PROPOSED REGULATION OF HOME REVERSIONS AND LIFETIME MORTGAGES

SUBMISSION OF THE LAW SOCIETY OF IRELAND

Proposed Regulation of Home Reversions and Lifetime Mortgages

Submission of the Law Society of Ireland

The following submission sets out some of the concerns of the Conveyancing Committee of the Law Society of Ireland in relation to the matters being considered by the Interagency Group set up by the Department of Finance to explore the possibility of regulating home reversions and lifetime mortgage products currently being offered to senior citizens in Ireland.

Introduction:

At the outset the Committee wishes to indicate that it is conscious of the dangers for many people of availing of equity release schemes of any kind. It feels that these schemes should be used only as a last resort where, for example, the need for money is compelling and there is no option such as family members who might offer financial assistance in return for a mortgage of the house or the purchase of the house giving a life residence to the houseowner on more favourable terms than a commercial promoter would give. The committee is conscious that availing of such a scheme can, perhaps, leave the owner without the financial means to pay for nursing home care at a later stage to the extent required.

Elderly people are vulnerable to being preyed upon by others who exert undue influence on them. A solicitor advising such clients will have particular regard in the first instance to whether the money is needed, the purpose for which it is required, whether it is for the benefit of any other person, what safeguards are being provided etc., and will then consider which scheme would be the most suitable having regard to the conditions attached.

Warning Notices:

This leads to the general query as to what warning notices should be mandatory when such schemes are being offered to the public. At the moment, most promoters of such schemes state that independent legal advice must be obtained and that it is desirable to discuss the matter with family members. Some advise in their application form that "I/We understand that I/we should not rely on the lender's valuation report in any way." However, these warnings appear in different places, with different degrees of prominence and are usually not placed together under a heading "Warning". They will not necessarily appear at appropriate places. For instance, an information leaflet may say "We will arrange to conduct a valuation of your property", but this will not be accompanied by the warning which may appear in the application form that reliance should not be placed on the lender's valuation in any way.

Apart from warning notices pursuant to the Consumer Credit Act etc., consideration should be given to the contents, positioning and necessity for a warning notice of specific relevance to these particular schemes. Such a Notice might stress the necessity of getting independent legal advice, financial advice and advice on valuations and point out that it is usually desirable to discuss the matter with family members before a final decision is made. Reference might be made to checking whether a redemption fee is payable on early redemption and what effect the current interest rates will have in the long term, the implication of a variable interest rate etc. It may be appropriate to vary the Warning Notice between lifetime mortgages and reversion schemes. In the latter case attention might be drawn to the fact that the price offered will not be the market price of a dwelling with vacant possession but will be that price reduced by the value of the life interest of the vendor in possession and that the vendor should "shop around" and compare the price offered by a home reversion promoter with the price which a competitor would offer.

<u>Independent Advice</u>:

As is mentioned later, some firms may offer a financial inducement to use a solicitor from a panel nominated by the promoter of the equity release scheme at a small fee paid to the solicitor for his "independent" advice. It should be considered whether such inducements should be prohibited so that it will be transparently clear that there is no connection between the scheme promoter and the solicitor giving independent advice.

<u>Lifetime Mortgages</u>:

These are at present provided by

(A) Bank of Ireland "Life Loan" Mortgage
(B) The S.H.I.P. "Seniors Finance" Mortgage Scheme, and
(C) The Seniors Money 60plus Loan

(A) The Bank of Ireland "Life Loan" Mortgage

The Conveyancing Committee has certain reservations about the provisions of this equity release scheme, some of which were set out in the Law Society Gazette of June 2003 under the heading "Equity Release Schemes – A Follow Up". The text of the committee's practice note is contained in Appendix 1 hereof. The main objections of the committee relate to:

1. The fact that the borrower is obliged to make a will as a condition of the loan. [Condition 10(iv) of the mortgage offer]

   This is not considered to be necessary or reasonable and is, accordingly, an unjustifiable intrusion into the private affairs of the borrower. Neither is it possible to know with certainty whether or not a will has been revoked at any time by making a further will or otherwise. Accordingly, this requirement, while objectionable in its effect on the privacy of the borrower, is of doubtful value to the bank. On the basis of proportionality, the balance would lie clearly on the side of the borrower.

   The borrower should, in any event, be free to decide not to make a will so that his or her estate will devolve on intestacy. He or she may have various reasons for doing this – because of being under pressure to make a will in favour of a particular person, or because of a wish to prevent a child or children from bringing a Section 117 Application after his or her death or otherwise.

2. The fact that the borrower must disclose the name of his or her executor. [Condition 10(iv)]

   Again, for the reasons given above, this is not considered necessary or reasonable. It is required by the bank, apparently, on the basis that while there is no guarantee that the person named as executor on the date of the loan will still be the executor at the date of death of the borrower, it gives some comfort to the bank in knowing that the person named might be the person representing the deceased at that time. It is submitted that this is meaningless in the context of normal security requirements and other mortgage companies do not feel it necessary to impose such conditions. It should be sufficient to request the borrower to nominate a contact person whom the bank should contact in the event of failing to contact the borrower. It should be a matter for the borrower to decide whether such contact person should or should not be his or her intended executor. It appears also that the bank will not agree to a borrower nominating his or her spouse as executor and this again, in the view of the committee, is an unwarranted interference in the private affairs of the borrower.

