later, upon further publicity around these issues, the lender itself applied to the Land Registry and had a charge over another related property removed, so that ultimately no mortgage charge over the defendant's properties remained.

6.5.4 Summary of Bank of Scotland v Waugh

As a consequence of the conveyancing practice of the lender in Bank of Scotland v Waugh (2014), and the would-be mortgagor's ability to evidence this, a document which appeared to be a valid deed was shown to not be compliant with a legislative requirement that it be witnessed and attested at the time of signing. As there was sufficient evidence that the deed was not validly witnessed, it was no longer considered to be a mortgage deed, and the judgment had the performative effect of so altering its nature, and therefore the relations between the parties.

The would-be deed could not give rise to a legal mortgage. Due to non-compliance with 1989 legislation, it could not take effect as an equitable mortgage either and the result was that the would-be mortgagee did not have an interest in the property. The charge which had been registered at Land Registry was also removed, after a protracted process.

6.6 Validity of attestation challenged at an observed hearing

In one observed hearing, a similar dispute to that in Bank of Scotland v Waugh (2014) arose over the apparent attestation of a deed. The document appeared to carry the signature of the defendant and an attestation by a witness who also acted as the conveyancing solicitor. Testimony submitted by the defendant stated the following:

> "*...It is unclear whether* [the financial institution] *has sufficient standing to bring the claim and the onus is on the* [financial institution] *to prove that.*"

From this point, the discussion in court led on to disputes over whether the deed had been correctly attested. The judge insisted upon the defendant testifying verbally under oath, leading to the following exchange:

Judge:	"*Is that your signature?*"
Defendant:	"*It looks like my signature.*"
Judge:	"*Right, so does that mean it is?*"
Defendant:	"*It means it looks like my signature,* [judge]*, whatever that means.*"
Judge:	"*Yes, well exactly, what does that mean?*"
Defendant:	"*Yes, that is all I can say, that is all I can swear by.*"
Judge:	"*So it is either you signed it or someone else forged your signature, is that right?*"
Defendant:	"*Well, it has been known that, I have a couple of these documents and they are all different.*"
Judge:	"*No, I'm just asking you, that looks like your signature?*"
Defendant:	"*It looks like my signature but I can't say...*"
Judge:	"*So it is your signature or someone else forged it?*"
Defendant:	"*That's a possibility too.*"
Judge:	"*Is that right. Yes thank you.*"
Defendant:	"*Thank you.*"

This parallels the manner in which Lynch and Bogen (1996, pp.170-172) report the chief house council in the Iran-Contra hearings dealing with a hostile witness. By responding in this manner, the defendant embeds their inability to authenticate whether they placed the signature on the document shown within a context in which they allege that there is significant cause for doubt in respect to whether and before whom, they signed documents. Therefore, it is inferred that there is too much uncertainty for an affirmative answer to be given. By avoiding giving a definite answer the defendant also avoided expressly validating the financial institution's key evidence: the mortgage deed. This is different than the conduct of the defendants in Shah v Shah (2002), who accepted that it was their signatures on the deed, and that it was delivered to the putative mortgagee, thereby shifting the point of contention to whether that recipient should be entitled to rely upon it. An important difference in this case, which distinguishes it significantly from Bank of Scotland v Waugh (2014), is that it took place in Northern Ireland, where the relevant legislation referred to in the 2014 case does not apply – The Law of Property (Miscellaneous Provisions) Act 1989. Therefore, even if the statements were accepted as fact, the outcome would not be the same.

It also differed substantially from Bank of Scotland v Waugh (2014) in other respects. Whereas in the 2014 case the defendant had made a firm statement that the signature was not properly attested, and provided evidence thereof, in this Northern Irish case, the defendant offered primarily doubt over whether the signature had been correctly attested, as well as doubt over the integrity of the witness. Written testimony previously submitted stated the following, providing supporting evidence:

> "*The claim of the* [financial institution] *appears to centre upon a deed allegedly executed on* [date]*, by* [defendant] *in favour of* [the financial institution]*, and allegedly witnessed by* [conveyancing solicitor] *(then working for* [solicitors firm]*, but now in jail for fraud in connection with mortgage accounts; see Exhibit* [###]*)...*"

The judge, meanwhile, operated on the presumption that a document which appeared to have been signed and witnessed on a particular date must have been, and ruled that it took effect as a valid mortgage deed so that the lender's security, the mortgage, was upheld.

The discussion so far in this chapter has focussed on the execution (or not) of a mortgage deed as security for a loan, but there is another related, but often-overlooked, form of security in mortgage loan terms and conditions which is considered next.

6.6 Deed of Power of Attorney

6.6.1 Introduction to Powers of Attorney

A power of attorney is a written authorisation from a grantor to act on their behalf. Such a power can only be granted by deed. This section discusses the role of a power of attorney in mortgage loans.

6.6.2 Powers of Attorney in Mortgage Deeds

When one mortgagor in a case I observed wrote to their financial institution, asking whether there was a power of attorney in effect between themselves and the financial institution, the company wrote back stating categorically that there was not, and referred to an enclosed copy of their terms and conditions which contained a similar clause to the following:

> "*16.1 By way of security, the borrower appoints the Lender and (as a separate appointment) any receiver the Lender appoints, to be the borrower's attorney. The borrower cannot cancel this appointment until the money secured by the mortgage is paid off in full. The borrower's attorney will be authorised to act in the borrower's name and on the borrower's behalf, and will have the following rights:*
>
> *(a) To receive any money due to the borrower to do with:*
> - *the property;*
> - *any right to the property or power or claim over it;*
> - *the Insurance of the property or any guarantee or compensation relating to it;*
>
> *(b) To enforce the borrower's rights or take over the borrower's right to make any claim or do anything else (including bringing or continuing court or arbitration proceedings) to do with:*
> - *the property*
> - *the insurance of the property or any guarantee or compensation relating to it.*
>
> *(c) To use any money received as the borrower's attorney to reduce or pay all the mortgage debt, put right any defect in the title to the property, repair or rebuild the property, or pay any money which the borrower has not paid under the mortgage.*
>
> *(d) To instruct anybody (such as a solicitor) who has any documents or accounting information (including tapes, films or computer records) about the property to let the Lender look at them and take copies.*
>
> *(e) To transfer any share or membership right in any management company, or residents' association or society connected with the property which the borrower is a member of, and/or exercise any rights the borrower may have in connection with such organisation.*
>
> *16.2 If there is more than one borrower, the attorney will act for all borrowers together and each borrower separately.* "

It emerged from communications with individuals in a similar position that such queries of lenders have met with the same odd response: both a denial of the existence of a power of attorney, and the simultaneous enclosure of the loan terms and conditions, which themselves always contain such a Power of Attorney clause; another example of which is provided below:

> "*You irrevocably and by way of security appoint Us to be Your attorney subject to the redemption of the Loan (with full power to appoint substitutes and to delegate on its behalf and in Our name or otherwise) to execute any document or do any act or thing which You are obliged to execute or do under the Mortgage or the Conditions or which We (or its substitute or delegate) may reasonably consider appropriate in connection with the exercise of any of Our powers. Any person appointed as Our substitute or*

delegate shall in exercise of the said Power of Attorney be Your agent who alone shall be responsible for the acts and defaults of such substituted person or delegate and We shall not be responsible for any misconduct, negligence or default of such substituted person or delegate. "

When the mortgagor who had received the above-mentioned letter raised this issue during court proceedings, the legal representative for the company initially tried to downplay the issue, but eventually conceded that the communication had been incorrect; that there was such a power of attorney in place but averred that it supposedly had not been used. The judicial officer explained that it was only needed during the sale of the property; a matter considered further in Chapter 7. In another case, when the same matter was raised, a legal professional responded in a sworn affidavit that:

"*Neither this firm nor the Plaintiff has power of attorney to act on behalf of the Defendant and has never acted or attempted to act in this capacity.*"

Despite this being sworn testimony, the statement was later acknowledged to be incorrect.

In one observed case, a mortgagor sought to cancel the Power of Attorney granted to the financial institution. The legal representative of the financial institution, as well as the judicial officer, noted that it was not possible for a mortgagor to cancel the attendant Power of Attorney, as it was given 'as security for the loan'.

These are not isolated cases. Rather, every set of UK residential mortgage loan terms and conditions that I have viewed contains a clause specifying that a Power of Attorney is granted by the borrower to the lender. It is standard practice. But just because it's standard practice does not make it legally valid. The next section considers the applicable legislation.

6.6.3 Legislation on a Power of Attorney as security

Indeed, the statement made by the legal representative mentioned above had some truth in it. Though they did not specify any legislation, sections 4 and 3, respectively, of the Powers of Attorney Act (1971) and the Powers of Attorney Act (Northern Ireland) (1971) mandate this, stating (identically) that:

"*(1) Where a power of attorney is expressed to be irrevocable and is given to secure—*

(a) a proprietary interest of the donee of the power; or

(b) the performance of an obligation owed to the donee,

then, so long as the donee has that interest or the obligation remains undischarged, the power shall not be revoked— "

Meanwhile, the terms and conditions of mortgage loans contain similar causes.

The power of attorney clause is considered further in relation to another power relevant to mortgage loans – that of sale.

6.6.4 The mortgagee's power of sale

As noted in previous chapters, in the absence of terms and conditions, "The mortgagee may go into possession before the ink is dry on the mortgage" (Four-Maids Ltd v Dudley Marshall (Properties) Ltd, 1967), and so there is no need for a lender to engage in litigation in order to invoke its right to possession (Ropaigenlach v Barclays Bank, 2000). The situation differs slightly in Northern Ireland, where the provisions of Schedule 7 part I, paragraph 5(2) of the Land Registration Act (NI) (1970), together with the Human Rights Act (1998) mean that a mortgagee does not have a common law right to possession, as they do in England. Rather, they hold what is known as a 'charge by way of legal mortgage', in accordance with which a court has the discretion, but not the duty, to grant a possession order.

However, even without a court's involvement the power of attorney clause quoted earlier purported to grant a power to appoint receivers, to seek possession of property, and administer its sale. This, like other powers of attorney, must be granted via the execution of a deed that is compliant with the provisions of the previously-cited Powers of Attorney Act(s). Even without such a deed, receivers can be appointed to sell property in England and Wales under sections 101(1)(i) and 109 of the Law of Property Act (1925) (West Bromwich Building Society v Wilkinson, 2005) and in Northern Ireland, under section 19(1) of the Conveyancing Act (1881). So, mortgagees have two mechanisms by which they can appoint receivers whereby the effect is the same as outlined in section 109(2) of the 1925 act:

" *(2) A receiver appointed under the powers conferred by this Act, or any enactment replaced by this Act, shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.* "

That is, such a receiver technically acts for the mortgagor. Another way that a mortgagee can ensure a property is sold without taking possession is by applying to a court for an order to that effect under section 91 of the Law of Property Act 1925, however it is at the discretion of the court whether to grant it.

These legislative provisions emerged because a mortgagee who takes possession has a number of liabilities to the mortgagor. These include maintaining the property; accounting to the mortgagor for any surplus income from rent or other sources (including rent which might only potentially be received), to be diligent in the use of the property, and to ensure that a fair market price is obtained if sold (Clark 2002, pp.531-535). If a receiver is deemed to be the agent of a mortgagor, as described above, then the mortgagee would not hold these liabilities. Therefore for a lender, exercising a power of sale via a power of attorney to act for the borrower is preferable.

However, if there was no valid power of attorney in the first place, and a receiver's appointment was ostensibly made under such a power, it would be invalidated.

Regardless of how a receiver is appointed, there must be some documentary authorisation for them to act. Where the appointment is made by the mortgagee, either directly or on behalf of the mortgagor, a deed of appointment will be required. A case from Ireland; that of McCleary v McPhillips (2015), illustrates a further point regarding such a deed of appointment – that for such a document to be valid, it must be executed (via company seal) or signed (via signature) by a person who is authorised to do so. The following is an extract from the judgment:

> "*160. In this case the deed of appointment of Stephen Tennant signed on 4th February, 2013 was signed by Rosa Montgomery. She is not the Chief Executive or Secretary or Law Agent of the Bank. Ms. Montgomery had authority to witness the affixing of the seal but did not have authority to sign on behalf of the Bank for documents which are required to be in writing under the Bank's hand. In those circumstances, I must conclude that this deed of appointment of Mr. Tennant as receiver was invalid.* "

So despite there being a deed of appointment in each instance, because the signatories to them were not validly authorised, it was effectively as if there were no such deeds of appointment; the appointments were of no force or effect. Given this, the ruling of the judge was that the mortgagor in the case, Mr McPhillips, was "*...entitled to damages for trespass to his property because the receivers were not validly appointed.*" McCleary v McPhillips (2015).

In a UK case, reported by an interviewee, a mortgagor raised similar arguments; that the receivers acting in connection with real estate property had not been validly appointed. The court ordered the solicitors acting for the receivers to produce a powers of attorney deed evidencing their right to act in connection with the property. The document that was provided, however, did not evidence such rights. Rather, it was a deed of power of attorney executed by the bank in favour of employees of the bank, enabling them to act in the name of each subsidiary bank. The document specifically stated that it conferred no powers upon non-employees of the bank. As the receivers fell into this latter category, they were excluded from acting under any powers granted under that deed. Further, even if the receivers were validly appointed under such a deed, any rights they may have had would still be one degree separated from the property itself, the proprietor of which was the mortgagor. The receivers would have to demonstrate not only that they were validly authorised to act on behalf of the bank, but also that the bank itself had the power to act for the mortgagor in the first place, in order to be able to grant such a power to the receiver. Therefore, two documents would have been necessary to satisfy the requirement that they were authorised to act in relation to the property itself, but it appeared that one of these did not exist, or at least that the financial institution sought to rely upon the loan terms and conditions as granting a power of attorney. Whether such a claim is valid will be explored next.

6.6.5 Legislative requirements for granting a Power of Attorney

For a valid power of attorney to be granted, there are certain proscribed criteria that would need to be met in the UK. A written document granting a power of attorney by an individual must be validly executed as a deed by the person making it; it must be clearly evident from the wording of the document ("on its face") that it is intended to be a deed by that person; it must be signed by the person as well as by a witness, and it must be 'delivered' (see section 6.2.2, above) (Powers of Attorney Act, 1971 s.1(1); Law of Property Miscellaneous Provisions Act, 1989 s.1(2&3); Law Reform (Miscellaneous Provisions) (Northern Ireland) Order, 2005 s.3&5).

So if a mortgage deed is completed by a customer, signed by a witness, and some action is taken by the mortgagor to indicate their intention to be bound by it, then it would seem to be valid and binding as a deed in favour of the lender. However, on the face of the deed itself there is no mention of the granting of a power of attorney. Rather, this a term included in a separate document - the terms and conditions document - which is typically said to be 'incorporated by reference', as if it were written on the deed itself. In the above case reported by an interviewee, the defendant stated that if the mortgage deed did grant a valid power of attorney, the lender could use this. This was a ruse by the defendant, who was aware of the legislative requirements, but the lender acted on it, filing an application in court on that basis. However, on the day of the court case, the legal representative sent a letter to the judge which was read out at the hearing. It stated words to the effect of:

> "*Having checked the applicable statutes and authorities it appears that the bank doesn't have the ability to rely upon the power of attorney clause in the mortgage conditions because under the Power of Attorney Act 1971 there needs to be a stand-alone deed, which the bank doesn't have.*"

Some consequences that could potentially arise from the deficiencies in this standard powers of attorney clause are considered in Chapter 7.

6.7. Connection between the deed and loan agreement

As mentioned above, and discussed further in Chapter 9, mortgage deeds universally contain clauses incorporating the general terms and conditions of loans, including the would-be power of attorney. However, the following clause, found in a schedule to a mortgage deed from Ireland, is conspicuous in its absence:

"*Letter of Offer*

Letter of Offer dated [date] issued by the Lender to the Borrower and accepted by the Borrower."

Such a clause purports to create a link between the signing of a deed and the borrowing of funds described in a letter of offer, so that one acknowledges and incorporates the other. It is notable that I have not seen such a clause in any UK deed even though the treatment of letters of offer varied considerably across cases. In Bank of Scotland v Waugh (2014), above, the mortgage arose following a credit facility which was not based on a standard letter of offer but on a document which had a signature for the borrower but none on behalf of the lender and so did not qualify as a loan contract under the relevant legislation. Though the circumstances of this loan arrangement differ from the common experience, this aspect of it is similar. As also noted in Section 6.5.3, some lenders required a signed letter of offer and others did not. For no case in the current research was a loan contract signed by both parties presented in court or referred to. In respect to the letter of offer, in many cases the evidence presented for its existence was merely a photocopy of an unsigned version of it, with no evidence that it had ever been received by the defendant, let alone signed by them. All of this was presumed or treated as irrelevant. Meanwhile, the deeds themselves did not refer to the amount of the loan, the interest rate, the period for repayment, or what would constitute default. As the deeds made no mention of these critical points, it is my contention that such deeds could not possibly constitute a promissory note, since the key elements required are absent.[38] And since in many cases no signed letter of offer exists, this is of significance, not only for the lender and borrower but for the Minskian form of the Credit Creation Theory of Banking, which is predicated on a signed promissory note creating the credit.

More remarkable still, in one case reported by an interviewee, a broker had arranged the loan and had been in such a hurry to complete it that they had not ensured that the borrowers signed documents. No deed or letter of offer was signed. The only document executed was a loan application sent by the broker and unsigned by the borrower. Nonetheless, nearly £300,000 in credit was drawn down by the borrower and used to purchase a property, and they made no loan payments at all. The lender[39] brought possession proceedings for the property but as there was no documentation executed, the borrower won the case. The lender wrote to them afterwards, attempting to negotiate to pay a lesser sum, but this correspondence was ignored and at the time of writing approximately 5 years later no further litigation had occurred and the borrower is still living in the property. What this, together with the other findings in this chapter imply, is that the execution of either a deed or letter of offer are not prerequisites for lenders to issue credit.

6.8 Summary of Chapter six

In this chapter I showed that where a deed is not properly attested it is void, retroactive to its creation. I also showed that the power of attorney clause in mortgage agreements, though important to the exercise of a mortgagee's power of sale, is improperly executed and of no effect. I detailed the history of deeds for context, which shows that historically there has been a trend towards less and less formality in their execution.

[38] "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer." Bills of Exchange Act (1882), section 83(1).
[39] Which was a bank/building society and so a creator of banking credit.

In respect to the transfer of land, where this once required a physical ceremony at the site of the land being transferred, the elements involved in this ceremony became incorporated into documentary form. In respect to sealing this could be described as occurring in four stages, with elements of the preceding conveyancing system being conserved at each stage. The transfer of a bundle of sticks or sod of turf as a symbol of the land itself was replaced by an impressed wax seal incorporating pieces of vegetation, then by a generic wafer seal, and finally by a mere indicator of where a seal should be placed. This transition is described in a Baudrillardian sense as moving from the real to a simulacrum (Baudrillard, 1994), with the concept of delivery also undergoing changes that saw it become more symbolic. It would seem that the requirement for witnessing (attestation) of deeds has been somewhat abrogated by the case of Shah v Shah (2002), but I report another case involving a participant in the research which established that where there was evidence that a 'deed' had not been correctly attested, it would not take effect as a deed. Consequently, the mortgage deed was ultimately voided and related charges removed at Land Registry. As to the significance of the would-be mortgagor's success in Bank of Scotland v Waugh (2014), the degree to which this cause of action extends to others is a question of the prevalence of the same conveyancing practices that gave rise to those circumstances.

Similarly, based on one participant's experience there would seem to be defects in the execution of the grant of a power of attorney within most if not all major lenders' standard practices. These involve a power of attorney clause within a booklet of terms and conditions, which, as noted in previous chapters, mortgagors often are not given until after the commencement of litigation. These terms and conditions include a clause purporting to grant a power of attorney from the borrower to the lender as security for the loan. However, as a power of attorney must be granted by deed, this is effected by verbiage in the mortgage deed stating that the terms and conditions are incorporated by reference. As this does not convey a valid power of attorney, the direct implications would appear to relate primarily to preventing mortgagees from exercising a power of sale via one route, though other routes for doing so would be available. However, another less obvious implication is explored in the following chapter.

A further finding is that the standard practice in possession cases is not to rely on a signed letter of offer or other form of promissory note for lenders to establish their claim, and that in many instances such a document does not exist. The implications for the Credit Creation Theory of Banking are discussed in Chapter 10.

Chapter 7 - Securitisation

7.1 Outline

So far in the thesis I have outlined the history of mortgages and issues in how mortgage loans are sold which present a cause of action for mis-selling. I have also detailed how regulatory non-compliance gives rise to a second cause of action whereby such loans, and indirectly mortgages, may be cancelled. In the previous chapter I covered the origins of deeds and how legislative non-compliance in their attestation gives rise to a third cause of action whereby a mortgage may be directly voided. I also identified fatal flaws in an element of all mortgages: the power of attorney.

In this chapter I build on findings from Chapter six and identify a fourth cause of action, albeit more speculatively. Based on my observations of hearings, documentary analysis and a review of case law, I show that some loan accounts appear to have been securitised (sold) more than once. I also show that it is routine practice for lenders to suppress information as to whether loans were securitised, which may emerge from confidentiality agreements linked to the process itself which were obtained in part from observed cases. Based on these empirical findings, I speculate that defects in the securitisation process may give some mortgagors a cause of action against lenders. I discuss pending cases against a major lender, where a firm aims to extinguish the remaining balances on mortgagors' loan accounts. I also identify that Minsky's account of the Credit Creation Theory of banking does not match with empirical observations, since in many cases there is no promissory note for a bank to 'purchase', as he suggests. Rather, based on the empirical findings from documentary analysis and court hearings, I suggest an alternative explanation: that where there is no promissory note, banks may be buying *the right to create securities* rather than a security itself. However, incorporating the analysis from Chapter six as to the power of attorney I also identify how this view would be undermined.

7.1.1 Introduction

This chapter looks at the securitisation of mortgage loans; their sale by lenders to be used as collateral for the issuance of bonds. It begins by examining how securitisation was framed in observed court proceedings and how economic monetary theory implicitly informs these views, before examining some clauses from securitisation transaction documents used in evidence from an observed case.

What these clauses and other findings show is a pattern of concealment of securitisation itself which has several dimensions.

a) Securitisation agreements typically contain confidentiality clauses prohibiting parties to them from sharing details about them.
b) Changes in ownership of charges resulting from such securitisation are not registered with Land Registry, since the originating bank is appointed to hold the legal title on behalf of the purchaser.
c) Accounting entries reflecting this securitisation in the originating bank's internal systems are redacted from accounting statements provided to borrowers.
d) When borrowers ask lenders whether loans have been securitised, false-negative answers are frequently provided, and only persistent querying by borrowers can determine whether this is actually true.
e) Cross-examination in one observed case indicated that there may be minimal if any written documentary record of loans being transferred back from a purchaser to an originator, so that some lenders may be seeking possession based on charges they do not fully own.
f) Courts have adopted a policy, based on historical cases, of not exploring issues related to securitisation.

The case law on the securitisation of mortgage loans is explored to show how this latter policy has developed, and in addition to the above points, accounting entries are examined which indicate that some accounts appear to have been securitised multiple times.

The chapter finishes by detailing the problems that securitisation presents for Minsky's (2008[1986]) account of credit creation and by speculating on explanations that build on the findings from prior chapters. It is postulated, based on evidence from observed cases, that rather than banks simply purchasing securities from customers, they are also purchasing the *right to create securities* in their name, and that this would explain the apparent multiple-securitisations of some accounts indicated from accounting records. However, it is also noted that the defects in the execution of a power of attorney noted in Chapter 6 would undermine these mechanisms, and indeed that this issue or a related one may be the basis of a number of pending court cases for defective securitisation which seeks to extinguish the balances on mortgage loan accounts.

7.2 Securitisation in court

As Dayen (2016, p.206) notes, comments in open court by a judge in Florida indicated a lack of knowledge about a government program that required lenders to restructure loans of eligible borrowers. Similarly, in one case witnessed by this researcher, where a defendant had made extensive arguments related to securitisation, the judge hearing the case admitted to not understanding what securitisation was, and elicited an explanation of it from the representative of the financial institution:

Judge:	"*...just explain to me in simple terms what securitisation is*"
Legal representative:	"*Securitisation,* [Judge]*, is effectively where the benefit of the mortgage is sold to a third party so you might have a primary lender such as* [Mortgagee] *who have the benefit of a loan with* [Mortgagor]*, they may decide because that loan is not performing or because they want to sell it that they may sell the benefit of that loan to another lender, normally a lender who would -*
Judge:	"*Is that factoring, do you remember there used to be factoring, do you remember that. Is that of a debt?*"
Legal representative:	"*Yes, factoring is of a debt.*"
Judge:	"*So this is kind of the opposite of factoring in that this is the assignment of a credit or a benefit.*"
	...
Judge:	"*It is a long time since I have looked at factoring and it is not something that arises often, but it is something along those lines.*"
Legal representative:	"*Yes, effectively* --"
Judge:	"*Just everybody talks about securitisation, I wasn't sure what on earth that meant.*"
Legal representative:	"*Well,* [Judge]*, it is effectively selling the benefit of the loan so here* [Mortgagor] *has a loan for* [sum] *was the original advance.*"
Judge:	"*Yes, because we all know that when you give someone a loan the bank makes money out of that in terms of the interest.*"
Legal representative:	"*Yes.*"

7.2.1 Belief in the Financial Intermediation Theory

Aside from the admission in respect to securitisation, the above exchange between a judge and legal representative is indicative of a misunderstanding this researcher found to be endemic within the judiciary and legal profession – that banks lend money and profit on the interest, like a rental fee. That is, the judiciary and other legal professionals were found to believe in this core element of the Financial Intermediation Theory of Banking and to reject alternative views; particularly the Credit Creation Theory. Attempts at broaching the subject were rebuffed each time. In one observed case, a mortgagor had submitted Werner's (2014a) journal article as evidence (as an exhibit). When they attempted to discuss it they were told by the judicial officer that:

> "*... the court will not be wasting time on completely unmeritorious arguments that there is no such thing as cash...The court is not going to waste time on wholly hopeless arguments*."

