THE HIGH COURT

IN THE MATTER OF A REFERENCE TO COURT UNDER SECTION 19(2) OF THE REGISTRATION OF TITLE ACT, 1964 AND IN THE MATTER OF AN APPLICATION BY ALLIED IRISH BANKS PLC AND ALLIED IRISH MORTGAGE BANK FOR THE REGISTRATION OF THE CHARGE DATED 12TH APRIL 2006, PENDING UNDER DEALING NO D2006 DNO 24363H, AND FOR THEIR REGISTRATION AS OWNERS OF THE CHARGE AS TENANTS IN COMMON OF THEIR RESPECTIVE SHARES

Judgment of Mr. Justice Henry Abbott delivered on the 20th day of October 2006.

This is a reference by the Registrar of Titles to the High Court pursuant to the Registration of Title Act 1964.

Section 19, para. 2 of the Registration of Title Act 1964, provides:

> "...
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> (2) Whenever the Registrar entertains a doubt as to any question of law or of fact arising in the course of registration under this Act, he may make an order referring the question to the court."

Counsel for the Bank and also counsel for the Registrar of Titles submitted written submissions to the court and in terms of introducing the factual background of the case it is useful to set out "the résumé of the background set out in the written submission of counsel for the Bank as follows:

> "1. These submissions set out the response of Allied Irish Banks plc and AIB Mortgage Bank to the questions raised. However, before dealing with that response, it is important to explain the background to the applications for registration which are before the court. The applications before the court comprise just two applications from a much larger series of applications which have been made for registration of charges created in favour of Allied Irish Banks plc and AIB Mortgage Bank since 13 February 2006. All of these charges are created by a new standard form mortgage introduced by the Allied Irish Banks group under which borrowers create simultaneously a mortgage in favour both of Allied Irish Banks plc and AIB Mortgage Bank.
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> 2. The latter (namely AIB Mortgage Bank) is a new entity having been created on 13 February 2006. The purpose of setting up AIB Mortgage Bank was to enable the Allied Irish Banks group (and its customers) to take advantage of the Asset Covered Securities Act, 2001 ("the 2001 Act"). The 2001 Act was enacted to allow credit institutions in Ireland to create a new form of security over their assets with the same characteristics as a security familiar to German law known as "*Pfandbriefe*" bonds. This form of security allows German credit institutions to obtain favourable rates of interest on the international money markets. German credit institutions are in turn in a position to pass these favourable rates of interest onwards to their customers.
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> 3. Under these "*asset covered*" securities, credit institutions are in a position to provide a very attractive form of security to lenders on the international money markets over their underlying mortgage assets and a 'limited category of other highly secured assets. The holders of such securities (i.e. the international lenders) are given the status of "preferred creditors" in that they are given exclusive recourse against the borrowing banks mortgage assets the subject of the security. In an insolvency, no other creditors are given any right against those assets until the "asset covered" security claims are satisfied. This makes these securities very attractive to international lenders. In return, the lenders on the international money markets are prepared to give the "asset covered" credit institutions more favourable rates of interest than would be available to traditional banking companies. Prior to the enactment of the 2001 Act in Ireland, Irish banks and credit institutions were not empowered to offer this form of security to their lenders on international money markets - with the result that they were not able to obtain as favourable rates of interest as the German credit institutions. The 2001 Act has put in place a mechanism under which Irish credit institutions will be able, subject to certain conditions, to offer security of this type to international lenders on terms that give the lenders the preferred status described above. Under the 2001 Act, such security can now be granted by certain specific types of credit institutions incorporated and authorised in Ireland - provided those credit institutions confine their activities, namely:
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> (a) to the provision of lending secured over real property; or
>
> (b) lending to the public sector.
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> Such credit institutions may be registered under the 2001 Act as designated credit institutions entitled to carry on "asset covered securities business".
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> 4. In order to avail of the 2001 Act, it is therefore necessary that the entity to be registered thereunder carries on one of the specific types of business identified in paragraph 2(a) or 2(b) above. The Allied Irish Banks group wished to avail of the 2001 Act in order to cut the costs to it of borrowing on international money markets. This was important not only to the Allied Irish Banks group but to its customers in that the cost of credit to a bank's customer is related to the cost of borrowing incurred by banks in the international money markets. However, in order to avail of the 2001 Act, it was necessary to set up a specific entity which would be involved solely in the provision of lending over real property. This was why AIB Mortgage Bank was established.
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> 5. The creation of AIB Mortgage Bank means that henceforth, home loans within the Allied Irish Bank group will be issued by AIB Mortgage Bank on the security over a. mortgage of tire property to be acquired. However, the grant of a loan to purchase property is only one of many transactions which a customer may wish to enter into with his (or her) bank. For that reason, bank customers will still wish to continue to deal with their existing bank branch (i.e. the branch of Allied Irish Banks plc). They will also wish to be free to use the property mortgaged to AIB Mortgage Bank for the purposes of securing loans granted by Allied Irish Banks plc in respect of other transactions carried out with the latter (such as personal loans, car loans, and possibly business loans).
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> 6. With rising property values, there is a strong appetite on the part of bank customers to continue to use their equity in their property for the purposes of securing additional loans (over and above the home loan granted by AIB Mortgage Bank) for a whole range of different purposes. However, if a mortgage has already been granted by that customer to AIB Mortgage Bank, then the customer would have to take out a second mortgage in favour of Allied Irish Banks plc for the purposes of securing these additional loans against the customer's equity in the property. This would mean that