3. The fact that the executor is obliged to sign a form as a condition of the loan being granted undertaking to co-operate with the bank on the death of the borrower. [Condition 10(v)]

   In reality, an executor cannot undertake to do anything other than to administer the estate in accordance with law. If this means bringing an action against the bank in the interests of the estate, the executor is obliged to do so regardless of what undertaking he or she has signed. In the ordinary course of events, the executor will be obliged to discharge the lawful debts of the deceased, and this applies whether or not he or she has signed an undertaking to co-operate with the bank and whether the mortgage is a Life Loan mortgage or any other kind of mortgage. The executor does not know, in any case, whether or not he or she will still be executor at the date of death of the borrower or whether he or she will predecease the borrower. This requirement to sign a form is again a meaningless exercise in a security context and is one which, on balance, is inappropriate and unnecessary.

4. The fact that the borrower is obliged to disclose to the bank the name of his or her beneficiaries. [Condition 10(iii)]

   For the reasons given above, this again is considered by the committee to be unnecessary, unreasonable and inappropriate. The beneficiaries intended to be named at the date of the loan may not be the beneficiaries at the date of death, and the borrower will wish to retain the right to change his or her mind on this aspect without having to inform the bank or anyone else.

5. The fact that the bank reserves the right to discuss the borrower's affairs with his or her executors and beneficiaries during the borrower's lifetime. [Condition 10(iii)]

   The borrower should not be subjected to the possibility that his or her affairs will be discussed with an executor or with a beneficiary during the lifetime of the borrower. By definition, neither an executor nor a beneficiary can claim to be such until the death of the borrower, and the borrower at all times will wish to retain the right to change the name of either an executor or a beneficiary without making them aware that they had been originally nominated. Any assurance that discussions will not be held with the executor or the beneficiary unless it is considered by the bank to be necessary is of no comfort to the borrower. The bank will clearly put its own interests first as it has amply demonstrated. The borrower should not be obliged to give a blanket consent in advance to any matter.

   The committee submits that the various provisions in the Life Loan mortgage impinging on the right of a borrower to maintain confidentiality regarding the contents of his or her will, or on whether or not he or she has made a will, and on his or her right not to have his or her affairs discussed with a nominated executor or beneficiary before his or her death without sufficient justification, should be viewed in the context of Article 8 of the European Convention on Human Rights:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence."

6. The fact that the bank reserves the right to call for repayment of the loan or to sell the house during the borrower's lifetime if another bank forecloses on a different property of the borrower which is no way connected with the Life Loan mortgage. [Condition 4(a)(vi)]

   The nature of this kind of loan implies that no payment is necessary during the lifetime of the borrower. Accordingly, it is submitted by the committee that it is of no consequence if the borrower is not financially in a position to repay this mortgage or any other mortgage which is not connected with the property. Accordingly, while this type of provision may be relevant to an ordinary mortgage when the borrower's creditworthiness may be a factor, it has no relevance to this kind of mortgage, and the words "or any other property, assets or revenues of the Borrower;" should be omitted from Default Condition 4(a)(vi), viz:

   > "an encumbrancer taking possession of or exercising or attempting to exercise any power of sale or a receiver being appointed over the whole or any part of the Property or any other property, assets or revenues of the Borrower;"

7. The further default provision in the Life Loan mortgage offer providing for repayment in the event of any undertakings given by the borrower's solicitor not being complied with in a manner satisfactory to the bank. [Clause 4(a)(x)]

   This leaves open the possibility of repayment being called for, although the solicitor's undertaking to the bank is not in relation to something which affects security in a material way and the remedy for which could be an action against the solicitor on foot of his professional indemnity policy or by way of complaint to the Law Society or otherwise. It also provides a remedy which might be preferred by or relied on, unreasonably, by the bank in circumstances in which its real or main complaint might be, for example, that the premises is not being kept in proper condition, which complaint might be considered to have less chance of success in court.

8. It is the experience of the committee that Bank of Ireland representatives, speaking at various seminars on equity release schemes, have said, with particular reference to the Life Loan provisions regarding wills, executors and beneficiaries, that "It is not a suitable product if you don't want to make a will". It is submitted that this is not a reasonable attitude for the bank to adopt, and that it would not be used in negotiations with a borrower who had a strong bargaining position with the bank or who was not of advanced age.

9. The fact that the borrower is penalised by way of a redemption fee for early repayment of the loan. [Condition 7]

   The reference to a redemption fee comes under the heading "Fixed Interest Rates" with no separate heading "Redemption Fee".