Of course, this is not at all an accurate reflection of the arguments Werner raises, nor the evidence he presents, but the mortgagor was cowed by this reprimand and as it seemed clear that the judicial officer would not tolerate a further discussion of this point, the mortgagor did not attempt to follow it much further.

In all of the paperwork submitted by lenders in the observed cases, there was never any indication of an actual loss suffered by a financial institution as a result of non-payment by a mortgagor. Nor was there ever a statement as to the source of funds; no report or accounting statement indicating from what supposed pool of the lenders' or savers' funds the 'loan' was taken, and to which the funds must be restored to prevent their experiencing a loss. Nevertheless, the following ruling was made in a judgment for the same case from which the exchange at the beginning of this chapter was taken:

> "*As a result of* [the mortgagor's] *failure to pay these instalments the bank has sustained a loss*"

It should be noted that none of the observed cases involved specialist lenders without a banking license; that is, there were no true financial intermediaries as defined by Werner (2014a), who could be accurately described as sustaining a loss from lending without qualifying how that might arise. As the above statement was not the result of evidence being provided to this effect, it would appear to have been as a result of the judicial officer having internalised a belief in the Financial Intermediation Theory of Banking. Such views of judicial officers restrict the scope for exploring pertinent issues, if they fall outside of their frame of reference. Judges in other court cases where securitisation was explored have shown varying degrees of openness to considering the issues, and precedents set in one court can significantly influence the approach taken in others.

7.2.2 Case law on securitisation

Gary Watt (2009, p.12) has described this system of precedent set by cases which can be appealed to higher courts as being less scientific and "more like a wheel of fortune: the nature of the legal outcome is determined at the point the wheel stops spinning, and would have determined earlier if the litigants had been at any stage unwilling, or financially unable to give it an extra push.". The latter, this research has found to be a determining factor in some of the extant case law in respect to mortgage repossession actions, and concerning securitisation in particular.

One of the most influential and often-cited cases with regard to securitisation in UK mortgage repossession actions is that of Paragon Finance Plc v Pender & Anor (2005). Meanwhile, in Northern Ireland the cases of Swift 1st Limited v McCourt (2012) and Santander v Carlin & Hughes (2013) are frequently referred to by judges when the question of securitisation is raised.

The former case, often abbreviated to Paragon v Pender, saw the Court of Appeal rule that the securitisation of a mortgage loan did not affect a lender's right to sue a homeowner. Similarly abbreviated, the case of Swift v McCourt reinforced this position and offered recommendations to judges in future cases; that any documents mentioned in testimony should be inspected by each party to a case, and:

> "*...the solicitor acting for the financial institution should warn the proposed deponent on behalf of the financial institution of the serious consequences he or she bears personally, and the consequences for his or her employer, if he or she swears an affidavit that is false in any respect.* "

This warning, it was recommended, should be confirmed within the body of any written testimony on behalf of financial institutions.

> " *If that course is taken, unless there is prima facie* [literally, 'on first face' - that is, sufficient to establish a fact] *cogent evidence that the Plaintiff does not have title, further discovery should not be considered necessary under Article 24 Rule 7.*"

Nonetheless, some homeowners do obtain further discovery and in one case where this occurred, a homeowner drew the court's attention to the following text within the relevant Mortgage Sale Agreement, which stated that:

> "*...the Seller hereby agrees to sell to the Issuer with full title guarantee ... all its right, title, interest and benefit in the Portfolio on the Closing Date in consideration of the Purchase Price and the Issuer agrees to purchase the Portfolio on the Closing Date*."

Said agreement had been signed and executed, with an affidavit from a financial professional testifying to its authenticity.

Not only did this show contradictions between the statements of the bank and the terms of their own transaction documents, but in doing so it indicated that the status of the bank, its authority to be present in the court for such a claim, was in doubt.

The homeowner asked for the case to be dismissed, as the bank did not have the appropriate status to claim possession of the property; to which the judge responded,

> "*If I rule in your favour, the mortgage industry would collapse overnight.*"

A transcript of the hearing was obtained by the homeowner, but notably although the discussion before and after this comment was included, the judge's comment above was omitted.

7.3 Falsehoods in testimony regarding securitisation

In Santander v Carlin & Hughes (2013), one of the judge's rulings on the case referred to Swift 1st Limited v McCourt (2012), mentioned above, and noting that the situation the earlier judge's recommendation had warned against had occurred; the evidence provided by Santander did, indeed, include falsehoods.

This case (Santander v Carlin & Hughes, 2013) had been heard at a lower level of the court, by a judicial officer known as a 'Master', who had given an order for possession in favour of Santander. Part of the evidence provided by Santander was a sworn statement by a solicitor, that the bank had not assigned the loan account; that is, it had not been securitised. This therefore became a fact in the case, as the mortgagor was unable to contradict it, since it was based on information in the lender's possession. After that order was given, a contradictory statement was made on behalf of the bank, that:

"*...it is now admitted that paragraph 15 of the affidavit of Miss Valerie Gibson, solicitor, for the lender Santander plc of 6 December 2012 is simply wrong.*"

What had been a fact; a type 2 statement (Latour and Woolgar 1979, p.81), was no longer so. It was ruled that:

"*...the Order of the court below was obtained improperly by a misrepresentation to the court, misrepresentation put by the advocate for the lender to the Master and put in a sworn affidavit.*"

An order had been provided based upon a certain set of facts. As these were no longer considered facts, as well as for other reasons stated in the judgment, the order predicated on them was overturned:

"...*I conclude therefore that the appeal should succeed and I reverse the order...*"

In relation to another case, observed in the current research, a lender's solicitor made the following statement (albeit in written communication rather than in testimony):

"*We have received confirmation from our client that your mortgage (the subject of the above proceedings) has not been sold, securitised, traded, swapped, assigned or pledged.*"

This statement also proved to be untrue, as the account was later shown to have been securitised. However, as the above statement had not been in the form of written testimony the judicial officer did not treat it as harshly as in the previously-mentioned case. However, in a third case reported by an interviewee, as in the Santander v Carlin case, a lender submitted testimony stating that a loan account had not been securitised and obtained a judgment on this basis. The judgment was later struck out for other reasons, and when the case was brought again by the lender the lender's representative again stated in testimony that the account had not been securitised, before later applying to withdraw this statement, thereby implying that the account had been securitised. This demonstrates a general pattern in mortgage litigation, of denying, avoiding or concealing that securitisation has occurred. When it is admitted to have occurred, legal representatives are keen to emphasise that it has no material effects on the rights of a lender.

7.3.1 Retaining legal title in securitisation

In all observed cases where securitisation was discussed, legal representatives were keen to stress that at all times lenders retain legal title to the loan accounts. They emphasise that, while the benefit, or equitable ownership, accruing from the account was sold to a third party, the financial institution itself retained legal ownership. What this means in practice is that the entirety of the financial institution's interest is sold to the third party, including both legal and equity title, but on the same day another agreement is executed whereby that third party – the new owner of the purchased loan accounts – appoints the original financial institution as the servicer of the accounts. This is analogous to a business owner selling the entirety of the business to a third party, and simultaneously being appointed as its CEO, to act on behalf of that new owner. While the originator remains, on paper, the manager and legal owner, they now act on behalf of another. Added to this, they remain the custodian of the accounts so that there is no actual transfer to the new owner, and therefore no change in the Land Registry's records to reflect the sale.

7.4 Securitisation documentation

To explain this process, mortgage loan securitisation agreements include a transfer of charges, transferring comprehensively all rights and benefits therein (legal and equitable) from the seller to the purchaser. If provided to Land Registry this would have the effect of changing the registered owner of the charge at in the register, from the seller to the buyer in the securitisation arrangement. However, these transfers are not registered. This, Butler (2009) describes as being one of the key elements that make securitisation economically viable, since by refraining from registering their ownership of the charge, the participants in the transaction can avoid paying tax on the transfer. This resembles the practice in the US, whereby the financial industry created a parallel, opaque and ultimately dysfunctional substitute for public registration of title, known as the Mortgage Electronic Registration System (MERS), which tracked servicing and ownership rights over mortgage loans (Peterson, 2011). Whereas in that model, the concealing of a transfer of title occurred centrally, via MERS, in what is described above and by Butler (2009), this concealing of transfer is decentralised; resulting from the parties to the transaction failing to register it with Land Registry.

This failure to register the transfer is rationalised by the appointment of the seller as servicer and holder of the legal title to the charges on behalf of the buyer, in documents executed on the same day. To draw parallels with the tripartite-agreement doctrine on mortgages identified in Chapter 6, there is no 'scintilla temporis' when the buyer of the mortgage loans (and so charges) owns them without the seller holding legal title on their behalf. Therefore, the requirement to register the transfer can be said to not arise. Actual transfer to the buyer is only deemed to occur if the seller becomes bankrupt. This would seem to violate the terms of legislation,[40] but there is an added mechanism within securitisation transactions that would cloud such allegations. Alongside the sale and purchase of a bundle of loan accounts, the selling institution agrees to appoint the purchaser, via a separate deed of power of attorney, so that the acts of the purchaser can be seen as the acts of the seller. The following is one example of just part of such a deed from evidence in one observed case:

> "*The Seller irrevocably and by way of security for the performance of the covenants, conditions and undertaking on the part of the Seller contained in the Mortgage Sale Agreement and the Servicing Agreement HEREBY APPOINTS each of the Issuer and the Security Trustee and any Receiver and/or administrator appointed from time to time in respect of the Issuer or its assets and any delegates thereof from time to time (each an* ***Attorney****) severally to be its true and lawful attorney and in the Seller's name or otherwise to do any act matter or thing which any Attorney considers necessary or desirable for the protection, preservation or enjoyment of that Attorney's interest in the Loans in the Portfolio and their Related Security...*"

And it goes further:

> "*Each Attorney shall have the power... to appoint a substitute who shall have power to act on behalf of the Seller as if that substitute shall have been originally appointed Attorney by this Power of Attorney (including, without limitation, the power of further substitution)...*"

Therefore, as a result of a securitisation transaction, the purchaser of those loans would also obtain a power of attorney to act for the seller, with a rather wide ambit; a power that can ostensibly be delegated through multiple degrees of separation. Particularly interesting in the first quotation above are the words "to do any act matter or thing which any Attorney considers necessary or desirable". These are particularly notable when read together with a clause from mortgage loan terms and conditions, purporting to grant a power of attorney from borrower to lender (abridged from Chapter 6):

> "*...to execute any document do any act or thing... which We (or its substitute or delegate) may reasonably consider appropriate... We shall not be responsible for any misconduct, negligence or default of such substituted person or delegate.*"

[40] Particularly the Land Registration Act 2002.

It would seem, therefore, that a lender presumes to hold the power to act for a borrower in any way it deems 'appropriate'. Simultaneously, the purchaser executes a similar power of attorney in favour of the seller. These reciprocal powers of attorney effectively empower each institution to act for the other, and by extension, by acting in the capacity of the other, they would also be empowered to act on behalf of any third-party legal entity that their counterpart held a power of attorney for.

When considered in light of the ubiquity of power of attorney clauses in mortgage loan agreements identified in the previous chapter (see Chapter 6), the picture quickly becomes murky. If a borrower grants the power to a lender to execute documents on their behalf, and the lender grants a power of attorney to a third party, so that the third party can act for the lender, then the latter grant of power of attorney implicitly contains the former power, and so it would seem that the recipient third party could do anything that the lender was empowered to do, including utilising the power of sale over a borrower's property, discussed in Chapter 6.

If we consider the possibility that some companies may purchase loans from multiple institutions, if the same reciprocal powers of attorney are granted in each case then the range of persons who could potentially act in the capacity of a particular borrower exponentially expands. This is rendered more problematic when considering that, as noted in Chapter 7, at least one large financial institution has granted power of attorney to a number of employees to act on behalf of their subsidiaries. Under such circumstances, it becomes difficult to identify what legal entity is specifically acting at any particular time, and on whose behalf, given the multitude of figurative hats that any particular actor could claim to be wearing. These complexities, in the discourse within the observed court case, were collapsed into simply stating that the lender had sold equitable title and retained legal title, which is arguably true, if they say so (as could, potentially, a number of other interpretations, given the ambiguity noted above). However, lenders usually don't say so. This is one way in which securitisation is concealed. Another, detailed next, is that accounting records relating to it are redacted from borrowers' monthly statements.

7.4.1 Accounting records of securitisation

Where mortgage loans are securitised, this is not reflected in a borrower's account statements, however some mortgagors have obtained more comprehensive records from their lender, in which the securitisation transaction entries, as recorded by the originator, can be observed. The following accounting records from an observed case illustrate how securitisation transactions are reflected in records not usually made available to borrowers, starting first by exploring the entries shown in a single account.

CREATE DATE	VAL DATE	TRAN TYPE	AMOUNT	BALANCE
OPENING BALANCE			0.00	
19/09/08	19/09/08	ADV	192099.00	192099.00

Figure 2: Initial account transaction.

The account initially had an opening balance of 0.00, with a debit entry made for 192,099.00, identified by code 'ADV', or an 'advance' (Figure 2).

742 days (2 years and 12 days) after the advance was recorded in the account, during which time monthly payments had been consistently made, a credit entry was recorded with the transaction code 'CST', which is defined within the glossary provided by the financial institution with the phrase:

> *Capital securitized to on* [sic] *some accounts. They do not affect the account at all*

This was for a sum equivalent to the face value of the initial advance, bringing the account to a zero balance.

CREATE DATE	VAL DATE	TRAN TYPE	AMOUNT		BALANCE
10/08/10	10/08/10	DDR	262.54	CR	192099.00
10/09/10	10/09/10	INT	262.54		192361.54
10/09/10	10/09/10	DDR	262.54	CR	192099.00
28/09/10	28/09/10	CST	192099.00	CR	0.00

Figure 3: Securitisation entry

This entry was followed, on the same day, by a balancing transaction for the same amount, returning the account to its previous outstanding balance (Figure 4); this was identified by the transaction code 'CSF':

> *Capital securitized from-these entries are in internal systems Audit that automatically takes place*

28/09/10	28/09/10	CSF	192099.00		192099.00
28/09/10	28/09/10	AIT	157.52		192256.52
10/10/10	10/10/10	INT	105.02		192361.54
10/10/10	10/10/10	DLI	291.35		192652.89
11/10/10	11/10/10	DDR	262.54	CR	192390.35
10/11/10	10/11/10	INT	678.75		193069.10
10/11/10	10/11/10	DDR	970.10	CR	192099.00
10/12/10	10/12/10	INT	678.75		192777.75
10/12/10	10/12/10	DDR	678.75	CR	192099.00
10/01/11	10/01/11	INT	678.75		192777.75
10/01/11	10/01/11	DDR	678.75	CR	192099.00
10/02/11	10/02/11	INT	678.75		192777.75
10/02/11	10/02/11	DDR	678.75	CR	192099.00

Figure 4: Second securitisation entry and increase in interest rate

It was around a year later that the mortgagor began to encounter financial difficulties, making monthly payments for lesser amounts by cheque ('CHQ') (Figure 5).

112 days after the initial incomplete monthly payment on the 10th of September 2011, on the 30th of December, there are identical CST and CSF entries to before, corresponding to the initial value of the advance. This is followed less than a month later by the first 'Litigation fee' ('LIT').

CREATE DATE	VAL DATE	TRAN TYPE	AMOUNT		BALANCE
10/11/11	10/11/11	OVI	4.10		193262.66
10/11/11	10/11/11	INT	678.75		193941.41
18/11/11	18/11/11	CHQ	100.00	CR	193841.41
23/11/11	23/11/11	MAF	40.00		193881.41
10/12/11	10/12/11	OVI	6.33		193887.74
10/12/11	10/12/11	INT	678.75		194566.49
13/12/11	13/12/11	CHQ	100.00	CR	194466.49
23/12/11	23/12/11	MAF	40.00		194506.49
30/12/11	30/12/11	CST	192099.00	CR	2407.49
30/12/11	30/12/11	CSF	192099.00		194506.49
30/12/11	30/12/11	AIT	437.90		194944.39
9/01/12	9/01/12	CHQ	100.00	CR	194844.39
10/01/12	10/01/12	OVI	3.01		194847.40
10/01/12	30/12/11	AOI	5.46		194852.86
10/01/12	10/01/12	INT	240.85		195093.71
23/01/12	23/01/12	MAF	40.00		195133.71
24/01/12	24/01/12	LIT	76.00		195209.71

Figure 5: Securitisation entries again

On the same date, a new code 'TAR' appears; 'Manual transfer arrears to capital' - a charge repeated the following month, alongside a solicitors fee ('SOL') (Figure 6). Miscellaneous charges also appear around this time ('MIS').

24/01/12	24/01/12	TAR	76.00	CD	195209.71
24/01/12	24/01/12	MIS	36.00		195245.71
3/02/12	3/02/12	CHQ	100.00	CR	195145.71
3/02/12	3/02/12	CHQ	80.00	CR	195065.71
8/02/12	8/02/12	CHQ	100.00	CR	194965.71
10/02/12	10/02/12	OVI	10.57		194976.28
10/02/12	10/02/12	INT	678.90		195655.18
2/03/12	2/03/12	CHQ	100.00	CR	195555.18
10/03/12	10/03/12	OVI	12.20		195567.38
10/03/12	10/03/12	INT	679.02		196246.40
23/03/12	23/03/12	SOL	150.00		196396.40
26/03/12	26/03/12	TAR	150.00	CD	196396.40

Figure 6: Manual transfer of arrears and solicitor's fee

A similarly unidentified 'Miscellaneous third party' ('MTP') charge appears a few weeks later for a substantial amount.

What this appears to reflect is the securitisation of the loan and then its subsequent repurchase (Figures 3, 4 and 5), with a pair of entries taking place on each date; the first apparently when the account was securitised, and the second when the process was reversed prior to the initiation of litigation. However, the definitions provided by the financial institution specify that this transaction is an internal process, which raises questions about the accounts these transactions relate to.

Via personal communication, some details were conveyed to this researcher by an individual who had worked processing legal documentation executed as part of the securitisation process. They had privileged access to documents which showed the agreed purchase prices for loan accounts sold by originators. The prices paid, they said, were usually one to two percent above the face value of the loans. The receipt of such funds has relevance for a mortgagor since the terms and conditions of mortgage loans in the UK typically contain an obligation to offset any funds received against debts owed by the borrower. In the above account, this appears to have taken place, although the effect of it is immediately negated by a countervailing transaction. Records from another account at the same lender, provided via a network of litigants, show a similar pattern, though in this case the repeating of the pairs of transactions make less sense, occurring within two days of each other (see figure 7):

1/10/10	1/10/10	DDR	148.50	CR	160059.56
1/11/10	1/11/10	INT	132.05		160191.61
1/11/10	1/11/10	DDR	148.50	CR	160043.11
2/11/10	2/11/10	CST	160043.11	CR	0.00
2/11/10	2/11/10	CSF	160043.11		160043.11
2/11/10	2/11/10	AIT	4.41		160047.52
4/11/10	4/11/10	CST	160043.11	CR	4.41
4/11/10	4/11/10	CSF	160043.11		160047.52
4/11/10	4/11/10	AIT	8.81		160056.33
1/12/10	1/12/10	INT	118.82		160175.15
1/12/10	1/12/10	DDR	148.50	CR	160026.65

Figure 7: Double occurrence of securitisation transactions within two days

Given that no other significant changes occurred on the account during this time, it would seem that this may indicate the same account being securitised twice. These entries were followed, years later, by a third pair of securitisation entries (see figure 8):

1/06/17	1/06/17	INT	111.00		180110.00
1/06/17	1/06/17	DDR	111.00	CR	179999.00
1/07/17	1/07/17	INT	111.00		180110.00
3/07/17	3/07/17	DDR	111.00	CR	179999.00
18/07/17	18/07/17	CST	179999.00	CR	0.00
18/07/17	18/07/17	CSF	179999.00		179999.00
18/07/17	18/07/17	AIT	60.87		180059.87
1/08/17	1/08/17	INT	50.13		180110.00
1/08/17	1/08/17	DDR	111.00	CR	179999.00
1/09/17	1/09/17	INT	111.00		180110.00

Figure 8: Third pair of securitisation transactions

In each instance, as with the other account, the outstanding balance reaches zero before being restored to its previous level, and these pairs of transactions were all omitted from the borrowers' monthly statements, even though other transactions at this time did appear. While three pairs of transactions are questionable, a commentator on financial affairs with more than ten years of experience in banking found something even more striking: an account where such transaction pairs appear five times. He has suggested that these indicate the financial institution was selling the same account multiple times (Goldberg, 2018). Aside from such anomalies at the level of accounting data, documentary records relating to securitisation are also problematic.

7.5 Documentary shortcomings and fabrication

The documents which embody securitisation agreements show some deficiencies. This is one example of a clause from a mortgage sale agreement provided as evidence in an observed case, which indicates incomplete disclosure between the parties involved:

> "*Each Loan and its Related Security is valid, binding and enforceable in accordance with its terms and is non-cancellable...*"

In light of the findings of Chapters six and seven, this would seem to be inaccurate in many cases, so that the purchaser of such loans and subsequent investors in bonds issued face an undisclosed risk. Should borrowers cancel the underlying loans, the income stream upon which the payments from the bonds are based would cease. However, in such instances the accounts would be classified as non-performing, and so the originator (the original lender) would undertake to substitute them for performing loans.

This research has found that although a series of template documents exist to execute the repurchase of non-performing loans from an SPV or other holder, they may not always be used. In an observed case, cross-examination of one financial institution's head of securitisation revealed that the company's practice is to simply exchange CDs or DVDs containing a schedule of the accounts to be substituted. While it is possible that legal documentation is executed to formalise or memorialise the arrangement, it is also possible that it isn't, or that it may be executed after the fact if necessary. Dayen (2016, p.56) reported that the fabrication or disingenuous execution of documents was a common approach in the US, to conceal defects and incomplete securitisation practices in respect to the transfer of mortgage loans. While it can't be concluded that this occurs in respect to securitisation in the UK, it is speculated to be possible. In Ireland at least, the practice known as robo-signing has been discovered by mortgagors as a result of litigation.

An interviewee in the current research recounted an instance where a man had signed an affidavit on behalf of a lender, stating that he was an employee of that financial institution. However, at the time the company in question had no employees and evidence of this was presented when the man was cross-examined in court. It emerged that the same man had signed multiple such affidavits for multiple companies, claiming to work for each one.

This is an identical practice to that related by Dayen (2016, p.128), wherein people were hired to sign documents they weren't even given time to read, and in doing so, to claim to hold positions at companies that they have never held. In the US, such signatures were then attested after the fact by people who weren't present in a practice echoing that of conveyancing solicitors described in Chapter 6. Investigations are ongoing into whether the fabrication of signatures on written testimony for possession hearings is a routine and widespread practice in UK banking. Known as the Bank Signature Forgery Campaign, it has received the support of MPs and the All-Party Group on Fair Business Practice, as part of the investigation, have been in contact with a least one major lender (Verity, 2019).

7.6 Concealing of securitisation

Whether the above examples of misstatements on whether a loan was securitised were intentional or not, the securitisation agreements viewed in this research typically contained non-disclosure agreements, whereby all parties to the transaction agree to keep the sale of the loan account confidential:

> "*None of the parties hereto shall during the continuance of this Agreement or after its termination disclose to any person, firm or company whatsoever any information relating to the business, finances or other matters of a confidential nature*"

However, there were exceptions stated, including for requirements of law, or where ordered or directed by a court. It is therefore in compliance with such agreements for financial institutions to avoid much discussion of securitisation in possession cases unless a judge instructs them to, and wherever possible to obscure the fact that it has happened at all. Given the findings presented above it appears that a resulting policy of non-disclosure may be reflected not only in the conduct of litigation but also in the monthly statements sent to customers. What follows is a speculative account as to why there might be a need for confidentiality.

7.7 Minsky and securitisation

Minsky's (2008[1986]) account of credit origination suggests that the originator purchased a loan agreement – a security – from the borrower. But for a securitised mortgage, it can't be as simple as that, for a few reasons. Broadly, there are considerable differences between an unsecured loan and a secured loan, as a number of other elements are present in the latter arrangements. As a result of the multiple and often reciprocal powers of attorney attendant within securitisation agreements, what a purchaser of a portfolio of loans is actually buying is unclear.

To explain this, as noted earlier in this thesis, a signed loan agreement does not exist in all cases, so that for at least some, if not a large number of, instances in the UK (including loans which have certainly been securitised), there is not a separate loan agreement in this sense for an originator to purchase, unless an agent of the originator were to execute one themselves. This is certainly a possibility, based upon the power of attorney clauses detailed in Chapter 6. However, as shown in Chapter 7, it would be possible for a successor in title to a loan portfolio to do the same; to create a promissory note in the name of a borrower they had no direct connection to. In this way, the physical signatory on a loan agreement intended to serve as a security analogous to a promissory note might be an individual several steps removed from the borrower, potentially in a different country and working for an organisation unknown to the borrower. Nonetheless, the name under which such a document would be executed could still, legitimately, be that of the borrower themselves, as if it were their act.

