

Commentary - Emanuel v Promontoria (Oak) appeal judgement 30th January 20

A judgement against vulture fund Promontoria (Oak) Limited is likely to have a profound impact on many victims of the banking crisis which is now moving into its twelfth year and remains unresolved. An appeal by borrowers Nicolas and Nicole Emanuel published on 30th January against Promontoria, buyers of distressed loans from UK and Irish banks, successfully challenged the routine practice of Promontoria relying on heavily redacted and photocopied documents, known as 'secondary evidence' to prove ownership of mortgages like the one the Emanuels took out with their bank in 2008.

Promontoria appears to have relied on case law involving the US singer Bruce Springsteen who in 2001 was able to convince a court that his limited company had copyright over his music despite not being able to locate original documents proving ownership. His case succeeded on the basis of 'secondary evidence' where a lawyer said he was satisfied that Mr Springsteen's company was the true owner of the copyright. For the Emanuel case, the appeal judge poured cold water on this precedent by stating that secondary evidence is not sufficient if primary evidence is available. In short, if Promontoria have original documents confirming that they have bought distressed loans then these entire documents must be used as evidence, heavily redacted photocopied documents will not suffice.

Already mortgage victim support groups in both the UK and Ireland are rubbing their hands in glee. At the very least, Promontoria's ability to repossess properties will be impaired, buying more time for distressed borrowers. In Ireland a group of lay litigants have found that the sales process from banks to vulture funds is not straight forward, involving a chain of legal entities in the process. Promontoria will now have to produce the original documents of the entire paper trail, something it clearly will not wish to do. [quote Clare Leonard]

What is very significant about the judgement is however that it will reveal substantial breaches of company law by UK and Irish banks. Banks must produce proper books of accounts that reveal their true financial position before declaring a dividend, something banks, eager to hide huge losses, may have ignored during and after the financial crisis. Banking directors have not disputed this legal requirement but claim that they are not required to disclose to the markets, losses they have calculated for the purposes of paying a dividend. Records of these calculations however must be retained by law and therefore represent 'primary evidence' which banks have up to now concealed. The Emanuel judgement may now force these banks to reveal these calculations and all the losses they have hidden including the huge discounts that banks gave to vulture funds but concealed from shareholders. Indeed there is the risk that some of these sales contracts may be null and void - a blessing to those customers under threat of eviction. [quote Tim Bush]

Irish politician John McGuinness, who chairs the Committee on Finance in the Irish Parliament has vented his fury at the way vulture funds have had a free reign over the Irish courts and forced innocent families out of their homes. "We are not supposed to comment on the courts but that is my view" he said at a recent hearing. His view is supported by UK Police Commissioner Anthony Stansfeld who claims that the banks and vulture funds can always 'outlawyer' the individual making the courts ineffective.

<https://www.youtube.com/watch?v=MnVH9m5m2rc>

Banks, vulture funds and even regulators have relied on the term 'commercial sensitivity' to justifying the redaction of evidence. The judge for the Emanuel appeal has now confirmed that this is not proper.

"Confidential communications has never been a ground for claiming privilege" he said. The appeal will certainly restrict the ability of Irish and UK judges to treat vulture funds leniently.

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