   The provision for redemption fees was brought to the attention of the committee by a customer's solicitor who found the clause being enforced by the bank. The provision is set out in clause 7 of the loan offer as follows:

   > "In the case of a fixed rate loan, in the event of the early repayment of the loan in whole or in part for any reason (other than as provided for in sub-clause (b) below),

> or conversion to a variable interest rate, or other fixed rate within the fixed rate period or any further or subsequent fixed rate period, the Borrower will be liable to pay a sum to be calculated in accordance with the following formula; (Amount x (R-R1) x Time) divided by 36500 and, for the purposes of this formula the variables are defined as follows: "Amount means the average balance of the amount repaid early or converted from the date or repayment or conversion to the end of the fixed rate term. "R" means the cost of funds for the Bank for the fixed rate period as incorporated in the existing interest rate applying to the Loan. "R1" means the interest rate available to the Bank for funds placed in the money market on the date of early repayment or conversion for the remainder of the relevant fixed rate period. "Time" means the number of days from the date of early repayment or conversion to the end of the relevant fixed rate period."

It is submitted that, while this may comply with Section 121 of the Consumer Credit Act 1995 (which merely requires a statement "specifying how the amount of such fee is to be calculated"), it does not meet with the requirements of paragraphs 4 and 5 of Schedule 3 of the Unfair Terms Regulations which refer to the necessity of setting out such terms "in plain intelligible language". Neither does it conform with the standards set out in Section 47 of the Consumer Credit Act 1995 relating to "Excessive rates of Charge for Credit" insofar as it provides that in determining whether the total cost of credit is excessive the court shall have regard to all relevant factors including, inter alia:

(b) the age, business competence and level of literacy and numeracy of the consumer,
(c) the degree of risk involved for the creditor and the security provided
(e) the extent of competition for the type of credit concerned.

While Section 47 does not apply to mortgage lenders, it is submitted that this is hardly because banks are expected to have standards inferior to those of, for example, moneylenders.

It is submitted that this is clearly a case in which the bank should, in any event, bring such a term to the attention of the borrower separately from the loan offer and give an example of how the formula works in practice. It does not, in that respect, meet with the grounds for objection set out in Schedule 3, paragraph (i) of the Unfair Terms Regulations:-

> "irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract."

While the bank may be permitted to charge such a redemption fee by virtue of Section 121 of the Consumer Credit Act 1995, consideration should be given as to whether such a charge is appropriate in the context of this particular kind of mortgage where the concept of being "customer focussed" could conceivably take precedence over the desire to maximise profits which, it is appreciated, is of some importance to the bank who will argue that it is to compensate them for having a fixed rate of interest, etc.

10. Additional Comments on Life Loan

(a) <u>The Equal Status Act 2000</u>:

A number of the above provisions of Life Loan agreements referred to are intended to be for the convenience of the bank rather than because they are considered as necessary security provisions. In this, it is submitted that they are discriminatory as no such provisions apply to ordinary mortgages, nor would they be imposed on borrowers with substantial bargaining strength. The recent arrival of some opposition to Bank of Ireland in this field is of some benefit to borrowers, but this, by itself, should not be considered a reasonable basis for allowing the provisions to remain.

Section 3(2) of the Equal Status Act 2000 provides that discrimination between two persons includes:

> "(f) ... that they are of different ages (the 'age ground')"

Insofar as customers under 65 years of age who are arranging a mortgage with Bank of Ireland are not required to make a will and to disclose the information which elderly people availing of the Life Loan facility are obliged to disclose, it is submitted that the terms are discriminatory, their necessity not being apparent. It is clear that it will always be useful to know in advance who the customer's executor or beneficiaries are, regardless of the age of the customer or the type of mortgage, but it is only in the case of elderly people that such conditions are imposed. Such conditions are not necessary as part of the security required by the bank.

(b) Unfair Terms Regulations:

Apart from the lack of sensitivity of these terms to the privacy and general sense of dignity of elderly people, there may be grounds for objection in the unfair terms regulations.

Schedule 2 of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 ("the Unfair Terms Regulations") sets out "Guidelines for the Application of the Test of Good Faith" and states that particular regard shall be had, inter alia, to:

> "the strength of the bargaining positions of the parties";
> and
> "the extent to which the seller or supplier has dealt fairly and equitably with the consumer whose legitimate interests he has to take into account."

As to the strength of the bargaining positions of the parties, it is hardly necessary to compare the position of the bank with that of elderly people who are obliged to mortgage part of their family home to raise necessary finance and who over many years may have come to depend on their Bank of Ireland bank manager for advice.

As to whether the bank deals fairly and equitably with the consumer "whose legitimate interests he has to take into account", it is submitted that freedom and privacy of testamentary disposition of elderly people is one of the legitimate interests which should be taken into account.

These provisions in the Life Loan agreement referred to above would appear to be contrary to various clauses in Schedule 3 of the Unfair Terms Regulations. As failure e.g. to notify the bank of a change in executor entitles the bank to call for repayment or sell the house during the lifetime of the borrower, this would seem to be unfair within the meaning of Clause 1(e) of Schedule 3: -

> "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation."