A second reason why Minsky's account does not fully match the observed phenomena is that such an interpretation implies an arms-length exchange between parties. Just as something approximating a US 'loan note' might be executed by any one of a number of entities involved in a securitisation transaction (Dayen, 2016), the acts of selling and purchasing are similarly entangled. When conceiving of a sale by one party and purchase by another, one might visualise a cash transaction whereby a document is exchanged for a pile of coins or bank notes. But the transaction itself is not of this nature. A 'borrower', for lack of a better term, first submits an application; a document which appears to initiate the transaction. This is provided first, before any consideration is given by the so-called 'lender'. Following this, there may be an intermediate document known as an 'agreement in principle', although this is not present in all cases, and does not appear to be a necessity or of particularly significant effect. The next step is for funds to be 'released' to the legal representative of the financial institution, in what appears to be a kind of escrow, or conditional custody. The next significant document to be executed is a mortgage deed, whereby a charge over property is granted to the lender and a set of terms and conditions are agreed to, which include a power of attorney.

At this stage, the fiction is entertained that the borrower is already the owner of property they have not yet bought, and sometimes this is facilitated by the document remaining undated until it is legally valid to do so; when the funds have been transferred to the vendor of the real estate. Of course, funds are not actually transferred. Rather, a debit entry is made in the loan account, in the name of the borrower and a credit entry is made in the nominated bank account of the vendor. While the word 'transfer' may be used to describe these functions, it is again a term of art.

However, the term 'security' could apply to a promissory note, a mortgage deed, or even a power of attorney. Indeed, this term is used in the latter sense in legislation, as noted in section 6. While 'securities' are sold by financial institutions to SPVs as part of securitisation transactions, what are also sold, or transferred, are the rights to create new securities in the names of borrowers; something obscured by the sometimes-arcane language of the documents, but arguably quite evident from a careful reading. What this means for borrowers as such is not clear from this fact alone, but contingent upon the capacities of the parties.

If a financial institution were to sell a borrower's security which they had purchased in an arms-length transaction, then their subsequent sale would be analogous to an uncrossed cheque transferred by endorsement to a new bone fide purchaser for value; someone therefore entitled to receive its value from the maker. However, if a financial institution were to sell a borrower's security as an agent (in some capacity) of the borrower, then the rights of the respective parties would be determined by the nature of that agency, and it could be that the borrower would retain some right to the value of that security.

So to summarise, a power of attorney granted from a borrower to a lender by means of a mortgage deed could authorise that lender to sign a promissory note in the name of the borrower, and it would take effect as the borrower's obligation, provided that the original grant of the power of attorney were valid. This in itself could explain why some lenders don't require a signed promissory note from a borrower, if they have the power to execute one, once the borrower signs the mortgage deed. It would also be consistent with the Credit Creation Theory of banking, but would represent a departure from Minsky's explanation of the origination of banking credit identified in Chapter 1, as arising from the purchase of securities. Rather, it presents a narrative whereby financial institutions purchase not the security itself from a customer, but the *power to create securities*.

Once a lender has such a power of attorney, if it were to then securitise the related loan account, a second stage of the process would initiate. Ramifying powers of attorney apparently emerge from such securitisation agreements, so that an original power of attorney granted from a borrower to a lender can become multiple copies (effectively) of that same power, potentially utilisable by a web of distantly connected parties unknown to the borrower. Applying this speculative explanation to observations, it is therefore conceivable that the multiple instances of securitisation transaction entries identified in the accounting records earlier in this chapter could reflect multiple exercises of that power of attorney to execute promissory notes and/or deeds; either by the lender itself or other parties.

However, there is a flaw in such a scenario. It was noted in section 6.6 that the standard practice of relying upon a clause in terms and conditions to give rise to a power of attorney was raised by a mortgagor and the legal representative for the lender ultimately conceded that no such power arose. If such a power of attorney was in all cases invalid (and it seems that it is), this would have implications for the account of securitisation detailed above. It might even mean that borrowers had a cause of action against lenders for creating securities in their name without authorisation.

Whether this is the case is unclear, but at the time of writing a large number of cases are pending against a major UK financial institution in relation to deficiencies in the securitisation process.

7.8 Pending court cases regarding securitisation

The precise cause of action is not known, but from limited information provided to this researcher via a network of litigants, it would seem that aspects of the securitisation process depend upon there being a valid power of attorney in place between lender and borrower, so that the deficiencies outlined in section 6.6 may have fatally undermined aspects of some securitisation arrangements. A simpler possibility would be that, as noted in Chapter 7, (on Cancellation and forging of signatures), there could be an incomplete reassignment of loans to the originator from the purchaser of them, when a mortgagor defaults. Given the complexity of securitisation transactions, and the propensity of financial institutions, shown so far in this research, to favour expediency over accuracy and completeness, it is conceivable that either for the reasons speculated on here, or for others, serious defects may exist in the securitisation process. Indeed, Wainwright (2009, pp.378-379) reported that lawyers and financial engineers involved in adapting securitisation to the UK context almost terminated the project due to the complexity of doing so. It's just possible that significant flaws remain in the processes they developed. Certainly, the confidentiality clauses and standard denials from lenders that accounts were securitised suggest a degree of guardedness which could point to underlying deficiencies.

What is known about the pending cases is that the company organising them is doing so on a no-win, no-fee basis, and aims to reduce the loan balances to zero, with their fee equating to 30% of the loan balance should they win.

7.8.1 Pending court cases regarding securitisation

Given the fatal flaws identified by section 6.6 in the execution of powers of attorney as part of mortgage loan agreements, it is possible that the Minskian account does not describe the current relationship between bank and customer. If so, the alterative account stated above should be evaluated. Minsky (2008[1986]) identifies the activity of banking as the purchasing of securities. In a mortgage loan agreement, three securities are transferred from customer to bank: a promissory note, a mortgage deed and a power of attorney. If there is no promissory note, and no valid power of attorney, that leaves only the mortgage deed as the ubiquitous component of all mortgage loan agreements. However, these do not fulfil the criteria for a promissory note[41] reported in section 1.1.2, as typically these do not identify a 'sum certain', but rather are in the form of what is known as an 'all monies mortgage'; one which charges property for all, though unspecified, debts of the mortgagor to the mortgagee.

If, indeed, this latter scenario is accurate then it presents problems for the Credit Creation Theory of Banking as currently expressed. This would not be by any means fatal to the theory, as its fundamental tenets can remain intact even without customers' promissory notes being the basis of money creation. However, this does identify a need to re-evaluate and possibly modify this aspect of the theory.

7.9 Summary

The findings reported above are inconclusive with respect to the Credit Creation Theory of Banking, providing neither firm support nor evidence against it. However, the data are consistent with it, and perhaps more importantly, they support a methodological finding - that documentary analysis of bank statements can be a useful tool in investigating the theory, provided that non-redacted documentation is obtained. Further, it is found that court processes involving bank accounts present richer opportunities for examination of records not commonly

[41] Under section 83(1) of the Bills of Exchange Act 1882.

available outside of this context, and together with the utilisation of data access rights,[42] may offer perspectives on banking processes that could advance understanding of the field.

This is further reinforced by some findings late in the current research, where there were some interesting developments in one of the observed cases. A mortgagor had pressed for further evidence from a financial institution on the question of the origin of funds for the loan, such as the 'advance' entry shown in Figure 2 of Chapter 7. The financial institution, after considerable evasion, stated that the only record they had as to the origin of funds was a line in an excel spreadsheet, relating to the 'Advances Pending Ledger', which was reproduced within the written testimony. It did not, in itself, provide a clear indication as to the ultimate source of funds, however I suggest that the financial institution's admitted inability to establish where the money had come from in itself provides some support for the Credit Creation Theory, even though not being proof positive thereof. This point is returned to in the conclusions.

Another finding of this research is that the belief of the judiciary and legal professionals in the Financial Intermediation Theory of Banking described by Werner (2014a) is instrumental in framing their understanding of possession proceedings, and in dictating the judgments given.

[42] such as under the Data Protection Act (1998); Data Protection Act (2018) or the Directive 95/46/EC; the General Data Protection Regulation.

Chapter 8 - Arrears and Default

8.1 Introduction

This chapter begins by examining how lenders, courts and regulators deal with missed payments on loans and reports on a case where a lender breached regulations by simultaneously 'capitalising' the missed payments, so increasing the monthly amount due on the loan, and also commencing possession proceedings on the basis that the borrowers were in default.
To investigate this, additional methods are utilised to that employed in the rest of the thesis, using two quantitative datasets in relation to possession hearings in the UK together with empirical ethnographic observations. The number of possession hearings brought by a financial institution over approximately one month are compared between two UK regions; England and Wales and Northern Ireland. The findings are intended to indicate whether the number of hearings in Northern Ireland was reduced to a comparatively greater degree than in England and Wales, in the wake of a case in that province which showed improper account management practices by that banking group. Ethnographic observations are reported of court practices in respect to arrears and quantitative data was collected on the time allocated for hearings; these quantitative and qualitative findings are analysed together. The conclusions are consistent with those of Whitehouse and Bright (2014), that the time allocated for possession hearings is unreasonably short and that most defendants approaching such hearings are unprepared and have inadequate access to legal advice.

8.2 Arrears management

8.2.1 Arrears Management prior to court

When a borrower falls behind on their loan payments, the total amount of the aggregated missed payments is known as the 'arrears', so that an account with such an accumulated balance will be said to be 'in arrears'. When this occurs, the lender has broadly two options by which they can deal with this; they can either litigate and seek possession of the property charged to secure the loan, or they can engage in what is known as ‘forbearance’. Their course of action is dictated in part by guidance from the financial regulator, the Financial Conduct Authority (FCA), which was formerly known as the Financial Services Authority (FSA), from which the Prudential Regulatory Authority (PRA) is also derived, with the latter now operating as a department of the Bank of England. The latter had been charged with a greater range of financial regulation, prior to the creation of the FSA by the Financial Services and Markets Act (2000), from which the current FCA derives much of its statutory power. In respect of mortgage loan agreements, these are identified as being regulated by the FCA (then FSA) by section 61(3) of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001. The majority of the FCA's regulations on mortgage loans are expressed in the Mortgage Conduct of Business Sourcebook, commonly abbreviated to 'MCOBS' (FCA, 2017b), which is based in part on the organisation's Principles for Businesses, breach of which can leave a regulated entity liable to disciplinary action (FCA, 2017c). Consequently, in handling arrears on mortgage loan accounts, lenders are under an obligation to do so with due skill, care and diligence, while paying due regard to the interests of its customers and treating them fairly; these comprising principles 2 and 6, respectively (FCA, 2017c p.12). This means that when a mortgagor falls behind in their monthly payments, a lender is expected, under MCOBS 13.3.2.A, to make reasonable efforts to reach an agreement with the customer to address the payment shortfall, and to allow a reasonable period in which to do so (FCA, 2017b p.504). The section stipulates other necessary adjustments, and if a payment plan cannot be arranged, to allow the mortgagor to remain in possession for a reasonable length of time to arrange a sale of the property. Possession of the property is only to be sought after all other reasonable attempts to resolve the situation have failed. In managing mortgage loan accounts in arrears, section 13.3.4.A (Ibid) stipulates the following:

> *(1) a firm must consider whether, given the individual circumstances of the customer, it is appropriate to do one or more of the following in relation to the regulated mortgage contract or home purchase plan with the agreement of the customer:*
>
> *(a) extend its term; or*
>
> *(b) change its type; or*
>
> *(c) defer payment of interest due on the regulated mortgage contract or of sums due under the home purchase plan (including, in either case, on any sale shortfall); or*
>
> *(d) treat the payment shortfall as if it was part of the original amount provided (but a firm must not automatically capitalise a payment shortfall where the impact would be material); or*
>
> *(e) make use of any Government forbearance initiatives in which the firm chooses to participate;*

As the course of action described in sub-section (d), above, would increase the effective principal balance on a loan, it could result in changes to a customer's required monthly payments, which in turn could make it more difficult for a borrower to service a loan. Therefore, the following limitation is specified (FCA, 2017b p.504):

> *In MCOB 13.3.4AA, the impact of a capitalisation would be material if, either on its own or taken together with previous automatic capitalisations, it increased:*
>
> *(1) the interest payable over the term of the regulated mortgage contract by £50 or more; or*
>
> *(2) the contractual monthly repayment amount under the regulated mortgage contract by £1 or more.*

It is worth noting, however, that dishonest practices can be utilised by lenders to artificially create arrears. One interviewee reported that though they tried to responsibly engage with their lender prior to missing any monthly payments, they were told that no adjustments or forbearance could be arranged until they had missed a few payments. They were effectively induced into entering arrears, and when they did they expected that some forbearance would be forthcoming, when instead the lender took a heavy-handed approach that escalated matters towards repossession. This matches the findings of Davies et al. (2016) as well as those reported by Dayen (2016) in the US.

More concerning behaviour was reported to me in personal communication by a non-interviewee mortgagor. While they were working outside the UK, they had set up a direct debit on a UK bank account to pay monthly instalments. Even though the funds were available, the direct debit was blocked by their lender, so that through no fault of their own, the borrower ended up in arrears on the loan. Similar, if more pernicious activity by lenders was reported by an interviewee who informed their lender that they were going to be hospitalised. While they were in hospital, the lender began taking larger monthly payments. When the interviewee complained about the conduct they were told by the customer service employee they spoke with that the lender had concluded, incorrectly, that the borrower was going to die. The interviewee was aware of another borrower where the same thing had occurred, except that this person did actually die and the changes to the borrower's repayments were only discovered posthumously by their family. While it is beyond the scope of the current research to determine the prevalence of such conduct, it appears that under circumstances of a borrower experiencing serious medical issues requiring hospitalisation, some lenders will accelerate the repayment of mortgage loans. It hardly needs to be stated that depriving such borrowers of their own funds at such times may in some cases place their life in jeopardy by reducing their capacity to pay for medical treatment. It also, of course, significantly raises the chances of arrears arising.

8.2.2 Court treatment of arrears

The total arrears on an account is one of the first issues considered in a possession hearing, as a judge will usually seek a statement from the lender's legal representative as to what the current balance of missed payments is, what the monthly payments should be, and whether the mortgagor has made any attempt to reduce the outstanding arrears. The defendant is then given the opportunity to explain their lack of adequate payment; a prompt which for the most part is an invitation to testify against themselves, as there is little to be said within those terms of reference that can alter the outcome, except for an offer to somehow pay off the outstanding sum while maintaining monthly repayments. If the court is satisfied that the borrower is likely to be able to pay off the arrears (or the entire balance) within a reasonable period of time, then as outlined in the case of Bank of Scotland v Zinda (2011), a court has the power, under the Administration of Justice Act 1970 section 36[43] to adjourn proceedings, to stay or suspend the execution of an order, or to postpone the date for delivery of possession. This provision cannot be nullified by the terms and conditions of a particular mortgage agreement; indeed this discretion on the part of a court was described by the judicial officer in the case of Northern Bank Ltd v Jeffers (1996) as "a statutory qualification to the contractual rights of mortgagees", which in his view was a rule of public policy. In Northern Ireland there is a nuanced difference in how this discretion in applied relative to England and Wales. In the latter jurisdiction a court may determine what constitutes a reasonable period, and in some circumstances this may extend to the remaining lifetime of the mortgage loan, as outlined in Cheltenham & Gloucester Building Society v Norgan (1996). Contrastingly, in Northern Ireland a court's exercise of this discretion should be based on the 'best realistic proposal' of a borrower, as described in the case of National & Provincial Building Society v Lynd (1996), so that if a borrower can afford to pay off the accumulated arrears sooner then it considered fair that they should do so. This means that for a court to exercise this discretion in Northern Ireland, the judicial officer must

[43] (amended by the Administration of Justice Act, 1973 section 8), and in the case of loans regulated by the Consumer Credit Act (1974), sections 129,135 and 136 of that act. This applies to real estate containing a dwelling (the main focus of this research). See Wallace (1986) and Whitehouse (1999) for detailed accounts of judicial discretion in respect to arrears, as well as Birmingham Citizens Permanent Building Society v Caunt (1962).

first evaluate the financial position of a borrower. In practice this means that defendants to mortgage possession actions in the province are frequently asked, by the court, to complete a statement of income and expenditure that itemises their weekly or monthly expenses. In this researcher's experience, judicial officers frequently remind defendants that, as these documents can potentially form the basis of a binding order from the court, they should ensure that in completing the form they make allowance for periodic costs such as medical bills so that any payment plan agreed can be realistically maintained.

8.3 Arrears mismanagement: Bank of Scotland v Rea, McGready and Laverty (2014)

A 2014 Northern Ireland ruling considered instances where it appeared that a material capitalisations of arrears had taken place, and that despite this, the financial institution proceeded to seek possession of the secured property. That is, the lender sought to take the contradictory action of exercising both categories of options in respect of customer arrears; both litigating and engaging in forbearance. The kind of forbearance step employed was not of a permitted nature, and certainly engaging in this simultaneously with litigation was abusive, for reasons best illustrated by considering the judgment in that case.

In Bank of Scotland v Rea, McGready and Laverty (2014), Bank of Scotland was accused of capitalising the arrears balance on three mortgage accounts. The bank's defense to this claim was essentially that its act of unilaterally adding the arrears balance to the capital sum owed on each account did not qualify as 'capitalisation' of arrears because the company did not define it as such. On instruction from Master Ellison, the testimony of the bank's solicitor, as reported in the published case (specifically that concerning Laverty), initially stated the following:

> *2. I make this Affidavit from facts and matters within my own knowledge which are true or from information provided to me by the Plaintiff or (sic) any fact or matter which is not within my knowledge, I identify the source and confirm that it is true to the best of my information and belief.*
>
> *…*
>
> *4. The arrears on the mortgage account currently stand at £15,448.69 as of today's date and at no time have the mortgage arrears been capitalised.*

The Master noted that subsequent evidence showed this to be false; that four such capitalisations had occurred, commenting:

The averment denying that any capitalisation had ever taken place was quite erroneous - even by the very restricted definition of the word relied on by the plaintiff right up to and including the submissions of its Senior Counsel at hearing.

Although the Master invited the solicitor himself, Mr Carvill, to clarify his previous statement, a colleague of his submitted subsequent testimony that attempted to defend his statements:

Paragraph 4 of the affidavit of Cahal Carvill is correct and relates specifically to the arrears on the account as at 30 May 2013, being £15,448.69 in which we were instructed upon (sic) and which were the subject of these proceedings. We obtained this information from our computer system which is linked to the Plaintiff's internal computer systems and details the information about the Defendants' mortgage account. At the swearing of the affidavit the computer system was checked and it confirmed the arrears of £15,448.69 remained on the account. If the aforementioned arrears had been capitalised they would not have appeared on the bank's computer system at all and our firm would have then been de-instructed. Our Cahal Carvill, therefore, was content to make the statement as at paragraph 4.

However, despite the bank's attempts to redefine the terms of reference so as to excuse their actions, the Master demonstrated by reference to numerous authorities that:

"Capitalisation" is indeed simply "adding the arrears to the mortgage balance". The plaintiff's interpretation seems perversely purposive. (It suggests a football team which defines "goal" as something that can only be scored by itself.)

Consequently, he noted:

It … appears to be the plaintiff's practice … "to use capitalisation in circumstances where the customer has not demonstrated sustained ability to meet future repayment" – those being exactly the sort of circumstances which the FCA presumably envisaged when they ruled that a firm "must not automatically capitalise" a payment shortfall.

Concluding that:

The plaintiff's reliance on extinguished arrears may fairly be described as double-billing. Unilateral consolidation with double-billing creates very real problems for borrowers, their advisers and the court. To the extent at least of the double-billing, it is unconscionable.

The Master adjourned two of the three cases, while ruling in the bank's favour on the third case. However, that was not the end of this matter as the Attorney General for the province publicly accused the bank of "Criminal Fraud" in respect of its actions (Campbell, 2014a). Following a lengthy process of investigation, the FCA (2017d) announced that the Lloyds Banking Group (of which Bank of Scotland is a part) had agreed to provide £283 million in refunds and compensation to 590,000 customers affected by the same mismanagement, or 'double-billing' in respect of arrears. This included various administrative fees incorrectly applied, as well as legal fees unfairly charged, with payments also intended for potential distress, inconvenience, and consequential losses. Similar miscalculating of arrears has been seen in Ireland; where the lender Start Mortgages DAC added arrears figures to the capital amount borrowed, while simultaneously relying upon the arrears as a cause of action in court (Weston, 2017). This may have affected thousands of borrowers, and the company, which was previously one of the most prolific in taking court action against borrowers, announced that it was suspending possession actions while they corrected this practice.

In the period leading up to the Bank of Scotland v Rea, McGready and Laverty (2014) judgment, notices were placed around the Belfast High Court, where all of the province's mortgage possession hearings take place, indicating that the master of the court did not intend to hear cases brought by the Lloyds Banking Group without a certificate stating, in essence, that arrears on the account had not been capitalised (see Appendix 8). One observed hearing shortly before this time was very brief, as the judicial officer indicated that the case would not be proceeding pending a judgment in another case, without specifying it by name. After the judgment was made public, in another hearing a mortgagor asked the judicial officer why only Lloyds cases were suspended, and was told that it was merely because that was the only lender against which a case had been brought. This suspension was the beginning of a prolonged hiatus in Lloyds Banking Group possession litigation which extended for a time across the whole of the UK. From the recollection of this researcher and anecdotal reports, including several of those interviewed for this research, as of spring 2017 the level of litigation did not appear to have returned to volumes seen before the 2014 judgment.

8.4 Suspension of cases following an influential judgment

8.4.1 Context of cases' suspension

The 2014 case of Bank of Scotland v Rea McGready and Laverty (discussed above) saw the Lloyds Banking Group suspend all repossession activity across the UK for a year (Campbell, 2014b; Hartley, 2015), and this has continued to be identified as an issue in the group's annual reports

(Lloyd's Banking Group 2016, p.243; 2017, p.225; 2018, p.239). While the company recommenced court actions in 2015, ethnographic fieldwork observations and anecdotal reports suggested that as of 2017 the pace of the group's repossession cases in Northern Ireland, where the case was heard, had not returned to its previous levels.

A hypothesis was developed that, potentially as a result of the above case, the number of court hearings concerning repossession actions by the Lloyds Banking Group remained at a depressed level in Northern Ireland relative to England and Wales.

To test this hypothesis, a comparison was made of the number of hearings of mortgage repossession cases in the two UK jurisdictions.

8.4.2 Data

Data was collected from the online Court Listing Service Courtserve, operated by Courtel Communications Ltd., partially as a public service on behalf of the Ministry of Justice. Among other information, it provides publicly-accessible daily listings of cases in county courts across England and Wales. Over a period from the 3rd of April to the 2nd of May 2017, 20 days' worth of data were collected from 149 county courts, of which 3 were discarded as they dealt only with Family Court cases, which are not relevant to the current research.

Similar data was collected from the website of the Northern Ireland Courts and Tribunals Service concerning cases listed as Summonses In Chambers in the Chancery Division of the Belfast High Court between the 28th of March and the 5th of May. The longer window was intended to compensate for the slightly longer holiday period, so that 20 days' worth of data could still be obtained (although for 3 of these days no repossession cases were listed).

8.4.3 Method

The data was processed to identify hearings of each repossession action by a financial institution, with the name of the institution recorded as well as the court in which the hearing took place. This data was collated and aggregated based on company group structure. A total of 1,582 hearings were recorded for England and Wales, involving 135 companies, which were reduced to 82 entities, once group results were consolidated (some of which 'groups' being companies which were closely associated, rather than jointly controlled). The 51 least litigious companies, which each had less than 13 hearings in total, were combined together and grouped as 'Others', with the resulting 32 categories plotted below.

For Northern Ireland, 278 hearings were recorded for 47 companies, which were consolidated into 36 (combining results for groups). The 18 companies with fewer than 4 hearings each were combined into the category 'Others' and the resulting 19 categories were plotted below.

