



## *OneSavings Bank PLC v Burns:* Enforcement concerns for lenders in the Scottish marketplace

*A recent decision of Banff Sheriff Court in Scotland has unexpectedly cast doubt on the validity of the form of legal title transfer used widely in the Scottish mortgage trading marketplace in recent years. We look at the impact of the decision and what it means for lenders operating in the Scottish marketplace.*

A judgment issued by Sheriff Mann in Banff Sheriff Court on 30 March 2017 in the case of *OneSavings Bank plc v Burns (Burns)* has called into question the validity of a style of assignation (legal title transfer) of a standard security (Scottish mortgage) which has been used extensively in the Scottish mortgage trading marketplace for the past 25 years. The court in *Burns* found that OneSavings Bank had no title to enforce the standard security which had been granted by Mr and Mrs Burns in favour of GMAC-RFC Limited and transferred to OneSavings Bank (via JP Morgan).

The decision in *Burns* turned on the wording used in the form of assignation of the standard security (the initial transfer from GMAC-RFC to JP Morgan was analysed for the purposes of the decision).

### Legal Background

The creation and legal title transfer of standard securities is governed by the Conveyancing and Feudal Reform (Scotland) Act 1970 (the 1970 Act). In addition to governing how and when standard securities can be created and transferred, the 1970 Act also sets out certain forms of wording to be used in the creation and transfer of standard securities. The prescribed forms of wording are limited and the 1970 Act allows for additional wording to be used in Scottish transfers, as well as different wording to be used in different circumstances. Section 53(1) of the 1970 Act specifically envisages circumstances where verbatim use of the forms of wording in the 1970 Act may not be possible by stating that it shall be sufficient that any deed conforms "as closely as may be" to the provisions of the 1970 Act. In addition, the 1970 Act does not preclude "the inclusion of any additional matter which the person granting the deed...may consider relevant".

The form of assignation in the 1970 Act states (our highlighting):

"I, A.B. (designation), in consideration of £ hereby assign to C.D. (designation) a standard security for **£ (or a maximum sum of £, to the extent of £ being the amount now due thereunder...)**"

It has for the past 25 years been market practice in Scotland to alter the above form of assignation in cases (being the majority of cases) of "all sums" or "fluctuating advance" standard securities so that the assignation did not state the specific amount due. The rationale behind this alteration was three-fold:

1. Stating the amount would likely have the effect of fixing or ruling-off the sums secured by the standard security at the specified amount which, in the cases of all sums or fluctuating advance standard securities, would potentially mean any further advances or drawings (whether pre-contracted or otherwise) not being secured by the transferred standard security.
2. In some cases where the standard security secured sums by reference to a figure (for example in shared equity transactions where the standard security secured a percentage



of the market value of the property) it would be difficult or impossible to identify the sum secured at the transfer date and even less desirable for that sum secured to be fixed (particularly in such cases where, for example, property prices would be expected to increase).

3. In the case of larger scale bulk assignments there are considerable practical challenges in assembling the necessary data to quote the sums due at the precise date of assignment.

The legal basis for such alteration was an earlier (1978) decision of the Scottish Court of Session in *Sanderson's Trustees v Ambion Scotland Ltd* (a decision which was analysed in *Burns*), as well as the terms of s.53 of the 1970 Act.

The particular wording used in *Burns*, set out below, therefore reflected the wording used extensively in the Scottish marketplace (with our highlighting):

*"[the Transferor hereby assigns] the standard securities granted by the respective parties whose names are specified in column 2 of the Schedule annexed and signed as relative hereto in favour of [GMAC-RFC Limited] for all sums due **to the extent of all sums now due or at any time or times hereafter to become due under the respective standard securities**, the creditors' interest in which is currently vested in the Transferor, the said standard securities being recorded in the register for the County specified in the relative entry in column 4 of the said Schedule on the date specified in the relative entry in column 5 of the said Schedule."*

The court in *Burns* held that, because the specific amount due under the standard security was not specified in the assignment, the assignment could not be said to conform "as closely as may be" to the relevant form in the 1970 Act. As a result, the assignment did not validly vest the standard security in OneSavings Bank and therefore they had no title to enforce the standard security

### The effect of the Decision

The effect of the decision is that assignees who have taken an assignment of standard securities which secure a variable sum, but have not included reference to the specific amounts secured as at the date of the assignment, will potentially not have the benefit of the standard security relative to the debt that has been assigned to them.

It is important to note that the court in *Burns* held that the secured debt itself was validly assigned although the standard security was not. Borrowers do not therefore have any right to stop paying their mortgage.

Whilst this is the decision of a single Sheriff Court and not therefore binding on other Sheriff Courts in Scotland, it will nonetheless be relevant to any court's considerations and it cannot be ignored as it is the first direct decision on this area of law in nearly 40 years (and one in which the decision ran contrary to market expectations).

### What next?

We understand that the decision in *Burns* is being appealed by OneSavings Bank. Going forward the precise timing and grounds of appeal are not something that can be predicted. Notwithstanding that *Burns* is a decision of a court of first instance, our view is that lenders should therefore (at least pending the outcome of any appeal) use the form of assignment approved in *Burns*, i.e. which contains the sums secured by and due under each standard security.

Where lenders have already purchased legal title to Scottish mortgages using the form of assignment held to be invalid in *Burns* the position is less clear. Our initial view, pending the outcome of any appeal, is that lenders should exercise caution when considering any



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rectification action, given the effect of such action is at this stage unclear and the potential costs associated with such action. Nonetheless we appreciate that there will be some circumstances – for example ongoing enforcement processes – where it may be important for lenders to explore rectification action. Where this is the case we recommend that professional advice is sought.

### Further detail

We appreciate that lenders and other operators in the marketplace may have concerns about the decision in Burns, and will want to understand the impact on their business and what options are available to mitigate any risk. We have prepared the [\[attached FAQ guide\]](#) which explores some of the key issues in more detail. If you have specific concerns about a particular transaction please do speak with your usual Shepherd and Wedderburn contact.

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