(B) The S.H.I.P. "Seniors Finance" Mortgage

The concerns of the Conveyancing Committee in relation to this scheme include:

1. As with Default Provision 4(a)(vi) of the Life Loan mortgage referred to above, the S.H.I.P. mortgage also provides that the mortgagee may exercise its powers of sale if:

> "an encumbrancer takes possession of or exercises or attempts to exercise any power of sale or a receiver is appointed over the whole or any part of the Mortgaged Property <u>or any other property</u> *[underline added]*, assets or revenues of the Mortgagor" [Clause 7.1.(f)]

For the same reason, it is submitted that it would be more reasonable to end the sentence with the words "or any part of the Mortgaged Property", omitting the remainder.

The committee noted that the terms of a loan offer from S.H.I.P. included a provision that:

> "In the event of contracts being executed within eight weeks of the date of this letter of offer, S.H.I.P. will furnish a bonus of €1,500 (one thousand five hundred euro) to you which may be used towards your legal fees or otherwise as you wish."

The committee submits that consideration should be given as to whether this kind of inducement is acceptable. In the past, the Conveyancing Committee has taken exception to offers of free cookers, fridges etc. from builders if building contracts for new houses were returned within a specified time in unaltered form. It is considered by the committee that such offers are undesirable as they create a conflict between solicitor and client where the solicitor may have a good reason not to return the contracts within the specified period, e.g. where negotiations are taking place or clarification is awaited in respect of some term of the loan offer or draft mortgage, etc. The loss of the inducement can be unfairly attributed to the solicitor being "unreasonable", etc., and it is submitted that the loss of the 'bonus' should not arise or follow on as a consequence of the proper representation of a client by his or her solicitor. If the bank wishes to offer a genuine bonus to the borrower, it need not be tied in to the performance of the legal or security aspects of the transaction or to the negotiation of the terms of the offer itself: it could still be offered if, for example, the borrower accepted the loan offer within 8 weeks of the agreed terms of the loan being fully negotiated between the borrower and the bank through the borrower's solicitor.

2. Redemption Fee: This is referred to in the S.H.I.P. offer of advance (on page 8) re Variable Rates (where redemption takes place within 5 years) under the heading of "Consumer Notices", as required by Section 121 of the Consumer Credit Act 1995. The formula for calculating the redemption fee is stated to be "Initial Cost of interest rate – residual cost of interest rate cap". And in its information leaflet re Fixed Rates, the formula is given as "Redemption fee = PV(f)-PJV(fl)" where -

> "PV9F) = Present Value of remaining flows under the original interest rate hedge; and
> PV(fl) = Present Value of remaining flows based off current market rates".

Presumably both formulas are intended to signify the same meaning, but without an example of how it applies in practice it is difficult for the layman to discern what exactly either of them mean. The comments made re the Life Loan redemption fee formula would equally apply here.

In relation to the Bank of Ireland "Life Loan" mortgage, reference was made to this aspect (pages 5 and 6 above) and it was pointed out that this section merely requires a statement "specifying how the amount of such fee is to be calculated". While the contents of the

S.H.I.P. "Consumer Notices" set out the "Important Information" to be brought to the attention of the consumer, this does not include a reference to redemption fees. This is information which should, in the view of the committee, be brought to the attention of the consumer at the earliest opportunity in a manner which is immediately intelligible and which should not be hidden behind obscure formulas or headings. Accordingly, the "Important Information" to be set out in the Third Schedule of the Act might be extended to include two further items of information:

(a) Whether the loan is subject to a redemption fee
and
(b) How such a redemption fee is calculated (with example)

The second item could be followed by an explanation such as "See Consumer Notices on Page 8", where the matter could be set out in detail.

This comment by the committee would apply to all providers of equity release scheme mortgages, not just to S.H.I.P.

(C) Seniors Money Ireland Limited - The Seniors Money 60plus Loan

Reference has been made to the concerns of the Conveyancing Committee to inducements to consumers which may create a conflict between the consumer and his or her solicitor. In relation to Seniors Money Ireland Limited, a similar cause of concern arises.

On page 4 of their Information Leaflet "All you Need to Know about the Seniors Money 60plus Loan", they properly state that:

> "It is a condition of the loan that you speak with an independent solicitor and receive independent legal advice before accepting any loan offer we may make to you."

On page 8, they again say:

> "An independent firm of solicitors must act for you".

However, they then, in the view of the committee, undermine the effect of their advice by stating in the next sentence that:

> "We can recommend solicitors to you from a panel of independent solicitors with whom we have negotiated a standard fee. This fee is included in the Set-Up Fee. Should you wish to use a solicitor not on the panel we will contribute our standard fee towards your chosen solicitor's costs."

In their "Seniors Money 60plus Loan Fact Sheet", they indicate that

> "A Set-Up Fee applies to all loans. This includes the following:

Valuation fee:	€ 130
Legal Administration fee:	€ 949
Seniors Money Administration	€ 70
Total:	€1,149"

In relation to the Legal Administration fee of €949, they state that:

"This fee includes a contribution of €140 towards independent legal advice."

It is the view of the Conveyancing Committee that this creates a possible conflict of interest situation for both (a) a solicitor on a "panel of independent solicitors with whom we have negotiated a standard fee", and (b) a solicitor employed by the consumer who is paid the sum of €140 by Seniors Money.