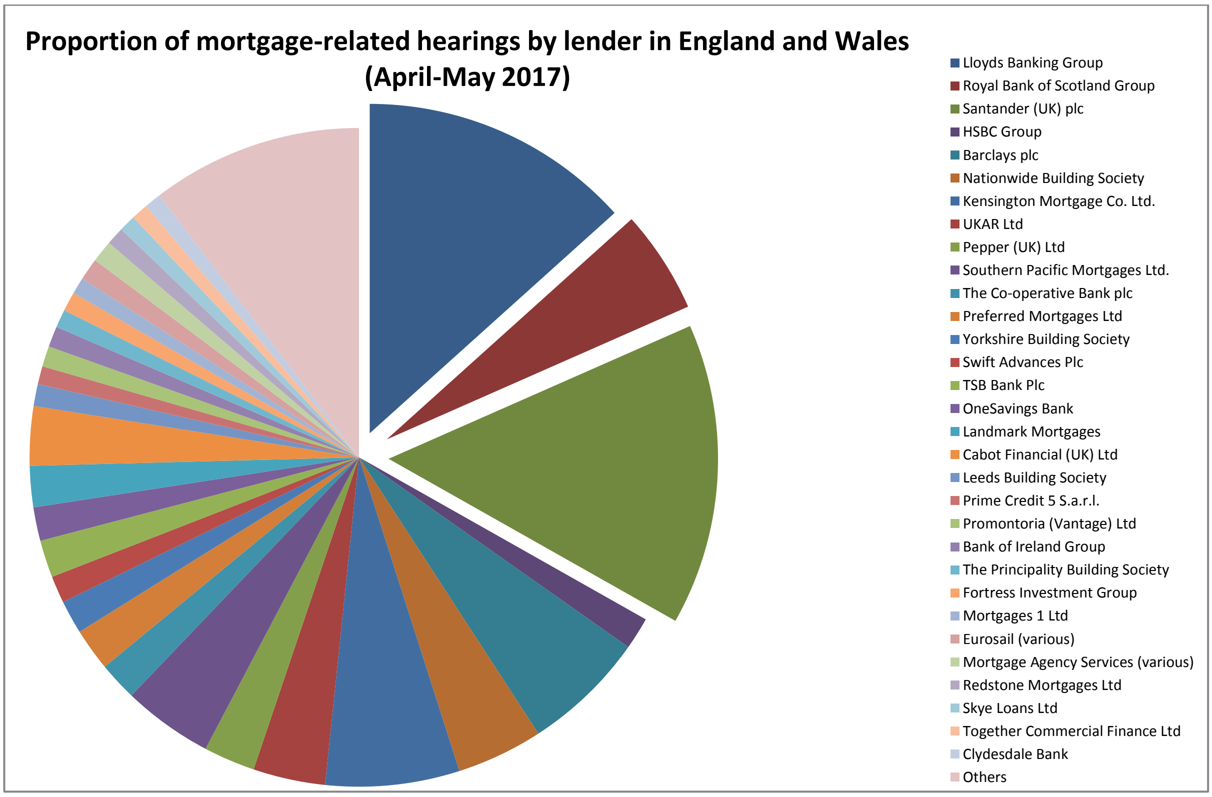

Figure 9: Proportion of mortgage-related hearings by lender in England and Wales (April-May 2017)

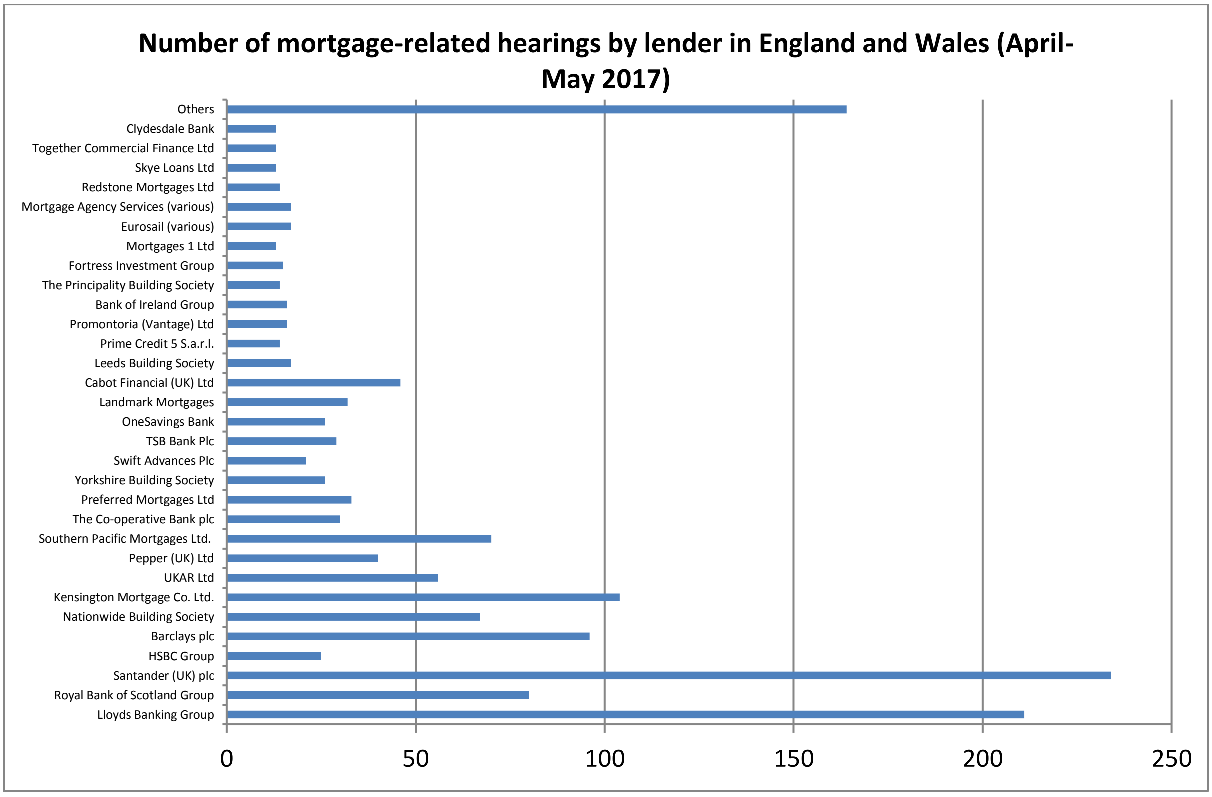

Figure 10: Number of mortgage-related hearings by lender in England and Wales (April-May 2017).

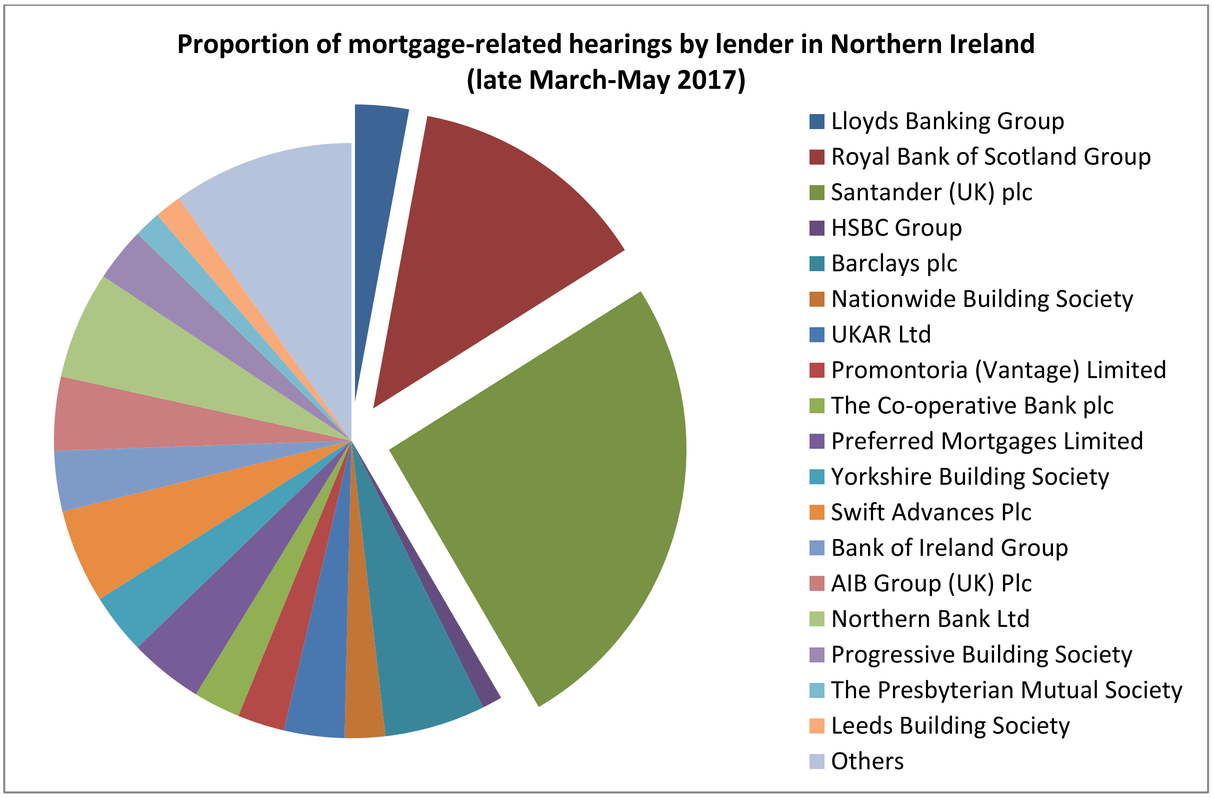

Figure 11: Proportion of mortgage-related hearings by lender in Northern Ireland (late March - May 2017).

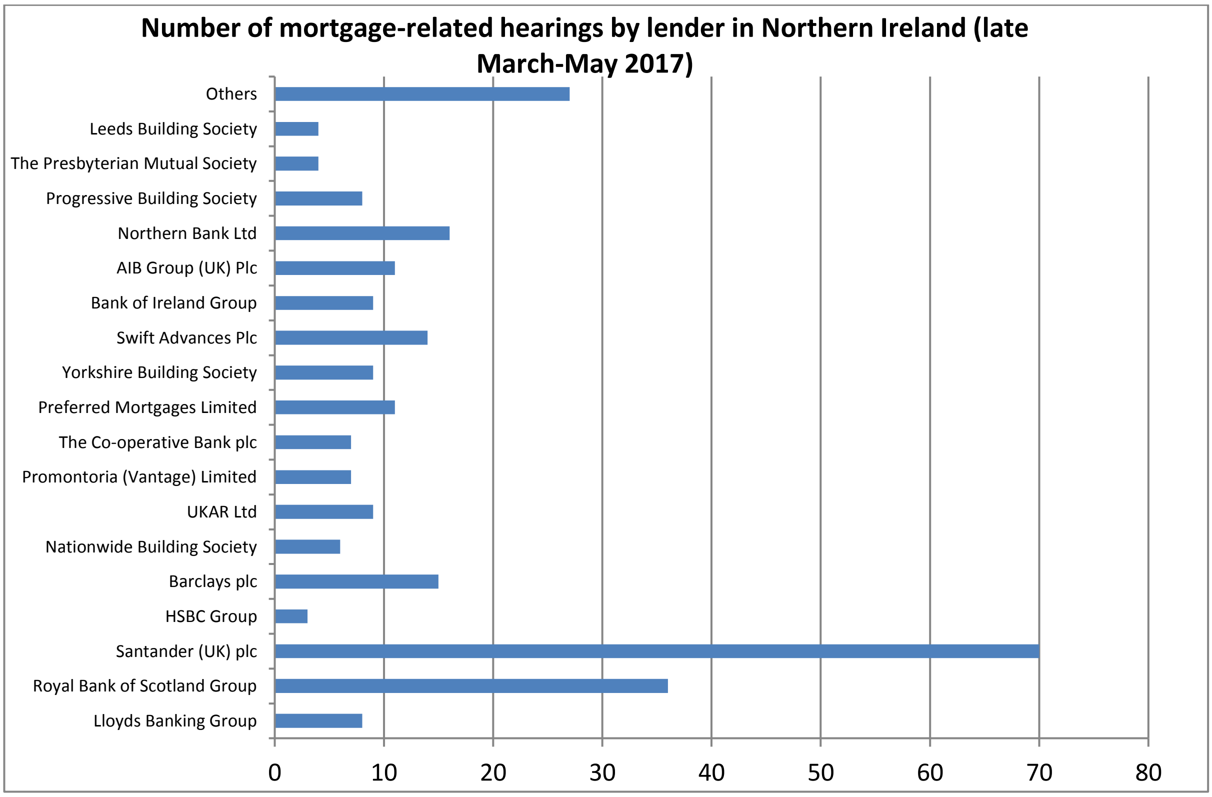

Figure 12: Number of mortgage-related hearings by lender in Northern Ireland (late March - May 2017).

To place the data shown in Figures 9 and 10 in context, and analyse the implications, it would be appropriate to consider the market share of the Lloyds Banking Group in Northern Ireland, to establish whether the comparatively small number of hearings relative to the extent of their UK litigation were explained by a lower overall presence in the province relative to the rest of the UK. There are, however, limitations in data access as typically only aggregate data is reported for lending in Northern Ireland which prevents a direct comparison of the regions in terms of market share for 2017.

Tables 7 and 8, below, show the 20 largest lenders across the UK according to their market share of newly-issued mortgage loans and the value of outstanding mortgage loans, respectively.

Lender	Rank (2016)	Lending (£bn) (2016)	Market share (2016)	Rank (2015)	Lending (£bn) (2015)	Market share (2015)
Lloyds Banking Group	1	38.3	15.6%	1	38.4	17.3%
Nationwide BS	2	35.3	14.4%	2	30.5	13.8%
Royal Bank of Scotland	3	31.6	12.9%	4	24.7	11.1%
Santander UK	4	25.5	10.4%	3	26.1	11.8%
Barclays	5	20.7	8.4%	5	19.7	8.9%
HSBC Bank	6	15.7	6.4%	6	12.5	5.6%
Coventry BS	7	9.0	3.7%	7	8.0	3.6%
Virgin Money	8	8.4	3.4%	8	7.5	3.4%
Yorkshire BS	9	7.0	2.9%	9	6.6	3.0%
TSB Bank	10	6.6	2.7%	11	4.8	2.2%
Clydesdale Bank plc	11	4.9	2.0%	10	4.9	2.2%
Leeds BS	12	4.0	1.6%	14	3.1	1.4%
Skipton BS	13	3.7	1.5%	12	3.5	1.6%
Co-operative Bank plc	14	3.2	1.3%	15	2.8	1.3%
Bank of Ireland	15	2.8	1.1%	13	3.3	1.5%
Metro Bank	16	2.0	0.8%	19	1.2	0.5%
Precise Mortgages	16	2.0	0.8%	18	1.3	0.6%
Aldermore Bank	18	1.6	0.7%	19	1.2	0.5%
Principality BS	19	1.5	0.6%	19	1.2	0.5%
OneSavings Bank	20	1.4	0.6%	17	1.4	0.6%

Table 7: Top 20 Mortgage Lenders in the UK, 2015-16, by value of gross lending.

Source: Council of Mortgage Lenders (2017)

Lender	Rank (2016)	Balances (2016)	Market share (2016)	Rank (2015)	Balances (2015)	Market share (2015)
Lloyds Banking Group	1	293.0	22.2%	1	300.9	23.4%
Nationwide BS	2	171.4	13.0%	2	160.6	12.5%
Santander UK	3	153.6	11.6%	3	152.1	11.8%
Royal Bank of Scotland	4	129.4	9.8%	5	117.3	9.1%
Barclays	5	127.9	9.7%	4	127.3	9.9%
HSBC Bank	6	78.1	5.9%	6	74.7	5.8%
Yorkshire BS	7	32.9	2.5%	7	32.4	2.5%
Coventry BS	8	32.8	2.5%	8	29.3	2.3%
Virgin Money	9	29.6	2.2%	10	25.3	2.0%
TSB Bank	10	26.8	2.0%	11	23.8	1.8%
Bradford & Bingley plc	11	22.6	1.7%	9	25.8	2.0%
Clydesdale Bank plc	12	22.1	1.7%	12	20.8	1.6%
Bank of Ireland	13	20.3	1.5%	13	20.4	1.6%
Co-operative Bank plc	14	16.8	1.3%	14	16.3	1.3%
Skipton BS	15	13.9	1.1%	15	12.7	1.0%
Leeds BS	16	13.0	1.0%	16	11.1	0.9%
Paragon Group	17	9.5	0.7%	18	9.6	0.7%
Northview Group	18	9.2	0.7%	20	6.0	0.5%
NRAM plc	19	8.6	0.7%	17	10.7	0.8%
Aviva Equity Release	20	7.2	0.5%	19	6.7	0.5%

Table 8: Top 20 Mortgage Lenders in the UK, 2015-16, by value of mortgages outstanding.

Source: Council of Mortgage Lenders (2017)

The figures indicate the emergence of a progressively less concentrated mortgage market, with the Lloyds Banking group, Santander and Barclays losing market share to Nationwide Building Society, the Royal Bank of Scotland and HSBC. The Council of Mortgage Lenders (2017) reports an overall trend of medium and smaller lenders both increasing in number (with 5 new lenders entering the market in 2016, to a total of 60), and accounting for a greater overall proportion of market share. This is echoed by the pattern illustrated in figures 9 to 12, with a large number of smaller lenders litigating via mortgage repossession proceedings. However, a number of the litigating parties are not originators of mortgage loans; they do not issue loans to customers, but rather buy 'whole loans' from originators or other intermediaries. Still other claimants have attained rights over mortgagors as part of a securitisation process, which is considered further in Chapter 7.

Though the same level of data on market share in 2017 is not publicly available for Northern Ireland, that for 2015 is available via a report prepared by the Consumer Council (2018), which is used as a substitute.

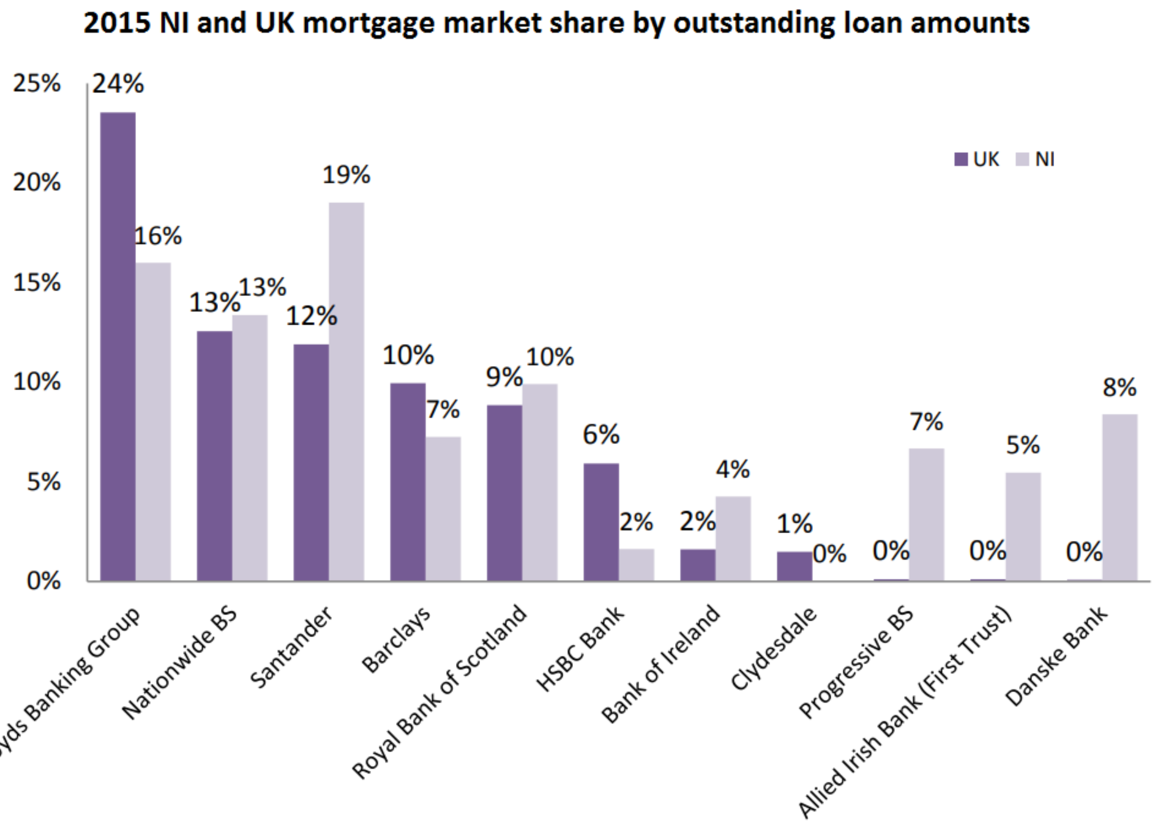

Figure 13: 2015 NI and UK mortgage market share by outstanding loan amounts.

Source: Consumer Council (2018, p.8)

The data shown in Figure 13, together with that from Table 8, Courtserve, and the Northern Ireland Courts and Tribunals Service, was used to calculate the expected number of cases for England and Wales as well as Northern Ireland based on the respective market shares of the seven largest lenders active in both regions. The findings are reported in Tables 9 and 10, below.

Lender	2015 Market share	Expected no. of cases based on 2015 market share	Observed no. of cases	Divergence
Lloyds Banking Group	23.4%	370	211	-42.97%
Nationwide BS	12.5%	198	67	-66.16%
Santander UK	11.8%	187	234	25.13%
Barclays	9.9%	157	96	-38.85%
Royal Bank of Scotland	9.1%	144	80	-44.44%
HSBC Bank	5.8%	92	25	-72.83%
Bank of Ireland	1.6%	25	16	-36.00%

Table 9: 2015 mortgage market in share in England and Wales, by outstanding loan amounts.

Lender	2015 Market share	Expected no. of cases based on 2015 market share	Observed no. of cases	Divergence
Lloyds Banking Group	16%	22.24	8	-64.03%
Nationwide BS	13%	36.14	6	-83.40%
Santander UK	19%	52.82	70	32.53%
Barclays	7%	19.46	15	-22.92%
Royal Bank of Scotland	10%	27.80	39	40.29%
HSBC Bank	2%	5.56	3	-46.04%
Bank of Ireland	4%	11.12	9	-19.06%

Table 10: 2015 mortgage market in share in Northern Ireland, by outstanding loan amounts.

The data shows considerable divergences for all the major lenders from the expected number of hearings. For Lloyds Banking Group, there is a notable difference between these divergences for England and Wales and Northern Ireland, with the latter region showing the most pronounced shortfall in hearings relative to what would be inferred from the company's market share in the province. This is consistent with the hypothesis; indicating a lower than expected level of litigation in both regions, but more so in Northern Ireland. However, the data show notable differences for other lenders as well. There is a large divergence for HSBC in England which doesn't have an obvious explanation. However, the fact that the number of cases brought by Nationwide diverges so starkly from what would be inferred from its market share, particularly in Northern Ireland, suggests that, as it is the only building society in the list, this may indicate that its policies on the treatment of arrears differ from those of the other lenders. If this were true for both organisations, this would be consistent with the findings of Whitehouse (1999), that financial institutions have differing policies in respect to loan defaults and the initiation of litigation so that some lenders are less aggressive than others at seeking possession. As Whitehouse relates, the origins of building societies as mutual organisations existing to serve their members would suggest that a more lenient policy on possession actions would be expected relative to the more profit-focussed banks.

The data also suggests a potentially more aggressive policy being taken by Santander in both regions, with a higher than expected number of hearings. This appears to be so for Royal Bank of Scotland in Northern Ireland, while in England and Wales the number of hearings is correspondingly lower.

There are a number of shortcomings in the data; in respect to the limited period of time covered, and the lack of a dataset from the before the 2014 judgment central to the hypothesis, which prevents comparisons being made to support a claim of causality. There is also a 2-year mismatch between the case listings data and that on lender market shares, due to limitations on data access for Northern Ireland. A further point is that the number of hearings has been taken as a proxy for the number of active cases, though as some cases result in multiple successive hearings this is not a perfect measure. Without a larger volume of data of broader scope it also can't be determined whether there was an impact of seasonality or whether other compounding variables might have influenced the results.

Overall, the results are inadequate to draw firm conclusions. They do confirm the hypothesis, that the number of Lloyds Banking Group cases in Northern Ireland was at a more depressed level relative to England and Wales based on respective market shares, however little weight can be attached to these findings and they remain little more than indicative.

8.5 Conclusions on the suspension of cases following an influential judgment

This research has found that following the case of Rea, McGready and Laverty (2014), possession cases brought on behalf of the Lloyds Banking Group were suspended across the UK, and that as of Q1/2 2017, the number of hearings of such cases in Northern Ireland was disproportionately lower than in the rest of the UK based on the group's relative market shares in the two regions. Therefore, the hypothesis is accepted although limitations in the data prevent firm conclusions being drawn from this.

The findings also show variation in the number of hearings brought by other lenders; particularly for Nationwide, which in Northern Ireland showed an 83% lower rate of possession hearings relative to what would be expected based on its market share in the province.

8.6 Case management

8.6.1 Context of case management

As noted by Latour (2010, p.137-138), court cases are managed as "*'just-in-time' production throughput*", so that there is an emphasis on timeliness in resolving matters, as expressed in the legal maxim that 'delays in law are odious'. This being one of the considerations weighing on judges, they must manage the cases before them with a view to avoiding prejudice to either of the parties, so that where a defendant complains of feeling 'rushed to justice', as was often observed in the hearings this researcher attended, judicial officers must balance this consideration against the perceived right of the claimant/plaintiff to have their claim resolved without undue delay. Courts can, however, manage the time allocated for cases in a strategic manner to meet their own operational targets. Dayen (2006, p.206) reports that one strategy employed to deal with a backlog of repossession cases in the US (there termed 'foreclosure actions') was to re-hire retired judges with a mandate to expedite hearings and foreclose on defendants with little regard to the merits of their defences. The result was that where cases previously took two minutes, hearings were sometimes reduced to 20 seconds. Indeed, this could be partly motivated by the fact that funding of courts in the US which deal with mortgage cases is at least partly contingent on the number of cases completed (Dayen 2006, p.223). It is not clear whether similar incentives exist in the UK.

