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## OneSavings Bank PLC V Burns: FAQs

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### Summary of the decision

The standard security (i.e. Scottish mortgage) in the Burns case had originally been granted by the borrower in favour of GMAC. GMAC had previously sold the mortgage (together with a portfolio of other residential mortgages) to JP Morgan who, in turn, sold it to OneSavings Bank. The point at issue in this case was whether it was necessary to specify in the transfer deed the amount secured by the standard security.

The Sheriff in the decision held that, whilst the form of wording used in the transfers between GMAC, JP Morgan and OneSavings Bank was sufficient to transfer the debt owed by the borrower from GMAC to JP Morgan to OneSavings Bank, it was not sufficient to vest the standard security. As a consequence, OneSavings Bank could not enforce the standard security.

The decision was out of line with market expectations.

### What is the impact of the decision?

The wording used in the assignment (i.e. legal title transfer) in the *Burns* case is the market standard form of wording used in Scotland. It did not expressly state the sums secured by the standard securities. The majority (albeit there are exceptions) of residential and commercial mortgage legal title transfer transactions use, or have used, this form of wording. The potential consequences of the decision in Burns are therefore wide-ranging and could impact thousands of residential and commercial mortgage legal title transfers across the Scottish marketplace.

The potential impact of the decision in Burns is that lenders who have purchased legal title to residential or commercial mortgages using the form held to be invalid in Burns could be unable to enforce or rely on the standard security without further action being taken. That said, it is important to note the limits of the decision, as well as ways in which the impact of the decision can be mitigated. We have set these out in more detail below.

### How do we know whether our mortgages are affected?

The forms of legal title transfer used in any residential or commercial mortgage purchase transaction will need to be reviewed. Clearly for lenders who have purchased legal title to a large portfolio or portfolios of Scottish mortgages across a number of transactions, this could potentially be an involved task. At this stage our view is that lenders only carry out such a review in those cases which are of immediate importance (i.e. those undergoing a pending enforcement process) or where lenders wish to review their risk position and are comfortable with the time and cost implications. We have set out our initial views (which are given pending any appeal of the decision) in further detail below.

### What are the limits of the decision?

At this stage the impact of the decision is somewhat limited. It is a decision of a single Sheriff in Banff Sheriff Court (i.e. a court of first instance, similar to a county court). The decision is not binding on other courts in Scotland, although it will be relevant to any court's considerations. However the reality is that, as the first decision on this area of law in Scotland in nearly 40 years, the decision is one which needs to be considered carefully. Pending an appeal of the decision, our view is that the transfer requirements set out in



*Burns* should be followed when purchasing or selling legal title to residential or commercial mortgages in Scotland. We have prepared an updated form of transfer wording which can be used for this purpose.

### Is the decision being appealed?

We understand that the decision is being appealed. However, given the potential impact of the initial decision our view is that parties who are participating in residential or commercial loan book sale transactions, as well as RMBS/CMBS transactions, should ensure that the transfer wording referred to in *Burns* is complied with. This will involve additional administration for legal title sellers, in particular obtaining the outstanding balance of the relevant security as at the effective date of any transfer. It will also likely mean that any sums secured by the transferred standard securities are limited to the specified amount.

As with all court processes, the timing and conduct of the appeal are not something that can be forecast or predicted. Whilst we take the view that the Sheriff Court decision is incorrect (based on prior authority and the terms of the 1970 Act), there is of course no guarantee that any appeal court will take the same view.

### Does the decision affect all Scottish mortgage loan book sales and/or RMBS/CMBS transactions?

**No.** The decision only potentially affects those mortgages which have had their legal title transferred from one lender to another. Where only beneficial title has transferred (i.e. legal title has remained with the mortgage originator with the mortgage(s) being held on trust for the transferee, which is the case in the majority of RMBS / CMBS transactions), the decision will have no impact.

Additionally, the decision will not affect all of those mortgages which have had their legal title transferred. Only those which have had their legal title transferred using the particular form of wording held to be invalid in the *Burns* decision could potentially be affected and, even then, each mortgage and mortgage transfer will have to be considered on a case-by-case basis.