In the first case, a solicitor who is seen to be on a Seniors Money panel which is put together and paid by Seniors Money is not likely to be regarded as "independent" of Seniors Money. If, after the death of the consumer, his relatives question the transaction, a query may arise as to whether the solicitor was genuinely independent of Seniors Money. Is such a solicitor likely to advise the consumer to deal with some other company in preference to Seniors Money, and, if so, would Seniors Money pay the solicitor for such independent advice? Insofar as independent advice will entail examining in detail a great many factors relating to the reason for raising the finance, the family circumstances of the client, the capacity of the client to make decisions, the valuation of the property, the effect on the client's estate, the interest rate and the ultimate cost of the finance, the terms of the mortgage offered and the comparative terms of alternative schemes available, and of other means of raising finance, it is questionable whether a solicitor could properly do this work for €140 and if he or she purports to do so, his or her "independence" could be open to query by a court.

Similarly, if the consumer's own solicitor accepts a sum of €140 as a contribution to his or her fees, the independence of the solicitor may be brought into question. Such a solicitor must not only be independent but be seen to be independent, and if he or she has a regular source of income from one source it may be considered or perceived to be likely (even if untrue) that he or she will tend to recommend the company which is paying his or her legal fees, rather than another company which is not.

It is submitted by the committee that this type of offer by the lender to pay or contribute to the borrower's legal fees should be prohibited by law.

Additional Comments on Lifetime Mortgages Generally

The Conveyancing Committee sets out below a number of further comments and submissions that arise from a consideration of the general questions of –

- payment of early redemption fees in (fixed rate) lifetime mortgages
- (fixed rate) lifetime mortgages –v- variable rate mortgages
- (fixed rate) lifetime mortgages -v- other fixed rate mortgages.

These submissions and comments apply to all lifetime mortgage products.

It is the case that a fixed rate of interest universally applies in lifetime mortgage schemes at least for the first 15 years and in some cases for the duration of the lifetime mortgage, which may be longer. The interest is calculated at a compound rate and is always set at a higher rate than a variable rate mortgage to take account of the fact that the interest rate is fixed. Further, it appears to the committee that the interest rate applied to lifetime mortgages is set a number of points higher than fixed rates offered to other borrowers in the general mortgage market. In addition, extra charges are imposed for early redemption of fixed rate lifetime mortgages.

It is the view of the committee that charging an early redemption fee on a lifetime loan on top of the fact that the fixed rate is set at a higher rate than a variable rate mortgage to take account of the fact that the interest rate is fixed, is in effect a double charge.

It might be argued by a bank offering lifetime mortgages that, because the interest rate does not go up and down as variable rates do, the rate is fixed to take account of this over a specified period, in this case based on average life expectancy. If the loan is paid off sooner than expected, the bank would want to be compensated for what it perceives to be the loss of income which it would otherwise have got over the longer period. Thus the bank would, no doubt, argue that this is not a double charge. However, the committee submits that the fixing of the rate is sufficient by itself to achieve the bank's desired profit on the transaction without the further necessity of imposing a redemption fee for the early redemption of the lifetime mortgage.

Two further points arise in rebuttal of the bank's argument:

(a) The bank does not need to charge the redemption fee because it is getting back the entire capital sum earlier than expected and it can re-lend that sum at a higher interest rate to someone else, or at the same fixed interest rate to someone else, which means that the bank is not incurring an actual loss at all.

(b) The second point is that if the rate is fixed on the basis of average life expectancy, the bank does not, so far as the committee is aware, decline to charge a redemption fee if the borrower lives beyond that average age on which the interest rate is based.

It is submitted that the net result of the above is that the bank, in addition to sufficiently realising its profit on the transaction from fixing the interest rate over the term of the loan, gains extra or super-normal profits on lifetime mortgages where the borrower lives beyond this average age, without it having to endure exposure to any risk associated with lifetime borrowers dying before reaching this average age.

Apart from the above, the question also arises as to whether the interest is fixed at the same rate for everyone regardless of whether they are 65 or 75, as appears to be the case. If so, the question arises as to how the lending institution can say that it has lost money because the mortgage is redeemed "early".

It is the further view of the committee that charging a higher fixed interest rate for lifetime mortgages than for other fixed rate mortgages available in the general mortgage market, is in effect a treble charge on a lifetime borrower. Lenders may say that a higher fixed interest rate for lifetime mortgages (as opposed to other generally available fixed rate mortgages) is warranted because the bank receives no payments during the course of the loan. This argument entirely disregards the facts that -

(a) the loan with all accrued interest compounded annually (or as per the terms of the loan agreement) will be realised at the end of the loan agreement. There is, therefore, no extra cost to the lending institution in providing the finance for which it needs to be compensated by way of a higher rate of interest. If the bank were to charge the same fixed rate for lifetime mortgages as it does for other fixed rate mortgages over the same period, it is submitted that it would not receive any less at the end of the loan period, and, in fact, it would likely receive more due to the fact that interest is compounded during the term of the loan on the accumulating sum due, there being no gradual reduction during the term of the loan of the capital sum. Therefore it is submitted that, because the eventual cost of a fixed rate loan is higher for the lifetime borrower, there is an argument for saying that the fixed interest rate for lifetime mortgages should be lower, rather than higher, than for other fixed rate mortgages.