8.6.2 Ethnographic observations on case management and defendant participation

The pragmatic reality of allocating cases means that the scheduling of hearings is usually reliant upon a triple coincidence of the availability of the counsel for the financial institution bringing the claim (the solicitor or barrister), the ability of a defendant to attend on that same day, and perhaps most restrictive of all, the availability of the judicial officer for a sufficient period of time to hear the matter. Where a number of contentious or complex issues arose in a case, this increased the perceived length of time required for a full hearing of the issues, which often resulted in a case being adjourned for two or more months, in large part due to a lack of an available timeslot when both the parties and the judicial officer were available.

Therefore, it may be as much a matter of pragmatism from a court's perspective that newly-filed mortgage possession claims are presumed to be simple in nature and so easily resolved within a minimal amount of time; possibly at the very first hearing. While the many issues raised in previous chapters would suggest otherwise, in practice this is often the observed outcome for apparently three primary reasons. The first, and perhaps most significant, is that many defendants do not attend hearings, as previously reported by Whitehouse and Bright (2014). The reasons for this, as mentioned again in later chapters, appear to centre frequently on a combination of fear and denial on the part of defendants, as well as a number of varied personal issues. The result is that in such instances, the claims of financial institutions go unopposed and a judgment can be entered in their favour. Legal professionals prosecuting such cases were frequently observed by this researcher, leaving a courtroom where a number of cases had been scheduled back-to-back for a single financial institution which they represented. They carried large stacks of paperwork as they left the courtroom and looked rather pleased with themselves; "*got them all*" one whispered to another with satisfaction. Sometimes the 'all' referred to could indicate that upwards of five cases had been, to use the court's terminology, 'disposed of' in a rather short period of time, so that the financial institutions bringing the claims won each case; obtaining possession orders for the properties due to the absence of any, or most, defendants. This being a frequent occurrence, it would justifiably be seen as wasteful for courts to allocate a great deal of time to matters where no objection is raised by the absent defendants. Indeed, given that cases which are contested can take up a great deal of the court's resources (with a single hearing taking upwards of an hour without necessarily resolving a case), in the interests of managing throughput it is pragmatic to compensate for the demands of longer, defended, cases by restricting the time allocated to those which are uncontested.

The second reason enabling cases to be dealt with within short timeframes is that, even where defendants do attend hearings, they are for the most part inexperienced in legal discourse and for many it is their first time in a court, so that they don't contest the matter. They typically experience the occasion as highly pressured, confusing and disorienting. In most instances observed by this researcher, defendants did not have the financial resources to afford legal representation, which is quite predictable given that the cases usually arise from individuals' inability to continue making monthly payments. Although research from the US suggests that at times up to 30% of defaults by mortgagors there are 'strategic', driven by economic incentive rather than financial necessity (Deng, Quigley and Van Order 2000; Elul et al., 2010; Guiso, Sapienza and Zingales, 2009), the same view is not supported in the UK, nor by this researcher's observations. This may be due to the prevalence of non-recourse mortgage loans in some US states, wherein borrowers' liability for a secured debt is limited to that of the collateral property (Basel Committee on Banking Supervision, 2013 p.4; Solomon and Minnes, 2011 p.531); the absence of such loans in the UK greatly reduces the comparative incentive to default, as borrowers would remain personally liable for the full sum.

Inexperienced defendants, without assistance from a legal professional, are in a vulnerable position as there is a significant knowledge differential. Government-funded legal assistance, termed 'legal aid' can help to bridge this gap, but eligibility for civil cases in England and Wales was restricted to 'exceptional' cases by a 2012 act (Legal Aid, Sentencing and Punishment of Offenders Act 2012, s.10). While some on low incomes or welfare benefits can obtain Legal Aid, provision is not guaranteed and solicitors can be reluctant to take on such clients; with cuts to funding for this initiative, the prospects are reducing further. According to the then Master of the Rolls (one of the UK's most senior judicial officers), most individuals who are ineligible for legal aid cannot afford legal assistance, even for rather simple cases, and this problem is more pronounced for more complex cases or those involving greater financial value (Woolf, 1997 p.719). Consequently, for many defendants in possession hearings, their information about the proceedings tends to come chiefly from three categories of sources: the judicial and other court staff; the opposing counsel, and supporting agencies external to the proceedings such as the Citizen's Advice Bureau, counselling services or a variety of sources in the not-for-profit sector. However, the broad provision of information to lay litigants, it was observed at one hearing by a senior high court judge, is totally inadequate for the purpose (similar to the findings of McKeever et al., 2018 and Whitehouse and Bright, 2014); suggesting that the agencies which do so are underfunded, understaffed and broadly inaccessible. This, the judge decried as a problem they had personally lobbied to address, but been disappointed to see persist. Despite this, less senior judges in the same court seemed oblivious to this inadequacy. At one hearing, a lay litigant identified to the judicial officer that they wished to file some paperwork in the case but did not know how to do so. They were told to seek legal advice. The defendant responded that they could not afford a solicitor, and the judicial officer directed them to a page in a court booklet providing guidance for lay litigants which identified the kinds of support agencies mentioned above. The litigant detailed their attempts to obtain legal advice from each one of the organisations listed, as well as from the court clerks, and being told by each one of them that they could not provide it. Similarly, the defendant identified that they were not eligible for Legal Aid. The judge dismissively stated that they would have to somehow find out how to file the paperwork they wished, and that perhaps their McKenzie friend [indicating this researcher] could be of some assistance. The defendant noted that due to a lack of legal training, the latter was not possible either.

Defendants in such situations, consequently, frequently find that the proceedings are partly explained to them by the judicial officer, who has a duty imposed on them by a lay litigant's inexperience and lack of professional assistance to make adjustments to how they present information (Judicial College, 2013 pp.25-36). At times, more problematically, lay litigants come to understandings of aspects of the proceedings from information provided by the opposing counsel. This introduces a conflict of interest whereby anxious defendants, unfamiliar with the operations of the court, and sometimes with a sense that they are at fault and so should be accommodating, find themselves persuaded into a course of action by their opponent that may not be in their best interests. Often, this researcher observed solicitors condescendingly, or with affected sympathy, speaking with defendants awaiting their hearings in a manner that seemed intended to generate rapport and trust. They explained the coming course of proceedings to them with such inevitability, and mentioning only the options which favoured their client, so that the defendants seemed to be left with the impression that they had no option but to submit and do what they were told; indeed, that this was somehow in their best interests, when it very often was not. In such circumstances, it is again not surprising that cases can be concluded with such rapidity.

The third reason for cases being listed in such quick succession is non-attendance or limited participation by defendants. Bright and Whitehouse (2014, p.13) report a 38% attendance rate by defendants based on partial data and suggest that lower values would be more accurate (something the current research confirms), while granting of outright possession orders is more likely in such instances; 47% of cases compared to 31.5% where defendants do attend. Meanwhile, Whitehouse and Bright (2014, p.16) reported that only between 10-50% of defendants file defences. The current research would point towards the lower end of that range. Even where defendants do attempt to challenge the claims made by financial institutions, they rarely enter what would be considered a legally valid defence. That is, the issues that they raise are often of little consequence to the claims that a financial institution has pressed. This is in part because the defendants are broadly unfamiliar with legal reasoning, and so frequently offer incomplete or irrelevant arguments. However, it is also because the criteria upon which a judicial officer is obliged to judge are extremely narrow and do not admit to a detailed examination of the case without a compelling reason. A judge is effectively in a position of comparing the narrative provided by the two parties to a checklist of sorts which in England and Wales comprises the relevant parts of the Civil Procedure Rules (CPR), and in Northern Ireland, relevant parts of the Rules of the Court of Judicature of Northern Ireland ('Rules of Court') (Valentine, 2017). A possession claim made by a financial institution references these rules; Part

55 of the CPR and Order 88 of the Rules of Court, respectively. These rules mandate that a judge must establish certain specific facts about a case; chiefly that a mortgage deed was signed and that a loan was defaulted upon (although these and other mitigating factors are considered in more detail in Chapter 9). These primary criteria being met, if a homeowner offers no legally valid defence, a judge is placed in a position of being restricted as to what possible courses of action are open to them. In most situations there is little to adjudicate on other than considering the viability of, or potential for, the defendant 'addressing the arrears', as discussed earlier in the chapter. If they take the view that this is feasible, a 'suspended possession order' (or 'postponed possession order') can be made. Such an order cannot be enforced by the claimant/plaintiff without the court's permission, and is usually made to be contingent upon the defendant adhering to an agreed-upon payment schedule, or similar conditions. In the absence of a credible offer by a borrower to address the arrears, a judge is placed into a position of having little option other than to issue an outright possession order, which instructs the defendant to transfer possession of the property to the claimant / plaintiff by a certain date. There is a grace period of 21 days following such an order, within which time the defendant can act in accordance with the order, or apply to the court to appeal the order. If neither takes place, within the following seven days the order is presented to a judge to be signed, and is witnessed by a court clerk. Following the elapse of this 28-day period, the financial institution can seek a 'warrant for possession' from the court to evict them; in Northern Ireland it is a separate body which grants these orders, called the 'Enforcement of Judgments Office' ('EJO'). In practice, even if the defendant takes no action several months can elapse between the possession order being granted and a warrant for possession being executed, depending on the schedule of the court or EJO. At the time of writing, this was approximately three months in Northern Ireland.

Given that the preceding account describes the overwhelming majority of defendants' experiences in mortgage repossession cases, and that the time allocated is a factor in determining a mortgagor's ability to present a defence, the following section provides a quantitative analysis of this factor in both England and Wales and Northern Ireland, to test whether the figure of 5-6 minutes allocated per hearing reported by Whitehouse and Bright (2014, p.17) is reflected in national data.

8.7 Quantitative study of time allocated for hearings

8.7.1 Method and data

The processed data from section 8.4.3, identifying hearings of repossession actions by financial institutions in England and Wales, was cross-referenced with data from the same online Court Listing Service, Courtserve, to identify cases where a specified amount of time was allocated for the hearings listed during the observation window, from the 3rd of April to the 2nd of May 2017.

Similarly, the same data was utilised from section 8.4.3, from the website of the Northern Ireland Courts and Tribunals Service concerning cases listed as Summonses In Chambers in the Chancery Division of the Belfast High Court between the 28th of March and the 5th of May. While specific times were not allocated for each case, where multiple possession hearings were scheduled in a specified period of time, an average was calculated as the inferred time allocated for each case. Those cases which did not meet these criteria were excluded.

Descriptive statistics were calculated from the processed data.

8.7.2 England and Wales

Out of the 146 courts surveyed, 76 reported specific durations of time allocated for some hearings. Out of 490 court hearings in England and Wales recorded during the period from 3rd April to 2nd May 2017 for which an allocated duration was identified in the court listings, the average time estimated for mortgage-related hearings was 9.79 minutes (Std Dev. 11.89), with a median time of 8 minutes per case and modal time of 5 minutes. That is, the most frequently allocated length of time for a hearing of a possession claim in connection with residential mortgages is five minutes. These results were skewed somewhat by three rather long hearings, so that with these removed from the dataset the mean time allocated drops to 9.18 minutes (Std Dev. 6.99).

8.7.3 Northern Ireland

Out of 164 court hearings in Northern Ireland recorded during the period from 30th March to 5th April 2017 for which an allocated duration was identifiable in the court listings, the average time estimated for mortgage-related hearings was 9.46 minutes (Std Dev. 3.93), with a median time of 9 minutes per case and modal time of 9 minutes. That is, the most frequently allocated length of time for a hearing of a possession claim in connection with residential mortgages is nine minutes. These results were skewed somewhat by one rather long hearing, so that with this removed from the dataset the mean time allocated drops to 9.25 minutes (Std Dev. 2.78). These results are consistent with the ethnographic observations, which are described further in Chapter 9.

8.7.4 Findings on time allocated

The time allocated for possession hearings in UK courts is problematic, being disproportionately low relative to the gravity of the issues under discussion. Whitehouse and Bright (Ibid, p.17) reported that on average cases were listed to last an average of 5-6 minutes in England and Wales, but did not clarify what form of average statistic was employed. This matches the modal time found in current research for that region, while the mean time was higher, at approximately 9.8 minutes. The mean time listed in Northern Ireland was slightly below that for England and Wales, at 9.5 minutes, though the modal time was 9 minutes.

The data reported here are drawn from court listings, rather than empirical observations of the actual time taken for hearings, and so represent an approximation. Cases listed to last longer inflated the mean figures, particularly for England and Wales, though these results should be interpreted in the context of the ethnographic findings reported in other chapters. Though the time allocated for hearings is on average very short, consistent with the experience reported by Dayen (2016) in the US, there is a counterpoint worth noting.

Some hearings, despite being allocated a very short time, continue for many hours, and it is not uncommon for daily court sessions to run significantly beyond the intended close of business hours. Therefore, overall the degree of variation in the actual time taken for cases is greater on both extremes of the data analysed than is captured by the quantitative data.

8.8 Conclusions on case management

These findings are consistent with those of Whitehouse and Bright (2014); both in respect to the inadequate provision of legal advice services to lay litigants and the time allocated for hearings.

The manner in which courts deal with arrears in loan payments is formulaic, with limited discretion on the part of a judge to suspend possession orders where mortgagors make a credible offer to pay off the arrears. Beyond such measures, there is a presumption that no viable defence is possible by a mortgagor. However, the case precipitating the suspending of possession cases examined in the first part of this chapter is an example of the kinds of challenges mortgagors can make with the right assistance. That case was brought on behalf of mortgagors by a free legal support service, so that the inadequate funding of such services significantly limits access to justice. The result is that most defendants don't attend hearings; when they do, they are usually unable to comprehend proceedings or articulate defences, and in this context courts rather pragmatically allocate around 5 per minutes per hearing, with some variation in this figure. Consequently, most cases are processed inexorably towards a possession order being granted to the mortgagee, with the greater possibility of its enforcement being suspended if defendants attend. The conduct of cases where defendants do attend is examined in the next chapter.

Chapter 9 - Court Process

This chapter describes the process by which possession actions are initiated and litigated, from the pre-action protocols to the preparation of testimony and the conduct in hearings. Drawing on Bogen and Lynch (1989) and Lynch and Bogen (1996), three themes are identified in the conduct of representatives of lenders: lying, concealment and maintenance of plausible deniability. The impact of case law is also discussed, in limiting the current scope for these practices in Northern Ireland.

9.1 Initiation of proceedings

There are specific expectations that a court would have of a lender prior to it initiating litigation. These are outlined, in England and Wales, by the 'Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property' (or 'E&W pre-action protocol'), which came into force on the 18th of November 2008. The Northern Irish counterpart, 'Pre-Action Protocol For Possession Proceedings Based On Mortgage Arrears In Respect Of Residential Property' (or 'NI pre-action protocol') came into force on the 5th of October 2009. These have since been revised, and so it is the versions current at the time of writing which will be referred to.

Where mortgagors believe that such requirements have not been correctly complied with, they may file a complaint with the Financial Ombudsman Service (FOS) (see Chapter 4 for discussion of the FOS's role in the endowment mortgage scandal). Established in the year 2000, the FOS, like the FCA, gained statutory powers when the Financial Services and Markets Act (2000) came into force in 2001. The jurisdiction of the FOS is outlined in section 2 of the FCA's handbook on Dispute Resolution (FCA, 2017e). Although this jurisdiction is not quite that of a court of law, it is held in high esteem by judicial officers such that in the case of Bradford and Bingley Plc v Thomas and Gabrielle Bennett (2006), the Master of the High Court commented that "Had such a complaint [to the FOS] been made and proved successful, these proceedings might have been averted". Consistent with this view, under paragraphs 8.1 and 8.2 of the E&W pre-action protocol, where a borrower has made a genuine complaint to the FOS that relates to a potential possession claim before proceedings have begun, a lender must consider delaying their legal claim or inform the borrower of their reasons for not doing so. Under the same paragraphs of the NI pre-action protocol, these provisions apply with the added expectation that lenders inform borrowers of their decisions to proceed with litigation at least 5 working days before doing so.

9.1.1 Notice of proceedings

While there are specified formats for most of the legal process, the initial letter by which lenders communicate to borrowers that litigation is about to commence can vary considerably. Usually these will be sent by law firms hired by the lender (or successor in title), and often the body of the letter will be as simple as the following:

> *"We have been instructed by* [lender] *to commence repossession proceedings. In the absence of proposals to maintain the contractual monthly payment due to our client, we are instructed to continue with repossession proceedings."*

However, one law firm representing a major UK lender included the following rather misleading statement as standard in such letters:

> *"...*[we] *write to advise you formally that the tenancy created by* [lender] *by way of mortgage made between you and* [lender] *of certain premises situate and known as* [residence address] *shall determine upon the expiration of 7 days from the service of this Notice upon you and* [lender] *shall enter into and take possession of the said premises."*

I have seen written testimony stating that in at least one instance the above statements caused a couple to fear for the safety of their young family, anticipating that they could be evicted from their home by force within days. Consequently, they vacated their house at very short notice, and moved what few belongings they could carry to a hotel room. Meanwhile, in a case I observed, such a letter, together with multiple other communications from, and on behalf of, a financial institution, were accepted to sufficiently meet the criteria for harassment that a high court injunction was granted, forbidding the lender from contacting the customer for a specified period of time; an order which the lender violated more than once.

The statement, as misleading as it is, echoes the medieval origins of our modern concept of possession, whereby:

> "*...a necessary element of ownership was not his until he had entered upon and taken possession of the land, and he therefore cannot be regarded as owner until that act has taken place.*"
>
> – Thorne (1936, p.361).

9.1.2 Service of documents

The most fundamental requirement for the initiation of litigation is that all parties are given notice of it occurring.

In one case I observed, the provision of notice was challenged by a defendant. This challenge took the form of an appeal to a judgment which had been given against them, granting an order for possession to the financial institution which had brought the claim. The defendant's contention was that they had not received notice of the prior proceedings until after the judgment had been given, and so did not have a chance to present their position. The hearing of this case therefore focussed on the legal requirements in respect to written notice, and upon whom the burden of proof lay in establishing whether notice had been provided. Latour (2004, p.99) describes a situation analogous to this, albeit one which was non-contentious:

> "*...if the question* [of] *whether an acknowledgement of receipt was actually sent is raised in the course of a hearing, and the file contains the appropriate post office form, signed and dated by the claimant, the quality of the reference is unquestionable.*"

In the above description, the weighing of evidence is entirely one-sided. In the observed case, however, there was substantiated dispute over the facts. On the one hand, the defendant had submitted a sworn affidavit stating that they had not received such a notice; that they were not, at the time, living at the property to which it was sent, and that their primary mailing address was at another location (identified in the paperwork). On the other hand, the financial institution presented no sworn evidence on this point, but rather a 'certificate of service' – a document which requires only one signature and no third-party attestation as to its signing. A generic example of such a certificate can be found at Appendix 9. A certificate of service should, according to best practice, be signed by a first-hand witness to the transfer of documents; such an individual being known as a process server. Their job is to ensure, and then certify, the delivery of legal paperwork to a named person. In principle a process server can then be called as a witness to attest to the delivery, so providing notice of what was written in those documents to that named person. In this case, however, the signature on the certificate of service was not that of a named process server, or indeed any specified individual. It was simply the handwritten initials of the law firm representing the financial institution.

This was pointed out to the judicial officer - that there was no scope for the defendant to call the law firm as a witness, and so to cross-examine the unknown person who had certified the delivery of the alleged documents. This, the judge dismissed by stating that:

> *"The court takes judicial cognizance that* [law firm] *is a reputable firm practising in this city."*

And on that basis the judge accepted the certificate of service as a valid record of what it stated. Effectively, the judge's ruling on this point was that a document prepared by an unknown individual, or individuals, containing no jurat or solemn declaration as to the truth of the statements, had greater weight than a sworn affidavit signed by an identifiable witness who was present in the court room and had also verbally averred the same information. In Northern Ireland, part of the basis for trusting in the accuracy of affidavits sworn by a named individual was articulated by the presiding judge in the case of Swift v McCourt (2012), when he underlined the:

> "*Serious consequences he or she bears personally, and the consequences for his or her employer, if he or she swears an affidavit that is false in any respect.*"

The extent to which these supposed consequences actually materialise is considered further later in this chapter, but from observations (including the one related above), the scope for censure or prosecution for perjury appears to be largely absent in the case of certificates of service. In this sense they represent a means by which law firms representing financial institutions can potentially manufacture a false narrative, while the individuals preparing the documents can hide behind the corporate identity of their employer and so maintain plausible deniability (Lynch and Bogan, 1996) should the contents be proven to be false. This echoes the thesis of O'Tierney, Kavanagh and Scally (2019), that legal identity, whether of individuals, companies or other kinds, is fundamentally representative in nature, and that the actions of people do not map isomorphically to natural persons (individuals), so that legal entities generally serve as avatars with varying degrees of correspondence to the physical world. In the above instance, the ability of an unknown person to hide behind the firm's corporate identity in this way and yet have their statement accepted as fact enabled the maker of it to circumvent mechanisms for ensuring accountability. As the case hinged upon the statement in that simple document, its admissibility and the defendant's inability to question its author resulted in their application for appeal being refused, and the property being lost without its owner having the chance to present their case.

An interviewee reported another instance of a law firm using a certificate of service to manufacture a false narrative, wherein service of documents was said to have taken place, while the interviewee vigorously denied this. While this did not occur specifically in a case arising out of a mortgage, it was as part of a court action seeking possession of a residential property for unsecured debt. For the purposes of this point, the procedural differences are immaterial. The certificate identified that a process server had tried to deliver documents to the individual at their home address, but that no-one answered the door. Consequently, the certificate stated, the documents had been left with a neighbour, and a physical description of that alleged neighbour was provided; one which did not match anyone living close by, or even, as far as the defendant could ascertain, any relatives of immediate neighbours who might possibly have been visiting them. The certificate, meanwhile, was not signed by the supposed process server, but rather by a solicitor working for the law firm. It was clear that these were two different individuals; the named process server was male, and the solicitor female. There was also no suggestion made that she had accompanied the process server or in some other way might have had first-hand knowledge of the occurrence. If the document were in the form of an affidavit, this would be classed as hearsay evidence; that is, second-hand testimony where one person states that they learned information from another source or person.

> "*...to tell a story as a character in that story is a markedly different thing from retelling a story one has heard from someone else (a second-hand story) and that these differences are reflected in our distinctions between, say, something witnessed and hearsay*."
>
> – Bogen and Lynch (1989, pp.202-203)

While permitted in UK courts,[44] hearsay evidence must provide clarity as to how, and from whom, the information was obtained, as well as the right (subject to judicial approval) for the other party to cross-examine the witness (Brodin 2016, pp.1420-1421). As the signatory of the certificate made no claim to having witnessed the events, it is difficult to see how she could have 'certified' them to be true. Nevertheless, the evidence was accepted by the court and challenges to it by the defendant were rejected. The use of hearsay evidence was common practice in the cases I observed, so that in most cases, written testimony on behalf of lenders consisted wholly or partly of such evidence.

9.2 Hearings

So far, this chapter has looked at the pre-litigation process (as well as how pre-litigation paperwork figures in later proceedings). This section looks at the conventions followed at an

[44] While hearsay evidence is broadly forbidden in courts in the Republic of Ireland (Law Reform Commission, 2010; also see Cullen v. Clarke, 1963), despite a long aversion to its acceptance (Peiris, 1981), as of 1995 it is broadly admissible in the UK for civil cases, as specified by section 1 of the Civil Evidence Act (1995) and section 3 of the Civil Evidence (Northern Ireland) Order (1997), albeit but with certain exceptions and stipulations (Brodin 2016, pp.1420-1421).

actual hearing; the formulaic structure that they follow, and the evidence typically referred to. The normal practice is that the claimant (in Northern Ireland, the plaintiff), that is, the financial institution bringing the claim, speaks first to present their case. Therefore, possession actions usually begin with the legal representative for the lender reading from the testimony of a solicitor, concerning the current balance on the loan account. In order to show that there is a valid reason for the financial institution to initiate litigation, this evidence will outline that there has been some kind of breach of the terms and conditions; almost universally, a failure to make the stipulated monthly payments; what is known as a 'default'.

In one case I observed, a financial institution had provided the standard grounding (initial) affidavit asserting its case - that money had been borrowed; that the borrower was in arrears on the repayments, and that they sought a possession order. The borrower did not appear at the hearing, and so their silence on those statements was treated as their agreement. As the facts in the case met the requirements for an order for possession to be given in favour of the financial institution, the judicial officer did so. However, the mortgagor's absence was for reasons beyond their control which delayed them arriving at court and so upon the mortgagor's late arrival the representative of the financial institution was called back to the courtroom and there was another hearing of the case, where the mortgagor was asked to make statements in response to those of the financial institution. The mortgagor said they did not agree with the statements made, but did not have paperwork with them that they could refer to. The judicial officer therefore asked the mortgagor, since they were challenging the figures provided on behalf of the financial institution, whether those figures were roughly accurate, even if possibly as much as £10,000 higher or lower than they should be. The mortgagor responded by saying:

> "*I'm challenging the whole scenario*."

On this basis, although the financial institution had been granted a possession order in the mortgagor's absence, the judicial officer stated that the ruling could not be upheld given the position taken by the mortgagor. Therefore, the order was set aside and the case was adjourned. As Latour (2004, p.101) notes, for a judge, an unopposed statement becomes an incontrovertible fact. However, the set of facts that had been established uncontested while the mortgagor was absent, were dissolved by the mortgagor's disagreement with them; what were type 2 statements were reduced to type 1 statements (Latour, and Woolgar 1979, p.81). Indeed, by presenting such a broad challenge to the accounts provided, the borrower had deconstructed the master narrative (Bogen and Lynch 1989, p.198), at least for that hearing.