### Can borrowers stop paying their mortgages as a result of the decision in *Burns*?

**No.** It was made clear in the decision that the wording used validly transferred the debt owed by the borrower to OneSavings Bank. The borrower therefore had no right to stop paying their mortgage. Borrowers will still be expected to pay their mortgage in the normal way, and mortgages can continue to be serviced in the same way as before. To this extent the decision should have limited impact on a day-to-day basis.

The decision may have an impact, however, when it comes to enforcement of the standard security which secures the mortgage. Enforcement of standard securities in Scotland is normally carried out by way of a procedure called 'calling up'. This involves serving a formal 'calling up' notice upon the borrower and, following expiry of a two-month notice period, applying to the court for an order to remove the borrower and/or to sell the secured property. Because the court in *Burns* held that the standard security did not vest in OneSavings Bank, they were not entitled to enforce the standard security.

### Does the decision in *Burns* mean that the borrower now has an unsecured property?

**No.** The decision does not discharge or release the standard security granted over the borrower's property. The existing standard security still exists over the borrower's property (including for the purposes of the insolvency or bankruptcy of the borrower). Where the decision is applicable it could however mean that legal title to the standard security remains with a previous lender / transferor. In many cases the standard security will be held in trust



by the previous lender / transferor for the transferee. The position where the prior lender / transferor has been dissolved or wound up will be more complex.

### Should a transferee take action to rectify any issues with mortgages it has taken legal title to? Could a transferee require a transferor to take rectification action?

There is no one-size-fits-all answer to these questions. Some lenders may wish to explore rectification action in immediately pressing cases (such as mortgages which are going through a pending enforcement process), whilst others may wish to look into "whole back book" rectification.

Rectification in most cases is likely to take the form of a fresh legal title transfer by the original legal title holder(s) in favour of the transferee. In some cases this could be done using any powers of attorney that were granted in relation to the original mortgage sale. In other cases it may require the co-operation of the original legal title holder(s). There are, however, a number of as-yet-unanswered questions surrounding how such rectification transfers would operate. For example, it is not clear whether such transfers would be accepted by Registers of Scotland for registration and, if not, whether this would impact their validity. Registers of Scotland have not yet given an indication of how they will deal with such rectification transfers.

Lenders should take into account three key factors when considering rectification action:

1. The cost of preparing and obtaining fresh transfers from the original legal title holder (in some cases where legal title has transferred more than once through a chain, the input of multiple prior legal title holders may be required) for a potentially large volume of mortgages.
2. The administrative burden of obtaining the relevant outstanding balances relative to all affected mortgages (as this is a requirement of the *Burns* decision).
3. Additional action may be required where the original legal title holder(s) has been wound up or dissolved (in such cases any rectification action is likely to involve increased complexity).

Our initial view, pending the outcome of any appeal of the decision in *Burns*, is that lenders consider rectification action only in circumstances where the mortgage is being enforced and the borrower has argued that there is no title to enforce based on the *Burns* decision. Our rationale here is that in most cases rectification action is likely to be costly, administratively burdensome and (in some cases) will require the co-operation of the original transferor. If the *Burns* decision is overturned on appeal then it could be that any rectification action (and associated cost) is unnecessary.

### What does this mean for enforcement?

Pending an appeal, how the decision will be applied by other courts in Scotland is uncertain at this stage. However some general principles in terms of enforcement can be considered:

- In Scotland, mortgage repossession proceedings are litigated at sheriff court level. Other sheriff courts are not obliged to follow a decision of another sheriff.
- In the *Burns* case, the borrowers specifically argued that OneSavings Bank did not have title to enforce the standard security because the form of the assignation used did not specify the sums due. In enforcement proceedings going forward, if a borrower does not specifically make such an argument the enforcement process should (all other matters being equal of course) proceed as normal. The court will then consider whether or not it is reasonable to allow the lender to enforce and repossess the property in the normal way. This is, however, in the absence of any guidance from the courts on the matter and it may be that the courts will, for example, start requiring evidence of title to the standard security having vested as part of the enforcement process.
- In many situations, standard securities which had their legal title transferred will also



have been held in trust (pending vesting of the standard security) by the transferor for the transferee. In such cases it may be possible to rely on this trust to have the transferor prepare and sign a rectification transfer (in compliance with the Burns case requirements) and/or join any enforcement action against the borrower in its capacity as trustee for the transferee. Where being enforced each standard security will need to be considered on a case-by-case basis.