(b) because the bank gets a registered charge over the borrower's property, there are in fact no extra security concerns for the bank arising from the fact that there are no payments during the term of the loan – or at least no extra security concerns sufficient to warrant the imposition of a higher fixed rate than could be charged to younger borrowers with regular or sufficient income.

(c) the bank specifically markets its products to elderly people on the basis that it has no requirements of them in terms of income or creditworthiness. It is submitted that there are in reality no additional credit control concerns for the bank arising from the fact that there are no payments during the term of the loan – or at least no additional credit control concerns sufficient to warrant the imposition of a higher fixed rate than could be charged to younger borrowers with regular or sufficient income.

(d) the administration of a lifetime loan where no instalments or payments are required or expected is bound to be cheaper than the administration of other fixed rate loans where monthly payments must be processed and any missed payments monitored and followed up. There is a strong case for saying that the reduced costs of administration of a lifetime loan during the term of the agreement should be reflected in a lower fixed rate of interest, rather than one that is higher than fixed rates generally available in the market.

For all the above reasons, it is submitted by the committee that redemption fees either should not apply to lifetime mortgages or that, if they do, the basis for calculating the redemption fee should be reviewed taking the above into account. If it should in the future be recommended or required that redemption fees should be taken into account when calculating the interest rate on lifetime mortgages, it is submitted by the committee that it would be extremely important that care would be taken to ensure that a situation does not result whereby all borrowers (including those who do not redeem the mortgage early) would, in effect, in lieu of paying a redemption fee, be charged an additional or higher interest rate. There would, in any event, appear to be a case for requiring a uniform formula for calculating redemption fees to be adopted by all providers of lifetime mortgages. The points made above do not appear to be taken into account in any of the existing formulas.

Reversion Schemes:

The two Reversion Schemes at present available are provided by:

(D) RRL (Residential Reversions Limited), and
(E) S.H.I.P.

The Windfall Factor:

One of the Committee's original causes of concern in relation to home reversion schemes was the 'Windfall Factor' whereby an exorbitant profit fell to the home reversion provider if the homeowner sold an interest in his home and died shortly afterwards. The market value paid for the interest sold would be reduced by the value of the life interest of the homeower to take account of the fact that he would remain in possession for the rest of his life. An interest with a market value of say €200,000 would be reduced to perhaps €95,000 – which would represent the profit margin going to the company if the homeowner died, say a month later, i.e. a profit of €105,000 on an investment of €95,000 after a period of a month.

This cause of complaint has been reduced to some extent by both RRL and S.H.I.P. and consideration might be given to whether (i) such compensatory provisions should be made compulsory and (ii) whether minimum requirements for such provisions should be provided for. The provisions made by RRL and S.H.I.P. may or may not go sufficiently far in this direction and consideration might be given to this aspect.

It is appreciated that at the moment these companies, not being lenders, but purchasers of property, are not subject to the control of the Financial Regulator but it is understood that they have recommended that they and any other such companies should come under his control.

The compensatory schemes referred to come into two categories, one dealing with early death, and the other dealing with an unusual increase in the value of property.

In the case of RRL, these come under the headings:

(i) An Inheritance Protection Guarantee

This gives the homeowner or his estate a percentage of the windfall profit (market value of interest purchased less amount paid for it) as follows:

If the house is sold or death occurs:

Within 6 months	-	homeowner gets	80%
Between 7-12 months	-		75%
In next 12 months	-		70%
In next 12 months	-		65%
In next 12 months	-		55%
In next 12 months (yr 5)	-		0%

This is available to applicants aged 75 years or less.

(ii) A House Price Inflation Guarantee

When the house is sold for any reason the homeowner will be paid half the profit made by RRL providing the sale price exceeds the original agreed valuation plus inflation plus 5% (the "Nominal Inflated House Price").

If the original agreed valuation was say	€400,000
and if inflation was say 2.5% and if	
the house was sold after 5 years	
then the Nominal Inflated House Price	
would be	€577,598.
If the house was then sold for	€650,000
the difference between that sum and	€577,598
would be	€72,402.

If RRL had purchased say a 40% interest it would be entitled to 40% of that sum - €28,960 - and half of this would be given to the homeowner who would get €14,480 in addition to his own 50% of the sale price.

S.H.I.P. also has an Inheritance Protection Pledge similar to the RRL Inheritance Protection Guarantee, with slight variations, including an extra year's duration. As with RRL it gives the homeowner or his estate a percentage of the windfall profit (market value of S.H.I.P.'s interest less amount originally paid for it) as follows:

If the house is sold or death occurs:

Within 6 months	-	homeowner gets	90%
Between 7-12 months	-		80%
In next 12 months	-		75%
In next 12 months	-		70%
In next 12 months	-		65%
In next 12 months (yr 5)	-		60%

A question arises as to whether the above allowances under these schemes should be made over a longer period and to a larger extent than is being provided for in the examples above.