The construction of facts can sometimes be accomplished by inference, such as a case I observed, where a lender's written testimony stated that it was normal practice for the company to provide a certain document to customers in the course of business. The lender's legal representative relied upon this statement to counter an argument made by the mortgagor. The lender alleged that the mortgagor *would have* received the document as a matter of the lender's normal practice. This use of qualified language sought to apply a generalised statement as if it were a specific one - that the company usually does something, and therefore, although there was no evidence that this had occurred in the particular instance, that it should be treated as if it had occurred.

The mortgagor responded to this by stating that they had not received the document, and so the allegation was unfounded. This statement by the mortgagor was rejected by the judicial officer as constituting new evidence, which could not be submitted at a hearing but must be in the court file beforehand. This procedural requirement would have been enough to defeat the mortgagor's argument. However, the mortgagor observed that the statement was in the court file, in the form of their own written testimony submitted some months before. After checking the court file this was confirmed by the judicial officer. The argument of the mortgagor (which was predicated on the non-receipt of that document) was therefore accepted, and that of the lender rejected. The 'path', as Latour (2004, p.102) would term it, of the lender's reasoning was shown to be flawed at its first step, with the consequence that the conclusion, the destination being suggested, could not be reached. The qualification to which the 'fact' was bound proved to negate the fact, once it was itself examined. Such arguments are commonplace during possession cases.

Besides testimony, the exhibits can also be instrumental in deciding the path of a case; particularly in respect to key documents like mortgage deeds. In a case reported by an interviewee, there were several defects in a document presented as a mortgage deed. The address identified as that of the mortgaged property consisted of merely the name of a rural road; not a house number or specific site. Though the lender had initially obtained a possession order because the borrower had not opposed it, on appeal this was overturned, with the judge commenting:

> "*You have won this case, but it's only a minor skirmish. You haven't won the battle. We can send this back to the* [lower court] *again.*"

In a subsequent hearing another judge noted that only a photocopy of the deed was provided by the lender, and when instructed to produce the original or explain where it was, the lender's representatives provided testimony stating that the original had been lost in the post when the loan was transferred to another lender more than twenty years earlier. After many years, at the time of writing the case remains unresolved and the mortgagor remains in the property.

While in this instance the deed was defective, in most cases such obvious defects are absent. They also, universally, make reference to a lender's terms and conditions, which are considered next.

9.3 Terms and conditions

Whitehouse (1999, pp.283-285) notes that mortgagors are treated by law as voluntary contracting parties who have negotiated the terms of their agreements with lenders, and on this basis give primacy to the rights of mortgagees. However, she observes that in practice this is not the case; that the terms and conditions for mortgage loans are drafted by lenders themselves and show great similarity to each other. With little variation in these terms and conditions offered across lenders, there is no meaningful differentiation in these substantive elements of the loans on offer, and should a mortgagor wish to vary the terms proposed they would be unable to do so. This remains the case today. It is industry practice for lenders to produce standardised terms and conditions which are periodically revised and dated accordingly. The Power of Attorney clause discussed in Chapter 7, which is ubiquitous in such terms and conditions, serves as one example of the similarity across lenders.

In this respect, I have found something rather more concerning; that in many cases mortgagors do not even see the terms and conditions they are purportedly agreeing to. While it cannot be ruled out that some of the participants might have had sight of the relevant terms and conditions prior to or at the point of sale of the loan, none explicitly mentioned this. However, in many of the observed cases, the mortgagors were certain that they had not seen the standardised terms and conditions for the loans prior to the commencement of legal proceedings. Rather, their first sight of them was in a bundle of court paperwork provided by the lender after the commencement of possession proceedings. In response to a statement on behalf of a financial institution concerning the terms and conditions in such a case, one mortgagor stated the following in written testimony:

> "*... The first time the alleged Mortgage Conditions were made known to* [me] *was via an exhibit to* [the mortgagee's solicitor]*'s affidavit of* [date] *...* [I] *was not presented with the alleged conditions at the alleged forming of the alleged contract.*"

In response to such an argument, a representative for a financial institution stated at a hearing that:

"*...the terms and conditions **would be** attached or dealt with in the mortgage process.*"

As the legal representative was not present at the time the events occurred, they are unable to claim to have direct knowledge of what transpired. Therefore, where such a refutation is called for it is common for such conditional language to be used (emphasised above), expressing their own presumptions about how the process is understood to occur. Such assertions are commonly made on behalf of lenders; in large part as a consequence of the process by which mortgage loans are sold. As multiple agents are involved at various stages of the process, and often remotely, no one person at a financial institution would have personal knowledge of what had transpired, or if they did, it would be highly unlikely that they could recall an individual transaction, among the thousands they may deal with, with sufficient accuracy. So, a statement by a first-hand witness – the borrower themselves – would seem to present an obstacle in this respect. For a financial institution which routinely enters into such agreements it is necessary to rely upon documentary evidence created to record the conduct of business. In this respect, a more substantive counterpoint to the defendant's statement can be made, which, as with points made earlier in this section, arises from the drafting of standardised paperwork by lenders. The legal representative continued, by referring to the mortgage deed itself:

Judge:	"*This document is signed by* [the defendant]."
Legal Representative:	"*Yes.*"
Judge:	"*And this document says at paragraph 3:* *'This mortgage deed incorporates the mortgage conditions'.*"
Legal Representative:	"*Yes.*"
Judge:	"*'the borrower has received a copy of them'.*"
Legal Representative:	"*Yes.*"
Judge:	"*So [the defendant] was signing confirming that that was correct.*"
Legal Representative:	"*Yes... .*"
Judge:	"*I think there is some case law on that in any event.*"
Legal Representative:	"*Well,* [the defendant is] *estopped from denying that* [they] *received them, obviously* [they have] *signed that.*"

...

Judge: *"But what you say is the mortgage deed means* [the defendant is] *estopped from denying that* [they] *got the mortgage terms and conditions."*

Legal Representative: *"Yes... ."*

Here, the legal representative addresses the statement – that the defendant had not received the terms and conditions prior to entering the agreement – and counters it with effectively another statement by the same individual. The first was made in written testimony to the court as part of the possession proceedings, and the second was an earlier 'statement' in the form of a clause within the mortgage deed itself. This is an example of the same kind of exegesis noted by Lynch and Bogen (1996, p.171); wherein "...the references implicate and bind the teller to the scene as constituted by those particulars". Here, the two statements are weighed, classified and criticised (Latour 2004, pp.89-90), with the result that the legal representative asserts that the defendant is bound by their prior 'statement' (a clause within the mortgage deed) and so 'estopped', or prevented, from denying it. Whether the defendant actually received the terms and conditions is of no importance. In this manner, the ambiguity is resolved and in the absence of a further challenge on this point it becomes a 'fact' in the case that the terms and conditions were received prior to the signing of the deed. There was a final observation on the terms and conditions worth noting, which followed this exchange. The legal representative stated:

Legal Representative: "*... even if the mortgage terms and conditions were not incorporated there would be implied terms.*"

...

Legal Representative: "*...[Judge], I can tell you paradoxically it suits [the defendant] that there are mortgage terms and conditions because otherwise we would be entitled to enter into possession as soon as the ink was dry on the mortgage.*"

Here, the legal representative is alluding to the ruling from Four-Maids Ltd v Dudley Marshall (Properties) Ltd (1957), discussed in Section 2.4, as well as the body of case law and legislation that somewhat abrogates and contractual rights of parties to mortgages discussed in the rest of Chapter 2, but for a more comprehensive account, see Clark (2002) or Fairest (1980).

9.4 Practices in written testimony

Though the deed and terms and conditions described above comprise key evidence in possession cases, it is the written testimony that mobilises it into effect. This section describes the typical practices by which this testimony is prepared and structured.

> *"... a story's unfolding details simultaneously reveal the teller's local identity as hero, next of kin to key characters, or mere bystander, and establish how it is that the teller is entitled to tell that story."*
>
> – Bogen and Lynch (1989, pp.202)

An affidavit begins in this manner, by identifying the author and their entitlement to speak on a topic; in possession cases, this entitlement states the deponent's proximity to the case, as either a defendant, associated person, or as an employee of either the financial institution, the law firm representing them, or an associated company otherwise connected to the accounts in question.

> *"The display of teller's entitlements is a central issue for witnesses in court since they are enjoined to provide testimony that displays the "witnessed" character of their story: that certain things were seen and heard, and thus reportable as witnessed-in marked contrast to what may have been inferred after the fact-and that it is precisely the witnessed character of testimony that provides the raw material for the court's investigations."*
>
> – Bogen and Lynch (1989, pp.202)

In most instances observed by this researcher, the named authors (deponents) of affidavits submitted on behalf of financial institutions were solicitors working for the law firm representing that institution. That is, their entitlement to tell the story stemmed not from being a witness to the events themselves, but rather being a 'witness' to records of that event held by their client. A typical affidavit would begin in the following manner:

> "*I,* [Name]*, of* [Solicitors firm] [firm's address]*, make oath and say as follows:-*
>
> *I am a Solicitor in the firm of* [firm name] [firm address] *and I have personal conduct of this action on behalf of the Plaintiff/Claimant.*"

The initial affidavit in a case, sometimes termed the grounding affidavit, must be accompanied by certain exhibits, including a copy of the letter of offer, mortgage deed and the loan terms and conditions. These documents form the basis of a narrative which is presented by the deponent, chronologically detailing a series of events and the nature of the agreement between the mortgagor and mortgagee:

> "*By a Charge dated* [date] *and registered at Land Registry on* [date] *and made between the Defendant* [Name] *of the one part and the Plaintiff/Claimant* [Name] *of the other part for the property known as* [address] *and held under Folio Number* [number] *("the Property") was mortgaged to the Plaintiff/Claimant to secure the repayment to the Plaintiff/Claimant the sum of £*[amount] *together with interest thereon. I refer to a true copy of the said Mortgage Deed marked* [reference] *and signed by me at the time of swearing hereof.*"

The style of such testimony parallels that of records from the committee studied by Bogen and Lynch (1989), who note the prevalence of anonymity in the tone. The focus is on the details being related, while the personality and other attributes of the author are absent:

> "... *the narrative is written in an anonymous voice. It is stated as a factual account, without disclaimers, qualifications, and partial recollections... Whether true or not, whether consensually validated or politically contentious, the text displays a factual style*."
>
> – Bogan and Lynch (1989, p.199)

Indeed, whether true or not the testimony is presented as factual. Given that my observations corroborate those of Bright and Whitehouse (2014, p.13), that most defendants do not attend possession hearings, such testimony will usually stand as fact regardless of its veracity. However, in cases I observed there were frequently misstatements in solicitors' testimony, such as the following:

> "*On* [date] *a search was carried out at Land Registry and no Charge has been registered pursuant to Article 6 of the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 no* [sic] *any application lodged under Article 6 of the Family Homes and Domestic Violence (Northern Ireland) Order 1998 against the Charged Property.*"

The defendant's response in their own testimony referred to records from land registry, which such a search would have produced, and showed that such a charge was indeed registered and had been for some years. The solicitor's response was:

> "*I refer to paragraph 11 of the Defendant's Affidavit and to the Grounding Affidavit at paragraph 8. This paragraph was made in error.*"

Another sworn statement by a solicitor was the following:

> "*To date this office has had no contact with the Defendant*."

To which the defendant responded by stating that they had had contact with the solicitor's office, and provided documentary records of four separate occasions, including written acknowledgements of those communications. The defendant also asserted that this statement amounted to perjury. The solicitor's response was:

"*Although out* [sic] *office did not have contact with* [defendant]*,* [defendant] *did contact our office... Our office responded... The Defendant also wrote to me... and our office responded. The defendant further wrote to our offices...*"

The defendant's response was:

"*...this is nonsensical and contradicts the remainder of the paragraph, as well as the agreed facts in this case. This casts further doubt upon* [solicitor's] *competence and the reliability of* [their] *testimony.*"

One solicitor explained such errors in testimony as being due to their use of a 'precedent affidavit'; that is, a template. However, in cases I have observed other solicitors have attributed their misstatements to being misinformed by employees of the lender. As such solicitors are neither employees of the lender nor professionally trained in accounting or finance, any misstatements in their testimony are easily attributed to error or miscommunication. Though judges are usually lenient with such matters, in a publicly stated case, one judge took a dim view of such a misstatement and struck out a possession order in part because of it:

"*[4]...it is now admitted that paragraph 15 of the affidavit of Valeria Gibson, solicitor, for the lender Santander plc of 6 December 2012 is simply wrong. Mr Carlin would say it is a lie and at the moment I do not see how that can be clearly gain said; it is not Ms Gibson's lie but when somebody told her that the mortgage had not been assigned they were either being careless or untruthful and at this precise moment in time I do not know which is the case.*

...

[8] Now the court recognises that everybody makes errors. They should not make them on affidavits, but at this point I do not know whether this was an honest error, I do not know whether somebody was playing fast and loose with the truth. No explanation of the earlier misstatement is given in the new affidavit. What is certainly clearly the case is that Santander have been in breach of the directions of the court, they have been in breach of the judgment of Swift v McCourt and they obtained an order by at least, as I said earlier, misrepresenting the facts to the Master.

[9] In all those circumstances I conclude therefore that the appeal should succeed and I... strike out the order for possession."

– Judge Deeny in Santander v Carlin (2013)

The Swift 1st Limited v McCourt (2012) judgment referred to by the judge was noted earlier in Chapter 7, as asking that employees of lenders act as deponents rather than solicitors, and that affidavits should include a statement acknowledging that they had been cautioned as to the consequences for misstatements. The above-quoted case came to augment this direction, nevertheless it continued to be ignored by solicitors. More recently, the issue came to the attention of the most senior judge in the province, Lord Chief Justice Morgan, when considering a case in the Court of Appeal; that of Bank of Scotland v Herron (2018). This resulted in a ruling against the practice of solicitors swearing affidavits on behalf of banks, and mandated that they should be sworn by 'suitably senior and knowledgeable' officers of the lenders. This was then formalised in the court's practice direction 02/2018 and since then, I have been informed by mortgagors in the province that this has largely been adhered to.

O'Neill (2018, p.13) notes that the Civil Procedure Rules for England and Wales refer to statements of truth being provided by someone in a senior position – a director, treasurer, secretary, Chief Executive, manager or other officer. However, it has been common practice for solicitors to provide these statements instead.

Whether in England and Wales or Northern Ireland, one matter which is conspicuous in its absence from written testimony is any explicit reference to the source of funds for mortgage loans. This point is considered next.

9.5 Source of funds

Despite possession proceedings being predicated on defendants having been initially provided with a loan, the actual source of these funds does not figure in most proceedings. It is only if a defendant raises the question that it is discussed at all.

If a bank demonstrated a loss arising from non-payment by a customer after receiving what is termed a 'loan', then this loss would be evidence in favour of one of the two theories of banking which were rejected by Werner's (2014a) study. If such a loss was shown to be incurred by a bank's depositors, this would support the Financial Intermediation Theory, while if a reduction in bank reserves was shown this would support the Fractional Reserve Theory. The lack of either would support the Credit Creation Theory.

When a mortgagor in a case I observed raised issues about the source of funds for his mortgage loan, and referenced the work of Werner (2014a), this explicitly introduced a countervailing explanation into the proceedings – the Credit Creation Theory of Banking – which conflicted with the master narrative presented by the lender. The judicial officer responded by misconstruing this competing narrative and effectively preventing discussion of it:

Judge: "*... the court will not be wasting time on completely unmeritorious arguments that there is no such thing as cash...The court is not going to waste time on wholly hopeless arguments*."

However, in another observed case the judicial officer permitted considerably more latitude in exploring this issue, instructing the lender to answer several questions as to the origin of funds for the loan. The disclosure of this information was resisted by the lender for several months, so that like a hostile witness under cross examination (Lynch and Bogen, 1996) the lender tried to evade the more awkward questions, responding to some but not all. When pressed to answer as to what documentary records the lender had for the origin of the funds, the following response was given:

> *"On* [date] *(i.e. the day before completion) the sum of £*[amount] *was debited from the Plaintiff's "Advances Pending Ledger" (ledger number* [number]*) to the Plaintiff's "CHAPS Ledger" (ledger number* [number]*). This sum was calculated as the loan amount of £*[amount]
>
> *...*
>
> *Due to the passage of time and changes to internal systems, all that the Plaintiff has been able to obtain as a record of this is a line in an excel spreadsheet relating to the "Advances Pending Ledger" for that period, where the Defendant's advance is identified as follows:"*

The data provided identified a debit entry in one account, with another account also referenced as well as several internal codes, the meaning of which were not clarified.

While this provided a partial answer to some of the questions asked, it did not satisfy the overall query as to where the funds had actually come from prior to that debit entry. The lender's response, therefore, in referencing the loss of records over time, closely parallels Lynch and Bogen's (1996, p.180) observations of a hostile witness's responses to difficult questions:

> "*I don't recall*
>
> *I don't recall at all*
>
> *I can't recall a specific date*
>
> *I guess – I don't remember*
>
> *I don't have a specific recall of that at this time point*
>
> *I don't think so, I mean you may refresh my memory*"

In contrast to Lynch and Bogen's observations, however, this response by lenders was rare in the observed cases. When required to provide documents, lenders relied upon equivocation, delay and evasion to avoid difficult questions, but most commonly upon the plausible deniability arising from the delegation of testimony to solicitors, as considered above.

9.6 Conclusions on Chapter Nine

In this chapter I have shown that court proceedings in possession actions are formulaic and routinised, such that testimony provided by solicitors is prepared based on templates. By delegating this role to external solicitors rather than employees, lenders maintain plausible deniability when the frequent inaccuracies in testimony are challenged, as these can be attributed to miscommunication. Though largely tolerated by judges, in rare instances where they are not the reliance on solicitors still ensures a degree of separation between the testimony and the lender on whose behalf it is provided.

Another strategy for avoiding accountability is concealment; both of the identity of signatories, and more generally, of evidence. When pressed for answers, in rare instances lenders simply claimed to have lost the records, much like a hostile witness might claim to have no memory of events.

Pressure from lay litigants in the cases of Swift v McCourt (2012), Santander v Carlin (2013) and Bank of Scotland v Herron (2018), has reduced the scope for lenders in Northern Ireland and their representatives to submit false testimony while maintaining plausible deniability, as solicitors are no longer permitted to submit their own written testimony on behalf of financial institutions. This is a welcome step, and it is hoped that the principle is extended in practice to England and Wales, where the same strategies have been observed.

Chapter 10: Conclusions

10.1 Introduction

This thesis has critiqued the injustice of UK residential mortgage possession proceedings via a critical analysis of UK residential mortgage loans, and tested the Credit Creation Theory of Banking in this context. The research involved an examination of the processes which comprise mortgage lending, from the sale of loans to litigation, employing a modified variant of Renner's (1949) theory of legal concepts as empty frames. This served to contextualise the issuance of credit within the modern mortgage market. This evaluation was paired with positive law analysis that served to identify where legislative non-compliance by brokers, lenders and solicitors gave rise to causes of action available to mortgagors. Meanwhile, an ethnomethodological approach was used to analyse observations of possession action hearings which combined a Latourian perspective with that of Lynch and Bogen (1996). This informing literature comprises elements of differing schools; with Renner's work representing the historic form of a 'law and society' approach which saw law as an instrument of social forces, and Latour's 'law in society' approach concerned with the construction of facts through the performative assemblage of material and immaterial elements. Incorporating these elements, I formulated two research questions to direct the study, and the findings reported in this chapter broadly follow each in turn:

How might changes in social, economic and procedural practices via which mortgages are constituted contribute towards changes in the juridical content of mortgages?

Are observations consistent with the Credit Creation Theory of Banking and what do they indicate about the relationship between an individual mortgagor and mortgagee financial institution?

Having outlined my research questions, in the following section I present a synopsis of the thesis. I begin with practical considerations that shaped the orientation of the research followed by a discussion of the effects and implications of the four causes of action available to mortgagors, as discussed throughout the thesis. I then discuss the implications of these causes of action on the juridical content of the legal concept of the mortgage under Renner's (1949) theory[45]. This is followed by a discussion of the implications of the lack of a letter of offer for the securitisation process, and analysis of the narratives around securitisation presented in the cases I observed. I then discuss the means by which lenders maintain plausible deniability in respect to several key facets of mortgage lending, and finally outline the implications of letters of offer being unsigned for the Minskian form of the Credit Creation Theory before identifying the research contributions and implications.

10.1.1 Synopsis of the thesis

When attempting to explore the origination of credit in a mortgage loan via possession actions, there are some challenges that present themselves. The existence of a valid legal mortgage acts as a kind of obstacle to exploration of the substance of the loan itself, as it grants the mortgagee a common law right to possession before the ink is dry.[46] This means that it is ordinarily not necessary for a lender to prove that funds were actually loaned in order to take possession, but to obtain a possession order in court they do need to show that a default occurred. Even so, the requirement to evidence a default does not incorporate reference to the initiatory steps in the relationship and so ordinarily the proceedings do not provide information that is as explicit for evaluating the Credit Creation Theory of Banking as that examined by Werner (2014a; 2016). Therefore, a more nuanced approach was necessitated and this involved a wider evaluation of the concept of the modern UK mortgage so as to understand the relationship between the mortgage and the loan as well as to create opportunities to look past the deed to the loan itself.

The following section outlines the legal mechanisms explored in this thesis by which these two otherwise inseparable components of a mortgage loan – the mortgage and the loan – can be prised apart. These involve claims by mortgagors as to defective elements of the processes that give rise to mortgage loans.

[45] In the modified form employed in the current research.
[46] Four-Maids Ltd v Dudley Marshall (Properties) Ltd 1957

10.2 The four causes of action

10.2.1 Preamble

This thesis has outlined four potential causes of action of mortgagors. These comprise claims against lenders and brokers for mis-selling; cancellation of loans (and indirectly, mortgages) for non-disclosure of the 7-day right of cancellation; voiding of unattested mortgage deeds and writing off outstanding loan balances as a result of defects in securitisation practices. The eligibility of mortgagors to make such claims varies considerably, cutting through cross-sections of the mortgage market and with varying degrees of overlap. The impact of these claims is considered below.

10.2.2 Effects of the four causes of action on borrowers' mortgages

Claims for mis-selling can be distinguished from the others in that broadly the remedy sought would be compensation, rather than measures addressed to the totality of the mortgagor's obligation.

Both cancellation of the loan and voiding of the mortgage deed would have the effect of negating a mortgagee's claim on the property since a secondary requirement of UK regulations is that, where the loan is cancelled the security for it (the mortgage) must be returned by the lender. It would seem that if the pending class action based on defects in the securitisation process(es) had the effect of wiping off any remaining balance on a loan account, then the consequence in respect to the mortgage would be effectively the same as if the loan were cancelled; the security for it would have to be returned to the borrower. Therefore, the latter three of these four causes of action should also enable such mortgagors to apply for rectification of the records at Land Registry, and have the charges removed; a point considered later. However, the financial implications for borrowers and the institution of the mortgage would not be identical, so each is considered in turn.

10.2.3 Financial implications of mis-selling claims

Where a mortgagor brought a claim for mis-selling against a lender or broker, the compensation awarded would almost certainly be proportional to the harm or loss caused. Therefore, it would be difficult to give a meaningful estimate of the implications for all claimants in this category as there would be variation depending on the facts of each case. While it is possible that some claims could be of a quantum sufficient to offset the remaining balance on a loan, or even to result in additional compensation beyond this, in other cases it could be considerably lower. Therefore, no general assertions can be made in this respect.

Whether claims are brought against brokers, lenders, or both jointly will impact on the sums obtainable, given that the lifespan of many brokerage firms would be shorter than those of major lenders, and where they have gone out of business claims would no doubt be brought against their insurers. Such claims would be limited to the value of those insurance policies, whereas claims against major lenders would likely not have as low a cap on the sums obtainable. Based on the endowment mortgage mis-selling scandal, it is likely that in most cases the sums awarded would be less than the outstanding loan balances, and would be offset against those balances.

10.2.4 Financial implications of cancellation of loans under Council Directive 85/577/EEC

Where a mortgagor cancels a mortgage loan under this directive, this would not have the effect of writing off the remaining balance. Rather, it would change its nature from being a secured loan, with the property as collateral, to an unsecured loan with a claim merely against the borrower. The financial implications for the mortgagor in respect to the sum owed would therefore be nominal, depending on the effect upon interest rates and fees. Though Twigg-Flesner (2010, p.322) has suggested the Schulte[47] case indicates that interest may still be due, the view taken on this by UK courts is not yet known.

10.2.5 Financial implications of voiding the mortgage deed based on lack of attestation

Based on a conventional understanding of mortgages, voiding of the deed itself should not affect the financial obligations of the borrower in respect to the loan. However, given the widespread practice of lenders not executing a separate loan agreement, voiding the mortgage deed could be seen as voiding the loan agreement as well. However, an equitable claim would still arise against the borrower based on their past performance: the receipt of funds and sending of monthly payments. So, a borrower would almost certainly be held liable for the outstanding balance. An avenue for claiming compensation for any loss, however, is considered below.

[47] Schulte and Schulte v Deutsche Bauparkasse Badenia AG (2005)

10.2.6 Financial implications of writing off the loan balance due to defects in securitisation

Though the entire grounds of the pending class action are not publicly disclosed, the firm bringing the claim is doing so on a no-win, no-fee basis; claiming 30% of the loan value as its fee should it be successful in wiping out the remaining balance. Therefore, the financial implications for a borrower seem straight-forward; the loan balance should be zeroed but the borrower would be left with a liability equivalent to 30% of this figure to the firm.