- In other situations, where a standard security in question was sold as part of a larger portfolio, the transferor may have granted a power of attorney in favour of the transferee for the purpose of further assurance provisions in relation to the sale. It may be possible to rely upon this power of attorney to sign a rectification transfer (in compliance with the Burns case requirements). Again, each standard security will need to be considered on a case-by-case basis.
- Similarly, in some cases (depending on the further assurance provisions in any mortgage sale agreement and the relationship between the transferor and transferee) it may also be possible for a transferee to require a transferor to join it as a party to any enforcement action. In truth this is likely to be more complex and cumbersome than the options outlined above, and should only be considered as an option of last resort.
- In addition to the above, other routes of debt enforcement such as sequestration (bankruptcy) will still be available to the lender and could be considered. The circumstances of each case would however have to be reviewed to determine whether bankruptcy was an appropriate enforcement method or not.

### What other legal protections or mitigations may be available?

The standard security in the Burns case was registered in the older Scottish property register (known as the Sasine Register). A minority of standard securities in Scotland are registered in this register. Most standard securities in Scotland are registered in the newer Land Register of Scotland. Standard securities registered in the Land Register of Scotland will not as a matter of course benefit from any protection or immunity as a result of registration. In some circumstances, certain standard securities may benefit from statutory warranty or compensation provided by Registers of Scotland (who maintain the Land Register of Scotland). A number of hurdles would however need to be overcome in order for a standard security to benefit from such warranty or compensation, and loss would have to be shown. Even then there is no guarantee that any warranty or compensation would be provided.

Further discussions around the outcome of the case are required with Registers of Scotland to determine the extent (or not) of any protection or mitigation offered to standard securities registered in the Land Register of Scotland. In the meantime, given this uncertainty, any such protection / mitigation should only be considered as a last resort and may not be available.

### What is the potential impact on RMBS and CMBS transactions involving Scottish assets?

RMBS or CMBS transactions involving originator-sold Scottish mortgages will be largely unaffected by the Burns decision (as legal title to those mortgages will not have been transferred). If a perfection event were to occur and trigger the transfer of legal title to the issuer, the forms of legal title transfer would require to be updated to adhere to the wording and requirements set out in the *Burns* case.

RMBS and CMBS transactions which could potentially be affected are those where the seller has (before selling beneficial title to the issuer) purchased legal title to the mortgages from a prior originator using the form of legal title transfer held to be invalid in Burns. This could mean that the beneficial title to the affected Scottish mortgages was, in some cases, not fully transferred to the issuer.





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## Do we need to notify Trustees or Note / Bond / Certificate holders in relation to RMBS or CMBS transactions?

Whilst there is a potentially large impact on Scottish assets held in RMBS and CMBS transactions as a result of the *Burns* decision, at this stage we would caution against taking such action until guidance has been obtained from a higher court (i.e. through an appeal) on the matter. This will give a better indication as to whether the courts in Scotland generally consider such legal title transfers to be invalid or not.

## What recourse is available to us / against us in terms of mortgage sale agreement warranties?

Parties who have sold either legal or beneficial title to Scottish mortgages under mortgage sale agreements will generally have given warranties as to the title they are selling. Purchasers of legal title to Scottish mortgages which are negatively affected by the *Burns* decision may have recourse to the sellers under the terms of the mortgage sale agreement. Such recourse will normally in the first instance consist of requiring the seller to provide fresh transfers which comply with the form outlined in *Burns* (i.e. which contain the amount due in respect of each mortgage as at the date of transfer). It is important to remember that recourse will also depend on the precise terms of, as well as any limitations (such as in relation to further assurance provisions) contained in, the mortgage sale agreement. There will also likely be time limits on recourse under the terms of any mortgage sale agreement. In certain historic transactions where the seller has been dissolved or wound up it is likely to be very difficult to obtain any recourse against such seller.

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