Maintenance Obligations under Co-Ownership Agreement

Under the co-ownership agreement that is a requirement of home reversion schemes, the homeowner is obliged to maintain and repair the house, and is solely liable for the cost of doing so, but if the house is sold the proceeds are apportioned in accordance with the interests of the co-owners (the homeowner and the home reversion company). While it may be considered reasonable for the homeowner who occupies the house to be liable for day to day maintenance and decoration it is the view of the committee that the homeowner should not be solely liable for structural repairs (such as a new roof), the cost of which should be shared proportionately by the co-owners.

(D) RRL

On selling an interest in a house to RRL, a consumer will be required to sign a "Co-Ownership Agreement". This agreement provides that, if the consumer at any time wishes to sell the whole of his interest in the house, RRL will be able to exercise a pre-emption right in accordance with paragraph 8 of the agreement. If RRL decides to purchase the interest which is for sale, then it may do so at "the Market Price" (paragraph 8.3.2.). This means the price determined by a valuer. "Valuer" is defined as:

> "... an independent valuer of at least five years standing appointed by the Management Company or in the event of a dispute regarding such appointment, an independent Valuer of at least five years standing appointed by the Chairman of the Society of Chartered Surveyors in the Republic of Ireland, or such Body of Professional Surveyors or Valuers as shall for the time being have undertaken in Ireland the functions currently performed by such Society; or by the President of the Law Society of Ireland".

The "Management Company" is defined as

> "The 'Management Company' means Residential Reversions Limited the company charged with the management of the Property and its successors and assigns."

That the valuation is to be decided by a valuer appointed by RRL or in default by an independent person is an improvement on the original version which did not provide for the alternative of an independent person. However, it is submitted by the committee that it would, nevertheless, be more transparently fair if the valuer could in the first instance be nominated by the homeowner so that RRL, if not satisfied, could request an independent valuer. If the homeowner has a valuation produced by his own valuer which is accepted by RRL, there will be fewer grounds for complaint subsequently by his relatives if they consider that the property was undervalued than if it had been valued by a valuer appointed by RRL.

(E) S.H.I.P.

A "Co-Ownership Agreement" is required to be signed by the homeowner on the sale of an interest in the home to S.H.I.P. This provides that:

> "3.3. If the Surviving Spouse should remarry he shall not permit his new spouse to reside in the Property without the consent in writing of SHIP Trading (which consent shall not be unreasonably withheld) and without obtaining his new spouse's agreement to adhere to the terms and conditions of the within Agreement. In that event the Surviving Spouse hereby agrees to procure that his new spouse will execute whatever documentation SHIP Trading may reasonably require to confirm the new spouse's consent to, but not limited to, the terms hereof and the new spouse's adherence to these terms including the execution of Deeds of Adherence by the new spouse to both the terms of this Agreement and of the Management Agreement referred to in clause 3.5.19 of this Agreement. The Surviving Spouse shall procure that the new spouse shall furnish SHIP Trading with evidence of having obtained independent legal advice in writing before consenting to the terms and conditions of the within Agreement."

Insofar as it appears to be envisaged that there are some circumstances in which a homeowner who remarries might not be permitted to bring his or her spouse into the house of which S.H.I.P. is part-owner, the question arises as to whether this is contrary to public policy having regard to the position of marriage in the constitution.

The homeowner is also obliged to execute a "Deed of Charge" in respect of any money which might be due by the homeowner to S.H.I.P. and it is provided also in this deed of charge that:

> "9. All monies due and payable hereunder shall become immediately repayable on demand in the event of either the first or second named Chargor marrying a third party in accordance with the law of this jurisdiction or of any other jurisdiction."

The same query arises as to whether it is contrary to public policy or unconstitutional to have such provisions.

<u>Conclusion:</u>

The Conveyancing Committee submits generally that consumers require protection in all the above matters, i.e -

- the negotiation of the terms of lifetime mortgage products or reversion schemes generally with providers of finance,
- the formulation of legislation to regulate the application of interest rates,
- the formulation of legislation to regulate the imposition of redemption fees in relation to lifetime mortgage products,
- matters to do with property valuation,
- default terms leading to the possible sale of the home, and
- the obligations placed on consumers under the terms of co-ownership agreements in reversion schemes.

The committee submits that perhaps the Office of the Financial Regulator might have a role to play in relation to such matters in the context of legislation and regulation, with, perhaps, an informational and educational function falling to the Office of the National Consumer Agency. It is the intention of the Law Society that it will continue to guide its members on such schemes in the interest of protecting vulnerable clients to the extent that it is possible to do so.

If you require any further information, or if clarification of any matter contained in this submission is required from the Conveyancing Committee, please contact Mr Barry MacCarthy, Committee Chairman, or Ms Catherine O'Flaherty, Committee Secretary, at the Law Society, Blackhall Place, Dublin 7, Telephone No. 01-8681220, or by email at c.oflaherty@lawsociety.ie.