10.2.7 Financial implications where an error was made by Land Registry

Where a loss had been incurred by a mortgagor as a result of a mortgage being erroneously registered against a property, it may be open to them to seek compensation. Given that the Land Registry's title guarantee serves a function similar to title insurance in the US, the range of circumstances in which a claim for restitution can be made are broad, even if the track record of the organisation making such payments is limited (Swift 1st Ltd v Chief Land Registrar, 2015).

It seems possible, therefore, that under the second and third causes of action, cancellation of the loan and voiding of the mortgage deed, arguments can be made that charges were registered erroneously. In the case of cancelling a loan under the above EU directive, the effect on the mortgage deed is to void it retroactively, as if it was never made. Therefore, a charge should never have existed. The same can be said where a mortgage is voided for lack of attestation; as it would be deemed that the document never took effect as a mortgage deed, any registration of a charge based on it would be erroneous.

Such claims against Land Registry would not negate any outstanding balances due to lenders but it's conceivable that they might offset them, and in some cases even exceed that level.

10.2.8 Combinations of the four causes of action

The eligibility of borrowers to employ any or all of the four causes of action will vary depending on when the mortgage loan was arranged (particularly for the right of cancellation — see Chapter 5), where it was arranged, whether a broker was involved, whether it was securitised, and on a range of personal circumstances. However, it is conceivable that there will be at least some overlap in borrowers' capacity to utilise these causes of action, so a brief consideration follows, of whether they might be combined.

Claims for mis-selling would seem to be broadly compatible with and complementary to the voiding of a deed based on lack of attestation, provided that the loan would remain extant and so if it had been mis-sold in some manner, a borrower should be eligible to make both claims. If no separate loan agreement exists and the voiding of a deed is deemed to also void the loan agreement, then the picture would be more complex but as long as a lender-borrower relationship is deemed to arise, some mis-selling claims should be viable. However, a claim for mis-selling would not seem to be compatible with the loan being cancelled, as the effect of the latter is retroactive as if the loan never existed. A loan which never occurred cannot be mis-sold. Since an inequity would remain between the 'borrower' and 'lender', so that the would-be borrower would remain indebted, it's therefore possible that some kind of claim could be brought that would resemble one for mis-selling, where someone's personal circumstances at the time the loan was taken out were of the kind that would otherwise enable them to claim for mis-selling. However, such a claim would likely be of a different character. As for whether a mis-selling case could be combined with a claim relating to securitisation, due to limitations on information as to the details of the claim, a comprehensive evaluation is not possible. However, if the latter claim is along the lines speculated on in Chapter 7, it would be analogous to a situation where a third party paid off the loan, and so the effect would not be retroactive, leaving the potential for some varieties of mis-selling claim.

Cancelling a loan based on the EU directive would seem to leave a borrower in a similar position to voiding a mortgage based on lack of attestation, so that combining such claims might not have much effect, or even be possible where no separate loan agreement exists, given that both causes of action are retroactive in their effects. However, where a separate loan agreement exists this should be cancellable separately from the voiding of a non-witnessed mortgage deed. As for how cancellation of a loan might combine with the arguments based around securitisation, this would depend upon the nature of the latter claim but it would seem that the retroactive nature of cancellation would be an obstacle in some respects. That said, if an agreement were retroactively cancelled any actions taken by a lender to securitise the related account would seem to resemble a situation where a lender created and sold accounts in the name of a person who had not taken out a loan; a stranger. Such a stranger would potentially be entitled to some claim on any funds gained by a lender as a result of those actions. Though speculative, the possibility opens a range of avenues not available for borrowers with extant or even redeemed loans and could become a logistical nightmare for lenders, courts and all parties connected to securitisation to resolve.

It remains to consider the combination of voiding a deed based on invalid attestation and claims arising out of a loan's securitisation. With the same caveat over limitations on available information, it would seem that the retroactive effect of voiding a deed that also embodied the terms of a loan would place the would-be borrower in the same position of being a stranger to the securitisation process. Therefore, they may have a similar equitable claim upon funds arising from that process, given that obligations would have been created in their name for commercial purposes, with the lender potentially profiting from doing so. However, if a separate loan agreement exists, or if terms similar to an extant loan agreement were imputed by a court based on the conduct of the would-be mortgagor, then this may split whatever claim a borrower might have between one based on an extant and valid loan agreement and a retroactively voided mortgage. The extant loan agreement, it might be arguable, could have been effectively paid off by a third party as a result of the securitisation process, but beyond that claims to the value of funds received, might not be viable on this basis. However, where the securitisation process treated a separate, void, mortgage deed as security for the various financial arrangements this could give rise to an equitable claim by a borrower for funds received. Evaluation of such a claim would be complex, and courts might apply a strict test requiring that the borrower show a resulting loss, but a parallel situation might be where someone fraudulently obtained funds based on the security of someone else's property, such as mortgaging their neighbour's house.

10.2.9 Implications of the four causes of action for the juridical content of mortgages

The above section details the consequences of changes in practices around mortgage loan issuance. Non-compliance with legislation by lenders, brokers and solicitors has resulted in outcomes that would not otherwise arise. In this section, I consider how each of these four causes of action may impact on the legal norms which comprise the institution of the mortgage in the UK.

As claims for mis-selling are of a different character to the latter three, being for compensation rather than being addressed to the mortgage itself, any impact on the concept of a mortgage itself would likely be minimal.

The ability to cancel a loan retroactively does not directly affect the institution of the mortgage itself, but indirectly alters its character. Given that it results in the retroactive voiding of a mortgage by a mortgagor, it undermines the security of a lender and alters the character of a mortgage as an irrevocable security for a debt.[48] This is a substantial and fundamental change to the institution itself. Therefore, the EU directive conflicts with this centuries-old convention

[48] The Cancellation of Contracts concluded away from Business Premises) Regulations (1987); The Cancellation of Contracts made in a Consumer’s Home, or Place of Work etc Regulations (2008)

of UK law so that the impact of the UK's (at the time of writing) pending withdrawal from the union remains an indeterminate factor.

The voiding of a mortgage deed for lack of attestation does not represent a significant departure from legal norms; at least not to those of the last 20 years. The 1989 act[49] introduced this change to the legal content of mortgages. The cause of action described merely makes use of a provision that courts have already given effect to.

The writing off of a loan balance based on defects in the securitisation process does not, in itself, vary the law of mortgage as it applies to the direct relationship between borrower and lender. The presumed, approximate, line of argumentation would have a similar effect to a situation where someone else had settled the debt of a borrower, and so the impact on the mortgage would be similar to the borrower merely paying the debt themselves. However, that does not mean that the entirety of such claims would be without impact on the institution of the mortgage. Securitisation was a major innovation in the financial field with profound effects upon the relationships involved in the issuance and management of mortgages. The impact Mortgage Backed Securities have had on financial markets and society as a whole can scarcely be understated (Demiroglu and James, 2012; Showalter, 2011), and I would suggest that the shockwaves from this innovation will continue to be felt. Moreover, Wainwright (2009, p.378-379) noted that the original project to convert the securitisation practices created in the US to a UK context was nearly abandoned due to its complexity. It is possible that the cause of action discussed above leverages a flaw inherent in the process from its inception in this country.

Renner (1949) would see securitisation as a validation of the narrow form of his thesis; his contention that a legal concept such as the mortgage can remain the same while its social function changes. The social function of the mortgage changed drastically as a consequence of securitisation; from the means of financing the purchase of a home to the foundation of a pyramid of labyrinthine financial complexity. Mortgages changed from being long-term commitments of both borrowers and lenders to long-term commitments of borrowers (until they remortgaged or sold the property), and potentially short-term commitments of lenders, until they sold the loans to third parties. They also became investment vehicles; mobilising finance on a vast scale and across international borders, enabling investment and pension funds in Europe and Asia to invest in securities backed by UK real estate. It is quite possible that claims brought by mortgagors based on these complex relationships could serve to unravel or

[49] Law of Property (Miscellaneous Provisions) Act (1989)

undermine much of the financial architecture, and so potentially alter this function of mortgages. Given that mortgages between financial institutions are often used as elements in such financial architecture, the impact on the institution of mortgages may not be limited to changing its macro-level function. This innovation may therefore give rise to unforeseen changes in the legal content of mortgages as well as their social function, and if this is to occur, it is likely that a class action by mortgagors will be the tipping point.

10.3 Summary on the four causes of action under Renner's (1949) Theory

Given the above findings, I conclude that under Renner's (1949) theory,[50] the changes in practice that gave rise to three of the four causes of action, earlier, have altered the juridical content of mortgages.

The finding in Heininger v Bayerische Hypo and Vereinsbank (2001) that a cancellation period applied indefinitely to a secured loan, when the trader did not inform the customer of that right, fundamentally altered the UK mortgage loan. Together with subsequent case law, it had the effect of changing a mortgage from an irrevocable grant of security for a debt to a revocable (cancellable) grant of security, conditional upon the manner in which the attendant loan was sold.

Meanwhile, legislative non-compliance by conveyancers has rendered incorrectly attested mortgages voidable, and charges at Land Registry capable of removal, by mortgagors, through rectification of the register. Therefore, the juridical content of mortgages has changed. Where once only a mortgagee could discharge a mortgage, now mortgagors can directly void mortgages.

In relation to securitisation, the extent to which this practice has altered the institution of the mortgage is less evident, but this may become clearer as the class action on these grounds proceeds. My findings indicate that the power of attorney clause in mortgage loan terms and conditions is likely an important factor. Notwithstanding its deficiencies, in conjunction with the powers transferred via securitisation transaction documents it appears that the process of securitisation transforms a mortgage from a grant of security for a loan into the grant of a right to create securities, with that right then ostensibly assigned to multiple connected parties. Though this is a speculative interpretation, it is consistent with the multiple concealed

[50] as modified by Whitehouse (1999) and adjusted for the current research.

transactions detailed in Chapter 7. Those records show that for securitised loans, the sums passing through the loan accounts far exceed the value of the loan balance. This could be explained if multiple debt instruments are created via power of attorney and covertly processed through a borrower's loan account. This also raises the possibility that account holders could claim an interest in the proceeds or profits from those operations.

10.4 Securitisation and the letter of offer

The above speculative interpretation regarding securitisation would explain a further observation; the absence of a debt instrument signed by borrowers. Though some borrowers sign letters of offer, many do not. If lenders exercised a right to create this instrument themselves, or via a third party, this would resolve this anomaly. If they do not, however, in many cases there would be no debt instrument. Though possession hearings focus primarily on mortgage deeds as the central documents, these are not monetary instruments; they do not qualify as promissory notes as they lack the necessary elements: a promise to pay and a specific sum of money (Bills of Exchange Act 1882, s.83(1)). Therefore, notwithstanding the speculative explanation above, and in the absence of an alternative one, it would appear that lenders have departed from a thousand years of banking history.

Chapter two traced the evolution of the modern mortgage loan from a marriage of Jewish merchant practices and English land transfer customs, so that the modern Letter of Offer is analogous to the medieval Shetar; both being loan agreements, while the modern mortgage is analogous to the mort gage or 'Jewish gage' (Shapiro 1983, p.1179). The absence of one of these (signed) elements from the modern practice is no mere triviality, and it has significant implications for the Credit Creation Theory of Banking, which is discussed later in this chapter.

Despite the changes in the juridical content of the mortgage occasioned by the above-detailed causes of action, courts continue to treat mortgage loans as inherently irrevocable grants of interests in land as security for a debt arising from the loan of pre-existing funds. This narrative is therefore barely changed from the origin of UK mortgages nearly a thousand years ago. The maintenance of this continuity is considered next, in terms of how proceedings are litigated: the strategies and dynamics by which this narrative is established.

10.4.1 Securitisation narratives in court

Whether the preceding speculative account of securitisation is accepted or not, what I have shown in Chapter 7 is that there are considerable anomalies in observations relating to securitisation.

Banks seek to maintain plausible deniability (Lynch and Bogen, 1996) in respect to securitisation by presenting false, but apparently comprehensive account statements to customers, conspiring with securitisation partners to conceal the transactions from those same customers, and even from the world at large, since the SPVs neglect to register their interests at land registry. In this sense, securitisation is arguably a modern-day mirror to the medieval uses, whereby land was held equitably as a means to avoid taxation (Butler, 2009). In court, lenders will go as far as instructing their counsel to explicitly and categorically deny that loans were securitised, though since it is their representative who makes such a statement, plausible deniability can be maintained by lenders through claims of error, oversight and miscommunication. One or more of these observations alone might be seen as coincidental, but taken together I suggest that they show a pattern of behaviour indicative of the concealment of something sensitive. Similar efforts to maintain plausible deniability can be seen throughout possession proceedings.

10.5 Maintaining Plausible Deniability

The effort to maintain plausible deniability is seen in many aspects of possession actions, from the issuance of proceedings and right through all hearings and paperwork. One lender used a standard notice of the commencement of possession actions which quite evidently was designed to mislead customers into thinking bailiffs would evict them within days. Since the wording was legally accurate, the lender's representatives claimed to have merely miscalculated what borrowers would understand from it. Legal representatives in other cases used template affidavits and either carelessly didn't check the facts before swearing to their truth or shrewdly stated falsehoods which were most expedient.

When lenders were ordered to provide potentially compromising documents they would equivocate, lie and conceal evidence and if those strategies failed, delay providing it for as long as possible. These micro observations build to a more macro pattern, whereby my observations show that the production of facts in possession cases is modulated via strategies deployed by lenders to present a narrative consistent with either of the two theories of banking falsified by

Werner's (2014a; 2016) findings: the Financial Intermediation Theory and the Fractional Reserve Theory.

Though this requires lenders to present a partial, or even incorrect, account of events, in most instances stating outright falsehoods can be avoided by relying on presumption and inference, such as the presumption that borrowers signed a letter of offer, or that documents were executed on the same day in the presence of a witness. Meanwhile, the mere inference that loans are issued from a lender's pre-existing funds is usually sufficient to maintain such a narrative since the belief that banks literally lend money appears to be pervasive among the judiciary, whether or not this is actually their view. Though I cannot speak to their internal beliefs, the insistence that banks lend money in a literal sense is rigidly maintained by banks' representatives and judicial officers, so that it is applied as a master narrative to all facts regardless of any inconsistency.

When the integrity of this master narrative is challenged, it is usually sufficient for judicial officers to point to the lender's evidence as supporting that narrative. As this evidence is consistent with the master narrative, or at least ambiguous, the burden of proof is placed on mortgagors to show otherwise. Since most of the evidence consists of lenders' own records, there is at least an opportunity for financial institutions to suppress evidence inconsistent with this narrative. My findings show that the manner in which such records are produced indicates that they are indeed engineered to conceal information inconsistent with that master narrative, just as Lynch and Bogen (1996) describe in their research.

A key aspect of this engineering of evidence is that documents are designed to produce and support this master narrative wherein the minimal action of signing a deed produces multiple simultaneous outcomes; not just charging the property, but agreeing to loan terms and conditions, stating that those terms and conditions have been received, and purporting to do this on a date other than it actually occurred (since typically deeds are only dated after being signed). Even where a deed is not witnessed, when a false witness's signature is added later and the document dated on completion of the process, the resulting document, though a fabrication of sorts, appears to be legally valid, binding, and in alignment with other documentary evidence. The same is true of securitisation – by signing multiple agreements ostensibly on a single day, despite a lender having sold its interest in a batch of loans, the documentary record shows no point in time when they were not the legal owner, and so despite not recording the sale of an interest in land (mortgage) at land registry, plausible deniability can be maintained. Monthly bank statements of securitised loans following such a sale carry no indication of it occurring, even though multiple transactions were processed through the account. Through concealment, the lender maintains plausible deniability.

In this way, lenders can maintain a false narrative while rarely needing to rely on outright misstatements. However, where falsehoods are necessary to maintain the narrative, and revealed to be misstatements, lenders can still avoid accountability for these falsehoods by attributing them to miscommunication between employees within the lender and legal representatives or to errors by one or other of these agents. Indeed, by ensuring that policies and records internally and externally largely reflect the master narrative, lenders can maintain plausible deniability as to how they operate. Therefore, given the control that lenders exercise over the narrative they present in documentary records, I find that the superficial narrative presented, though inconsistent, is sufficient to obscure the mechanisms of credit creation.

However, what I have shown, while not firm proof-positive of the Credit Creation Theory of Banking, is supportive of it in the apophatic sense that through exegesis of written testimony in possession actions, as well as observation of proceedings and study of other sources, I cannot find substantive evidence against it. Though that may seem a weak general conclusion, it is, I would suggest, a stronger one than it first appears. For, one would presume that where a lender had actually loaned funds it would be not merely possible, but commonplace and indeed a matter of course in possession actions to demonstrate or at least assert a loss through being deprived of pre-existing funds as a result of a mortgagor's non-payment. I have seen no such averments or evidence in the written records. Occasionally, inferences to that effect did creep into the oral submissions by representatives of lenders, and even in one case, into a court judgment. However, when examined in context these were non-sequiturs where either counsel for lenders overstepped their authority as representatives to state their opinion which was unsupported by evidence, or where judges misconstrued the facts presented. These occurrences are interpretations of evidence, but not evidence itself and none stand up to scrutiny. The normal pattern is for legal representatives to present evidence for the lender in a formulaic manner which creates the semblance that there was a loan of pre-existing funds, while avoiding actually stating this in unambiguous terms.

One observed fact that does present problems for the Minskian (2008[1985]) form of the Credit Creation Theory, however, is the absence of a signed debt instrument in a number of cases.

10.6 Evidence against the Minskian form of the Credit Creation Theory of Banking

To return to the question of the role played by the Letter of Offer in a mortgage loan agreement, the conventional view is that this is a debt instrument, but this is inconsistent with the findings of Werner (2014a). However, this inconsistency notwithstanding, if it is seen as a debt instrument, the observation from a lender's correspondence that "signed acceptance of the offer is not necessary" and that a borrower is "not bound by the terms of [the] offer document until [they] have signed the legal charge and the funds are released" indicates that at the very least, a conventional view of this as a loan agreement originating with the letter of offer itself is at face value inaccurate. A few possibilities emerge from this. One is that lenders have dispensed with a thousand years of banking practice and, in contravention of countless banking regulations, are lending without receiving actual debt instruments from borrowers. This seems highly improbable.

Another possibility is that the mortgage deed itself serves as a debt instrument sufficient for the lender's purposes. However, this too seems unlikely, as it does not take the form of a promissory note, doesn't state all of the terms of the loan on its face and does not, in all cases, even state the sum borrowed.

When considered in light of the findings regarding the power of attorney clause within all of the standard terms and conditions examined, another possibility emerges. It may be that it is unnecessary for the borrower to sign the letter of offer, because their solicitor will sign it on their behalf. This could be possible where the solicitor acts for both borrower and lender, as they have a duty to the latter to assist them in perfecting their security for the loan. There is another possibility, however. As the power of attorney clause stipulates that the lender can act in the name of the borrower and as the borrower's attorney, this right in principle would enable officers of the lender to sign a promissory note on behalf of the borrower, and for that document to have the same effect as if it were signed by the borrower themselves. This is an even more persuasive explanation when the practice of securitisation described earlier in this chapter is considered. The major caveat to it, of course, is that as noted in Chapter 6, a clause in the terms and conditions which are merely referenced in a deed cannot give rise to a valid power of attorney.[51]

[51] As this does not satisfy the requirements of the Power of Attorney Act (1971) or Powers of Attorney Act (Northern Ireland) (1971).

10.7 Contributions

The research set out to test the Credit Creation Theory of Banking via examination of possession actions, and the modern concept of a mortgage in general. It is the third empirical investigation of this theory and the first to study secured lending. It also contributes to the existing body of knowledge, as the first academic study of the whole process of mortgage lending, from sale to litigation, and is one of the few studies[52] involving direct observation of court proceedings for possession actions, with the added dimension of involving direct participation, as an assistant to defendants.

I have shown the potential for scandals resulting from legislative non-compliance by brokers, lenders and solicitors, as well as models for how these might transpire, with reference to prior scandals and disruptive court judgments. In this respect, I have identified four causes of action open to mortgagors. I have also identified three themes regarding the conduct of lenders within court cases: lying, concealment and maintenance of plausible deniability. What I conclude from these findings is that the juridical content of the modern institution of the mortgage has been altered by the changes in practice which gave rise to those causes of action.

The modified form of Renner's (1949) theory employed in this research proved a suitable framework and I concur with Whitehouse's (1999) conclusions that the law can only be fully understood by reference to its constituent elements; herein identified as its origins, juridical content and the related contemporary social, economic and procedural practices.

My findings in respect to the Credit Creation Theory of Banking are less conclusive than those of Werner (2014a; 2016), but consistent with them. That is, though I have not established proof positive in support of the theory, I have not found evidence to the contrary. Given that the nature of this inquiry concerns the source of loaned funds (or the lack thereof), I contend that the absence of evidence of such an origin point is tentative evidence of its absence. Therefore, I conclude that the findings are consistent with the Credit Creation Theory of Banking, and weakly support it. A further finding in this respect, though, is that the evidence is superficially inconsistent with the Minskian form of the Credit Creation Theory. Specifically, the absence of a monetary instrument (signed letter of offer) in many cases contradicts this variant of the theory. It also conflicts with prior prevailing banking practice. Therefore, I speculatively suggest an alternative variant of the theory, whereby a lender executes one or more monetary instrument(s) on behalf of the borrower, in lieu of a signed letter of offer and based on invalid

[52] Another UK study, Hunter et al. (2005), focussed on rent arrears cases rather than mortgage possession cases. I am not aware of another UK study involving direct observation of possession actions.

powers of attorney purportedly derived from terms and conditions agreed to when the borrower signs a mortgage deed.

With these findings, I have contributed to a better understanding of the innately legal nature of financial transactions, and illustrated the role of documentary practices instantiated within the legal and accounting functions that give rise to and mobilise financial systems.

10.8 Implications

10.8.1 Moral imperatives under the Credit Creation Theory

The current findings are consistent with, and weakly supportive of, the Credit Creation Theory of Banking, while being inconsistent with the Minskian form of it, given the absence of a promissory note or other signed financial instrument in the observed cases. The findings yield very different sets of facts about mortgage loans than are suggested by the countervailing Financial Intermediation Theory, which appeared to implicitly inform both judicial officers and legal representatives observed. Solicitors and barristers utilised written statements, and their own verbal delivery, to assemble facts (Latour, 2010; Latour and Woolgar, 1979) supportive of the view that a financial institution had loaned pre-existing funds to a defendant, and were entitled to receive the money back, or to possession of the collateral property. Judges, similarly, would routinely invoke the equitable concept of unconscionability to assert that it would be unfair for a borrower to remain in possession of a property they had not fully paid for. The presumed detriment to the lender, of being deprived of its money, was frequently invoked when evaluating which party should prevail.

The Credit Creation Theory (Werner 2014a; 2016) yields different moral imperatives. Given that under this view a lender did not part with its own funds or those of its depositors when issuing a ‘loan’, the presumption that they are morally entitled to possession of a charged property due to a defendant’s non-payment becomes much more nuanced. The detriment to a lender, such as it exists, becomes difficult to substantiate; morphing into a more intangible modification to their balance sheet and potential impact on their regulatory compliance. The loss of the borrower’s home, meanwhile, remains tangible and ruinous despite the borrower having paid, in many cases, their life savings towards the purchase of the property, a series of loan instalments, as well incurring costs in maintaining and improving it.

In the era of quantitative easing,[53] when virtually unlimited banking credit is issued by decree as a remedy for economic ills (Joyce et al. 2012), without an evident exit plan for the strategy (Prins, 2018), this moral dilemma takes on an added dimension. It is difficult to reconcile the government bail-outs of so-called 'too-big-to-fail' corporations (Moosa, 2010) with borrowers' loss of their homes, given that the default of each party appears to stem largely from the same cause: a contraction in credit (Werner, 2005). That is, since a contraction in banking credit is the proximal cause of a decline in asset values, economic activity, and ultimately employment, the current findings support the view that a change in the 'lending' behaviour of financial institutions can indirectly lead parties to default on their financial obligations. Consequently, where a major lender seeks possession of a defaulting borrower's home following a financial crisis, one could argue that that lender, in reducing its credit issuance, had a substantive role in creating the very circumstances that made that default inevitable.[54] Therefore, in litigating for possession of a borrower's home such a lender is arguably seeking to benefit from their own wrong.

This analysis does, however, broach upon more complex areas of economics which, while under-explored in the literature from the perspective of the Credit Creation Theory, must take account of wider factors than those outlined here. Therefore, it is beyond the scope of the current research to give a full account of the dynamics bearing on these discussions. It would, however, raise questions for consideration by the fields of economics, political economy, finance and politics. These include a problematising of the role of credit-issuing financial institutions; of their economic function and the benefit society supposedly receives from reserving the power of credit creation to a privileged few corporations, including central banks.

The current findings speak to the essence of the current financial system, wherein investors must seek a return on funds or see them decline in real value; the fundamental expectation of an endless autopoetic cycle of money yielding yet more money and of economic growth without end; an insatiable need which is driven in large part by the dynamics of money creation (Bjerg, 2016).

10.8.2 Implications of legislative non-compliance and judicial conduct

The research findings also show disparities between what Pound (1910) would term 'law-in-books' and 'law-in-action', so that actual practice has deviated from legislative requirements.