Conveyancing Committee
Law Society of Ireland
January 2007

APPENDIX 1

Text of a practice note published by the Conveyancing Committee to the legal profession in the Law Society Gazette, June 2003 edition.

"EQUITY RELEASE SCHEMES – A FOLLOW UP

The Conveyancing Committee published a preliminary Practice Note on these schemes in the May 2001 Gazette. During the intervening period representatives of the Committee have been in negotiation with the Bank of Ireland in the hope of securing modifications in some aspects of their Life Loan Scheme. Regrettably little progress has been made in achieving such modifications. The Committee has serious concerns about some of the requirements and provisions of the Scheme, some of which appear more relevant to commercial property mortgages. The Committee appreciates that this scheme is a novel one in the Irish market, but notes that it has more stringent requirements than are imposed in a similar scheme operated by a major U.K. lending institution.

The Committee's principal concerns relate to the following aspects of the Scheme:

1. (a) The requirement that the Borrower(s) make wills and appoint executors.

   While the making of a will would normally be advisable, there are circumstances where a person may decide, on a fully informed basis, that they should not make a will. Thus, for example, a person might elect to protect the estate against a claim under S.117 of the Succession Act, by allowing the intestacy rules to apply when he or she had good reason to anticipate a claim under that Section from a child disappointed by the provision made for that child.

   (b) The requirement that the Borrower(s) disclose the names of their chosen Executors, and any replacement Executors to the Bank and that the Bank is entitled to contact such named executors and require them to enter into an agreement to co-operate with the Bank and to contact them further during the term of the loan, and not just after the death(s) of the Borrowers.

   Apart from the basic principle that an executor has no legal status until the testator's death, this requirement involves the Borrower(s) in a waiver of confidentiality which seems quite unnecessary.

2. The requirement that the named executors enter into a consent to co-operate with the Bank after the death(s) of the Borrower(s).

   It is not clear to the Committee that the Bank really needs such consent, nor what real strength such consent has. The Bank will, after the Borrower(s) death(s) be a Mortgagee with an exercisable power of sale. The Bank have indicated that their concern is to be able to sell the house speedily in order to stop the interest accruing. While this is clearly desirable the Committee believes that this object is capable of being achieved without such a requirement which it feels is somewhat draconian. The Borrower's personal representative, whether an executor or administrator, has, in any case, to swear to administer the estate and pay the deceased person's lawful debts. Any further assurance required by the Bank on this point is superfluous.

3. The requirement that the Borrowers disclose the names of their beneficiaries and next-of-kin to the Bank.

   This requirement involves a further invasion of the privacy to which a person making a will is entitled, but appears, having regard to the obligation to make wills and disclose the names of executors to be a belt-and-braces provision in case the executors don't co-operate with the Bank.

The Committee is very concerned that the consent given to the Bank to contact named beneficiaries and next of kin will in some cases create or increase pressures on the Borrowers to vary the provisions of their wills, particularly if the next-of-kin is not a beneficiary. The Committee is aware of a number of cases where elderly peoples' twilight years were blighted by wrangling between members of their family who had become aware of the provisions of a will.

4. The inclusion as one of the events of default of "the appointment of a receiver over the whole or any part of the property or any other property assets or revenue of the Borrower".

   Such a provision might well be reasonably included in a mortgage where interest and/or repayments of capital is payable at regular intervals, since such events of default would cast doubt on the borrowers ability to make such payments. It is central to this scheme that interest is rolled up until the death(s) of the Borrowers. The creditworthiness of the Borrowers during the course of the loan should be irrelevant to the Bank

The Committee's principal concerns are to ensure that solicitors acting for persons contemplating entering schemes are fully informed about the advantages and disadvantages of them, in order that they may give effective advice to their clients and that solicitors are aware of the heavy obligations that will fall on them in advising their clients, and of the importance of maintaining adequate records of their advices, bearing in mind that any questions as to the quality of such advice is only likely to arise after the death(s) of the client(s).

The Committee has in the past found it necessary to criticise mortgage packages issued by other lending institutions and will continue to offer such criticism where it believes that such packages contain excessive restriction or provisions which are not in the interest of clients or are just not fair.

The Committee has had lengthy negotiations with the Bank with a view to modifying the conditions which seriously concerned it. While the Bank were prepared to make some changes the Committee's concerns were not allayed because the outstanding requirements included those about which the Committee had the most serious reservations.

The Committee believes that equity release schemes can be a useful method of releasing "dead capital" which is tied up in residential property. However, since all such schemes involve the elderly in disposing of some interest in their homes, it is critical that the procedures involved are fair and reasonable and that solicitors are able to advise their clients accordingly. The stringent provisions identifying "events of default" are not in the Committee's view fair, reasonable or necessary, while the obligation to inform the names of chosen executors, beneficiaries and next-of-kin involves the borrowers in waiving aspects of their privacy to which they are entitled are objectionable and quite unnecessary.

The Committee wishes to emphasise that it has not agreed to the use of the Certificate of Title scheme forms in connection with this scheme.

The Conveyancing Committee"