[53] A term which, as noted in Section 1.3, was coined by the same Richard Werner on whose findings the current research is based.
[54] See Section 8.4.3 for an illustration of the degree of concentration in the UK banking sector.

This has been identified both in the processes which give rise to mortgage loans and the mechanisms by which default upon them is litigated. These disparities have implications for the contemporary legal concept of a mortgage, such that … and give rise to causes of action potentially available to mortgagors.

My observations have shown that where such disparities are pointed out by lay litigants they are not always treated with appropriate weight by judicial officers, who frequently demonstrate bias in favour of financial institutions; even to the point of substantially misrepresenting testimony to the detriment of mortgagors. This further disadvantages the defendants in what is an already precarious situation. Given the specialised nature of legal discourse and litigation generally, defaulting mortgagors are placed in the position of being unable to afford legal representation while being held to largely the same standards as legal professionals, with some minimal allowances. Though a few charities provide some guidance to lay litigants, with one even funding influential litigation in this area,[55] in a hearing observed as part of this research one very senior judicial officer expressed their own frustration at the ongoing lack of advice and support for lay litigants, despite having personally pressed for greater provision in this area. These observations are largely consistent with other research on access to justice by litigants in person (McKeever et al. 2018), though the Latourian, fact-focussed and quasi-covert nature of the current research, along with my direct involvement in cases, revealed judicial bias which was not evident from less embedded approaches.

10.9 Concluding remarks

I initiated this research in an effort to advance understanding of the concealed and murky mechanisms that lie at the heart of all modern economies; those which give rise to credit. In providing some contributions to the Credit Creation Theory, I hope that the research, or elements of it, will be disseminated to audiences both within and outside of academia to stimulate debate and motivate further probing into this obfuscated field which is currently the subject of a great deal of dissimulation.

I see the findings as being of relevance outside of the particular niche that this research straddles at the interface of accounting, finance and law. I would hope that it speaks to practical considerations of households, businesses and communities as much as regulators, journalists and civil servants. However, one group in particular has featured prominently in the research;

[55] See Chapter 8 for a discussion of the impact of this case; that of Bank of Scotland v Rea, McGready and Laverty, 2014

lay litigants who chose, or were forced by circumstance, to challenge lenders' accounts of events. Their tenacity has served to highlight malpractice among lenders and legal professionals resulting in many small victories as well as changes to court protocols, and the suspension of one major lender's possession actions nationwide following a case in 2014.[56]

At the time of writing, I understand that two large-scale legal actions are pending, aligning in part to two of the four causes of action identified in this thesis, with lay litigants prominent in both and the driving force behind one of them. The same lay litigants have produced a moving documentary, The Great British Mortgage Swindle (2018), which has served to raise awareness of such causes of action. Though not given much prominence in the mainstream media, it highlights a decentralised grassroots movement based on co-operative self-help whereby many homeowners across the country have held on to their property in the face of concerted efforts to take it from them. Long may that continue.

[56] Rea McGready and Laverty (2014), as discussed in chapter eight. This case was brought by the charity Housing Rights.

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Appendix 1

Template letter of offer

MCOB 5 Annex 1R

The mortgage illustration: table of contents, prescribed text and prescribed section headings and subheadings.

1. This annex belongs to *MCOB* 5.6.2R.

2. The underlined text indicates instructions that must not be included in the *illustrations* provided to *customers*.

keyfacts®   about this mortgage

Personalised illustration for: insert *customer's* name – see *MCOB* 5.6.15R (1) **Date produced:** insert date – see *MCOB* 5.6.15R (2) **Insert details of how long the *illustration* is valid for, and if appropriate when the mortgage needs to commence by – see *MCOB* 5.6.15R (3)**

This is not a legally binding mortgage offer and it does not oblige [name of *mortgage lender*] to provide you with the mortgage described in this illustration.

1. About this illustration
We are required by the Financial Conduct Authority (FCA) – the independent watchdog that regulates, financial services – to provide you with this illustration. All firms selling mortgages are required to give you illustrations like this one, that contain similar information. Ensure that you obtain other illustrations if you want to compare this mortgage with mortgages from other lenders.

2. Which service are we providing you with?	
	We recommend, having assessed your needs, that you take out this mortgage.
	We are not recommending a particular mortgage for you. However, based on your answers to some questions, we are giving you information about this mortgage so that you can make your own choice.

3. What have you told us
See *MCOB* 5.6.18R to *MCOB* 5.6.24G

4. Description of this mortgage
See *MCOB* 5.6.25R to *MCOB* 5.6.30G For *foreign currency mortgages* see also *MCOB* 5.6.127R to *MCOB* 5.6.128R For *shared appreciation mortgages* see also *MCOB* 5.6.129R to *MCOB* 5.6.131R
5. Overall cost of this mortgage

See *MCOB* 5.6.31R to *MCOB* 5.6.38R	
See *MCOB* 5.6.34R to *MCOB* 5.6.36G The total amount you must pay back, including the amount borrowed is This means you pay back The overall cost for comparison is	 £[insert details] £[insert details] for every £1 borrowed [insert details] % APR
See *MCOB* 5.6.37R For *shared appreciation mortgages* see *MCOB* 5.6.129R(2)	

6. What you will need to pay each [insert frequency of payments from *MCOB* 5.6.40R e.g. monthly]	**[insert frequency of payments from *MCOB* 5.6.40R e.g. monthly] payments**
See *MCOB* 5.6.41R to *MCOB* 5.6.51R For multi-part mortgages see *MCOB* 5.6.45R For mortgages without a term or a regulator payment plan (e.g. secured bridging loans or *mortgage credit cards*) see *MCOB* 5.6.134R to *MCOB* 5.6.138G	Insert amounts(s)

This box is required only where all or part of the mortgage is an *interest-only mortgage*. It must be deleted for *repayment mortgages*. **Cost of repaying the capital** See *MCOB* 5.6.52R to *MCOB* 5.6.53G	Insert amounts(s)
This section is required only for multi-part mortgages where there is a future change in the interest rate(s) charges. It must be numbered as a subset (e.g. 6a) to follow the preceding section. **6a. What will you need to pay in future**	**[insert frequency of payments from *MCOB* 5.6.40R e.g. monthly] payments**
See *MCOB* 5.6.55R to *MCOB* 5.6.57G	Insert amounts(s)

This section is required only for deferred interest rate mortgages. It must be numbered as a subset (e.g. 6b) to follow the preceding section. **[…]. Effect of deferring interest on the amount you owe**				
This table shows the effect of the deferred interest being added to the amount you owe. Where the interest rate is variable: The amounts shown in the table could be considerably different if the interest rate changes. See *MCOB* 5.6.132R				
Year	Interest deferred	Amount of deferred interest that is added to the mortgage	Remaining debt before deferred interest is added	Remaining debt with deferred interest added
7. Are you comfortable with the risks?				

See *MCOB* 5.6.59R to *MCOB* 5.6.65R For mortgages without a term or a regular payment plan (e.g. secured bridging loans or *mortgage credit cards*) see *MCOB* 5.6.140R to *MCOB* 5.6.145R

8. What fees must you pay?	**Fee amount**
Fees payable to [insert name of *mortgage lender*] See *MCOB* 5.6.66 to *MCOB* 5.6.71G	Insert amount of each fee
Other Fees See *MCOB* 5.6.66 to *MCOB* 5.6.71G	Insert amount of each fee

9. Insurance	**[insert frequency of payments for premium quoted payments**
Insurance you must take out through [insert name of *mortgage lender* or *mortgage intermediary*] See *MCOB* 5.6.73R to *MCOB* 5.6.76G	Insert amounts(s) if appropriate
Insurance you must take out as a condition of this mortgage but that you do not have to take out through [insert name of *mortgage lender* or *mortgage intermediary*] See *MCOB* 5.6.77R to *MCOB* 5.6.83G	Insert amounts(s) if appropriate
This box is required only where quotations for optional insurance are provided in the *illustration* **Optional Insurance** See *MCOB* 5.6.80R to *MCOB* 5.6.83G	Insert amounts(s)

10. What happens if you do not want this mortgage any more?
Early repayment charges See *MCOB* 5.6.84R to *MCOB* 5.6.89R **What happens if you move house?** See *MCOB* 5.6.84R (2)

11. What happens if you want to make overpayments?
See *MCOB* 5.6.90R to *MCOB* 5.6.91G

12. Additional features
See MCOB 5.6.92R to MCOB 5.6.112G
13. Using a mortgage intermediary

[This section is required only when the *illustration* is provided to a *customer* by, or on behalf of, a *mortgage intermediary*. If the *illustration* is provided by a *mortgage lender*, this section must be removed and Section 14 must be renumbered Section 13]
See *MCOB* 5.6.113R to *MCOB* 5.6.116G

[…]. Where can you get more information about mortgages?
The Money Advice Service publishes useful guides on choosing a mortgage. These are available free through its website: www.moneyadviceservice.org.uk, or by calling 0300 500 5000.

Contact details

See *MCOB* 5.6.122R to *MCOB* 5.6.123G

Your home may be repossessed if you do not keep up repayments on your mortgage – see *MCOB* 5.6.124R to *MCOB* 5.6.125G

For *foreign currency mortgages* add the following risk warning (see *MCOB* 5.6.128R):

Changes in the exchange rate may increase the sterling equivalent of your debt

Last updated: March 2016

Appendix 2

Request for warrant of possession of land

Click here to reset form | Click here to print form

Request for warrant of possession of land following a suspended order for possession

To be completed and signed by the claimant or their legal representative and sent to the court with the appropriate fee.

1. Claimant's name and address

2. Name and address for service and payment (if different from above)

Ref/Tel No.

3. Defendant's name and address

4. Warrant details

(A) Balance due at the date of this request	
(B) Amount for which warrant to issue	
Issue fee	
Legal representative's costs	
Land Registry fee	
TOTAL	
If the amount of the warrant at (B) is less than the balance at (A), the sum due after the warrant is paid will be	

5. Property/land details

Date of judgment/order	
Date of possession	

Describe the land (as set out in the particulars of claim)

In the

Claim no.

Fee Account no.

For court use only

Warrant no.

Issue date:

Warrant applied for at o'clock

Foreign court code/name (execution only):

I certify that

(1) the defendant has not vacated the land as ordered (*and that the whole or part of any instalments due under the judgment or order have not been paid) (†and the balance now due is as shown)

(2) notice has been given in accordance with The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010.

(3) a statement of the payments due and made under the judgment or order is attached to this request.††

Signed

Claimant (Claimant's legal representative)

Dated

* *delete unless defendant is in arrears with the suspended possession order or judgment*

† *delete unless warrant is to issue for execution also*

†† *Only use this form where possession was suspended on terms*

IMPORTANT

You must inform the court immediately of any payments you receive after you have sent this request to the court

If there is more than one defendant and you are **not** proceeding against all of them, enter here the name(s) of the defendant(s) you wish to proceed against

You should provide a contact number so that the bailiff can speak to you if they need to:

Daytime phone number | **Evening phone number** *(if possible)* | **Contact name** *(where appropriate)*

Defendant's phone number *(if known)*

If you have any other information which may help the bailiff or if you have reason to believe that the bailiff may encounter any difficulties you should write it below.

N325A – Request for warrant for possession of land following a suspended order for possession (12.16)

Appendix 3

Interview questions

Have you missed any mortgage payments?

Were you employed at the time the mortgage was taken out?

Did you use a broker?

Did you have an income of under £10,000 at the time?

Did the broker accurately state your income?

...or verify your income?

Was your income self-certified?

Was it an interest-only mortgage?

[If so] for how many months / years were the interest payments waived?

Were you told that the conveyancing solicitor would work for the bank as well as for you?

< Move to open-ended discussion >

Appendix 4

Data completeness tables

Table 11: Datapoints per variable

Region	Employment Status	Credit Quality	Primary Income Verification	Origination Channel	Payment Type	Repayment Method	Total
N.E. England	23,540	30,211	21,425	28,928	32,148	42,489	42,489
N.W. England	57,038	90,941	69,268	90,794	103,598	137,543	137,543
Yorkshire	49,091	70,343	51,615	74,551	81,637	110,076	110,076
East Midlands	40,891	53,144	41,151	52,811	59,692	79,829	79,831
West Midlands	49,754	64,231	52,548	64,639	72,029	102,941	102,941
East of England	38,795	60,219	36,237	54,309	64,128	75,161	75,161
London	68,138	88,921	67,145	87,039	100,327	127,097	127,097
S.E. England	87,486	110,054	90,187	118,738	132,787	173,305	173,305
S.W. England	49,331	63,146	58,005	59,796	72,024	92,069	92,069
Wales	28,513	34,155	29,621	33,361	38,386	54,631	54,631
Scotland	44,588	71,909	44,889	67,799	75,644	96,568	96,568
Northern Ireland	8,613	4,188	7,589	3,934	4,544	10,669	10,669
						Sum Total	1,102,380

Data source: ABSNet Loan Europe Database

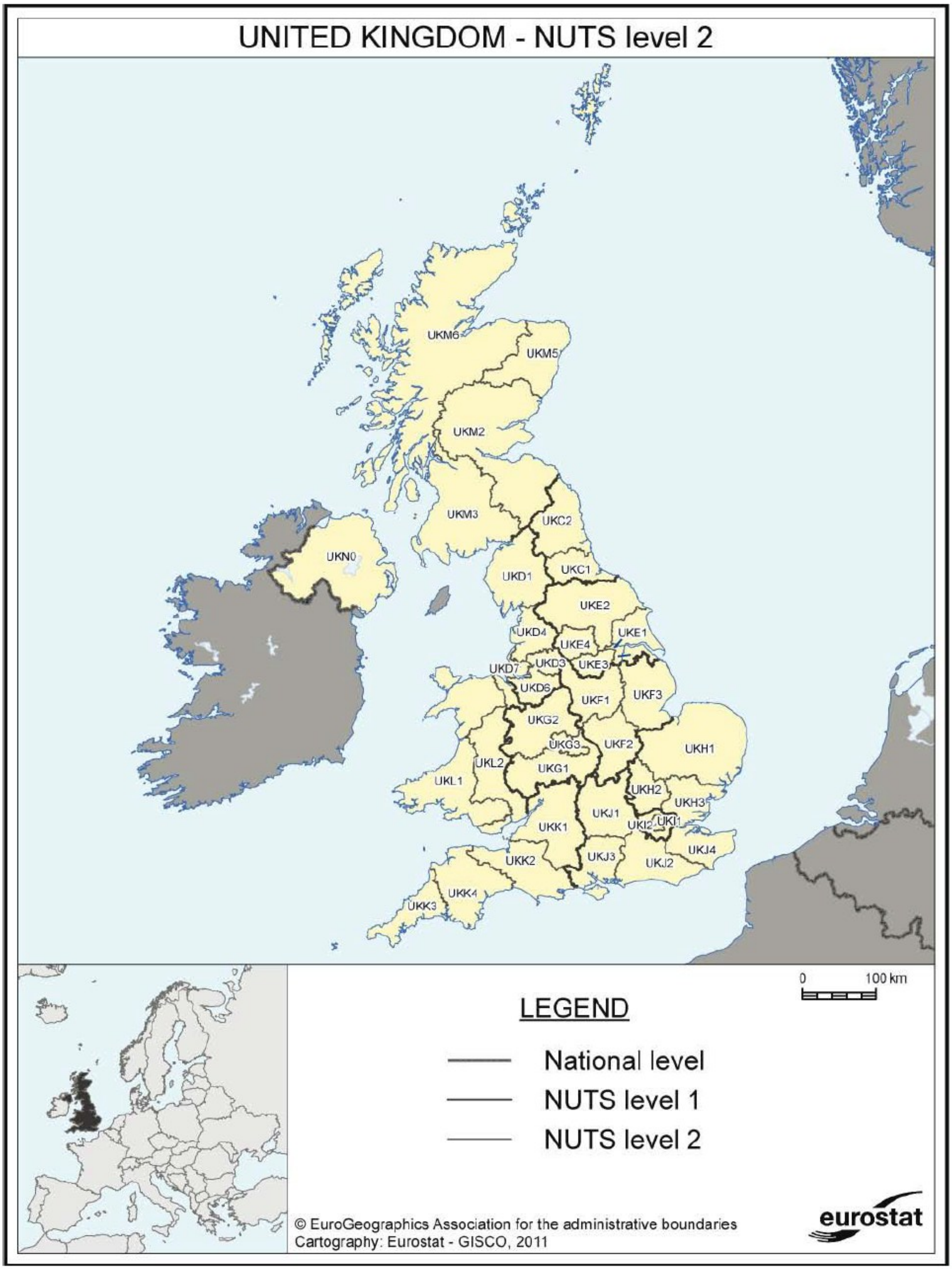
Table 12: Data Completion per Variable

Region	Employment Status	Credit Quality	Primary Income Verification	Origination Channel	Payment Type	Repayment Method	Total
N.E. England	55.40	71.10	50.42	68.08	75.66	100	70.11
N.W. England	41.47	66.12	50.36	66.01	75.32	100	66.55
Yorkshire	44.60	63.90	46.89	67.73	74.16	100	66.21
East Midlands	51.22	66.57	51.55	66.15	74.77	100	68.38
West Midlands	48.33	62.40	51.05	62.79	69.97	100	65.76
East of England	51.62	80.12	48.21	72.26	85.32	100	72.92
London	53.61	69.96	52.83	68.48	78.94	100	70.64
S.E. England	50.48	63.50	52.04	68.51	76.62	100	68.53
S.W. England	53.58	68.59	63.00	64.95	78.23	100	71.39
Wales	52.19	62.52	54.22	61.07	70.26	100	66.71
Scotland	46.17	74.46	46.48	70.21	78.33	100	69.28
Northern Ireland	80.73	39.25	71.13	36.87	42.59	100	61.76
						Aggregated Average:	68.19

Data source: ABSNet Loan Europe Database

Appendix 5

UK NUTS map divisions (Nomenclature of Territorial Units for Statistics)



Appendix 6

The Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008

SCHEDULE 4 Notice of the right to cancel

PART I

Information to be Contained in Notice of the Right to Cancel

1. The identity of the trader including trading name if any.

2. The trader's reference number, code or other details to enable the contract or offer to be identified.

3. A statement that the consumer has a right to cancel the contract if he wishes and that this right can be exercised by delivering, or sending (including by electronic mail) a cancellation notice to the person mentioned in the next paragraph at any time within the period of 7 days starting with the day of receipt of a notice in writing of the right to cancel the contract.

4. The name and address, (including any electronic mail address as well as the postal address), of a person to whom a cancellation notice may be given.

5. A statement that notice of cancellation is deemed to be served as soon as it is posted or sent to a trader or in the case of an electronic communication from the day it is sent to the trader.

6. A statement that the consumer can use the cancellation form provided if he wishes.

PART II

Cancellation Notice to be Included in Notice of the Right to Cancel

If you wish to cancel the contract you MUST DO SO IN WRITING and deliver personally or send (which may be by electronic mail) this to the person named below. You may use this form if you want to but you do not have to.

(Complete, detach and return this form ONLY IF YOU WISH TO CANCEL THE CONTRACT.)

To: .. .. [trader to insert name and address of person to whom notice may be given.]

I/We (delete as appropriate) hereby give notice that I/we (delete as appropriate) wish to cancel my/our (delete as appropriate) contract .. .. [trader to insert reference number, code or other details to enable the contract or offer to be identified. He may also insert the name and address of the consumer.]

Signed
Name and Address
Date

Appendix 7

Application to transfer title to land

HM Land Registry

Transfer of whole of registered title(s)

TR1

Any parts of the form that are not typed should be completed in black ink and in block capitals.

If you need more room than is provided for in a panel, and your software allows, you can expand any panel in the form. Alternatively use continuation sheet CS and attach it to this form.

For information on how HM Land Registry processes your personal information, see our Personal Information Charter.

Leave blank if not yet registered.	1	Title number(s) of the property:
Insert address including postcode (if any) or other description of the property, for example 'land adjoining 2 Acacia Avenue'.	2	Property:
Remember to date this deed with the day of completion, but not before it has been signed and witnessed.	3	Date:
Give full name(s) of all the persons transferring the property. Complete as appropriate where the transferor is a company.	4	Transferor: For UK incorporated companies/LLPs Registered number of company or limited liability partnership including any prefix: For overseas companies (a) Territory of incorporation: (b) Registered number in the United Kingdom including any prefix:
Give full name(s) of all the persons to be shown as registered proprietors. Complete as appropriate where the transferee is a company. Also, for an overseas company, unless an arrangement with HM Land Registry exists, lodge either a certificate in Form 7 in Schedule 3 to the Land Registration Rules 2003 or a certified copy of the constitution in English or Welsh, or other evidence permitted by rule 183 of the Land Registration Rules 2003.	5	Transferee for entry in the register: For UK incorporated companies/LLPs Registered number of company or limited liability partnership including any prefix: For overseas companies (a) Territory of incorporation: (b) Registered number in the United Kingdom including any prefix:
Each transferee may give up to three addresses for service, one of which must be a postal address whether or not in the UK (including the postcode, if any). The others can be any combination of a postal address, a UK DX box number or an electronic address.	6	Transferee's intended address(es) for service for entry in the register:
	7	The transferor transfers the property to the transferee

Place 'X' in the appropriate box. State the currency unit if other than sterling. If none of the boxes apply, insert an appropriate memorandum in panel 11.	8 Consideration The transferor has received from the transferee for the property the following sum (in words and figures): The transfer is not for money or anything that has a monetary value Insert other receipt as appropriate:
Place 'X' in any box that applies. Add any modifications.	9 The transferor transfers with full title guarantee limited title guarantee
Where the transferee is more than one person, place 'X' in the appropriate box. Complete as necessary. The registrar will enter a Form A restriction in the register *unless*: – an 'X' is placed: – in the first box, or – in the third box and the details of the trust or of the trust instrument show that the transferees are to hold the property on trust for themselves alone as joint tenants, *or* – it is clear from completion of a form JO lodged with this application that the transferees are to hold the property on trust for themselves alone as joint tenants. Please refer to *Joint property ownership* and *practice guide 24: private trusts of land* for further guidance. These are both available on the GOV.UK website.	10 Declaration of trust. The transferee is more than one person and they are to hold the property on trust for themselves as joint tenants they are to hold the property on trust for themselves as tenants in common in equal shares they are to hold the property on trust:
Insert here any required or permitted statement, certificate or application and any agreed covenants, declarations and so on.	11 Additional provisions

The transferor must execute this transfer as a deed using the space opposite. If there is more than one transferor, all must execute. Forms of execution are given in Schedule 9 to the Land Registration Rules 2003. If the transfer contains transferee's covenants or declarations or contains an application by the transferee (such as for a restriction), it must also be executed by the transferee.

If there is more than one transferee and panel 10 has been completed, each transferee must also execute this transfer to comply with the requirements in section 53(1)(b) of the Law of Property Act 1925 relating to the declaration of a trust of land. Please refer to *Joint property ownership* and practice guide 24: private trusts of land for further guidance.

Examples of the correct form of execution are set out in practice guide 8: execution of deeds. Execution as a deed usually means that a witness must also sign, and add their name and address.

Remember to date this deed in panel 3.

12	Execution

WARNING

If you dishonestly enter information or make a statement that you know is, or might be, untrue or misleading, and intend by doing so to make a gain for yourself or another person, or to cause loss or the risk of loss to another person, you may commit the offence of fraud under section 1 of the Fraud Act 2006, the maximum penalty for which is 10 years' imprisonment or an unlimited fine, or both.

Failure to complete this form with proper care may result in a loss of protection under the Land Registration Act 2002 if, as a result, a mistake is made in the register.

Under section 66 of the Land Registration Act 2002 most documents (including this form) kept by the registrar relating to an application to the registrar or referred to in the register are open to public inspection and copying. If you believe a document contains prejudicial information, you may apply for that part of the document to be made exempt using Form EX1, under rule 136 of the Land Registration Rules 2003.

Appendix 8

Notice displayed in the Belfast High Court from 11th June 2014

NOTICE

MORTGAGE APPLICATIONS FOR POSSESSION AND APPLICATIONS FOR LEAVE TO ENFORCE SUSPENDED POSSESSION ORDERS BROUGHT BY BANK OF SCOTLAND PLC AND OTHER LENDERS IN LLOYDS BANKING GROUP

With immediate effect, until further notice and unless in a particular case there are compelling circumstances which persuade the Master to take a different view, he is not minded to make orders for possession or for leave to enforce in applications by the above lenders in the absence of a certificate by a solicitor (for cases before the Master this week), or, if considered appropriate by the Master for particular cases this week and in all cases listed on and after Monday 16 June, an affidavit stating that the regular and timely payment of the current and ongoing monthly instalments as calculated in accordance with the plaintiff's current method of computation in respect of the mortgage account or accounts will not of itself discharge part or all of the arrears of contractual monthly instalments on or before the end of the mortgage term.

Appendix 9

CERTIFICATE OF SERVICE

On the twenty seventh day of Month, A.D. 2015 (27/xx/19), I witnessed the following contents, placed in an envelope:

1) **Notice** dated 27/xx/2016 - Ref. [ref no] (1 page(s))

The envelope, containing the Notice, was sealed and deposited for postage at a post office, sent via First Class Mail

To the following address:

Addressee
Address line 1
Address line 2
Town
State
Postcode

A duplicate Notice was retained.

Signature ______________________________

Name Surname
xx/xx/2019