customers would have to execute two mortgages. This would be unacceptable from a costs point of view for the customer. It would also increase the costs to the Allied Irish Bank group in that it would be necessary to process twice the number of mortgages. In turn, this would have an adverse impact on the Banks' ability to offer the lowest possible rates to its customers.

7. It is in these circumstances that Allied Irish Banks group decided that it would be preferable - both from the Banks' perspective and from the customers' perspective to have a single mortgage executed in favour of AIB Mortgage Bank and Allied Irish Banks plc. The intention of this single mortgage is that it will secure all debts due to each of the Banks in respect of any loans or credits of any nature made, by then: to the mortgagors both present and future and that it will cove:; both registered and unregistered land. The Banks believe that the use of this single mortgage is clearly in the best interest both of the Banks themselves and their customers. The single mortgage should greatly simplify customers' dealings with the Banks. Prior to the inception of the single mortgage, a plethora of different mortgage forms were used within the Allied Irish Banks group. The AIB Home Mortgage Department use two different forms of mortgage. In addition, the AIB Finance Limited mortgage was also in a different form. The adoption of this new single form of mortgage will also assist in ongoing discussions between the different credit institutions in Ireland with a view to adopting an industry wide single form simple residential mortgage. This will facilitate customers in switching mortgage loans from one lender to another.

8. The introduction by the Allied Irish Banks group of this single form mortgage is also consistent with the ongoing drive to introduce a single form of mortgage for use throughout the entire EU.

9. Insofar as the Allied Irish Banks group is aware, it is the first banking group in Ireland to establish a mortgage bank for the purposes of taking advantage of the 2001 Act. However, it is undoubtedly the case that other banks will wish to follow suit, if so, it is almost inevitable that they will wish to adopt a similar approach in relation to the creation of a single mortgage. Otherwise, they will have all of the problems associated with the creation of second mortgages as outlined in paragraph 5 above."

The asset covered Securities Act 2001, (the "2001 Act") was not opened in detail to the court, but suffice it to say that the 2001 Act, is a complex and technical piece of legislation containing 106 Sections, the purposes of which are stated in s. 2 of the Act to facilitate:

"(a) the establishment and operation in the State of designated credit institutions, and

(b) the establishment and operation of a market in asset covered securities so as to make available further sources of funds to those institutions."

The Reference

The questions referred by the Registrar of Titles pursuant to s. 19(2) of the 1964 Act are as follows:

1. The Registrar has brought the matter before the court pursuant to section 19(2) of the Registration of Title Act, 1964 ("the 1964 Act") seeking the Court's assistance in relation to the following questions: -

(a) is the ownership of a fluctuating share in property (in this case a charge) an interest which may be registered on a Register maintained under the Registration of Title Act, 1964?;

(b) does the description of the nature of such a share satisfy the requirement in Rule 48 that the Registrar ascertain the share of each tenant in common owner?;

(c) would the description of the nature of such a share in the Register comply with the requirement of Rule 48 and. section 91(1) of the 1964 Act that the Registrar enter in the Register the share of each tenant in common?;

(d) is it the case that the nature of the interest created by the mortgage (i.e. where they are subject to variation or fluctuation) is such that they are not capable of being registered on the Register maintained under the 1964 Act?

I set out the written submissions of the parties as follows:

Written submissions of counsel for the banks

"1. The transaction between the Borrower and the Banks is a simple and time honoured transaction, namely the provision of a mortgage, being an interest in land as security for an advance of monies. It cannot be questioned that the form of mortgage does operate to create the mortgage or charge the lands, it cannot be questioned but that the owner of land has, and is indeed guaranteed under Article of the Constitution, the entitlement to deal with land as he or she shall see fit. There is no principle in law which limits the nature of interests which can be created in land, or which provides that any new or novel interest cannot be recognised.

2. There can be no dispute that the intention of the new Allied Irish Banks single form mortgage is that the lenders will hold their respective interests as tenants in common and not as joint tenants. That is clear from the terms of the single form mortgage itself. It is accepted that the shares held by each of the Banks in the mortgaged property may potentially vary over the lifetime of the mortgage deed. This will be so if, for example, further advances are made by any of the Banks to the mortgagor subsequent to the date of creation of the mortgage. It has always been the Banks' case that there is no principle of law which prevents a tenancy in common operating merely because the respective legal interests of the tenants in common may fluctuate from time to time. In this context, it is clear that ownership of land, whether legal or equitable, is capable of arising in a myriad of different forms and situations. While the concept of a joint tenancy is subject to very strict requirements, a tenancy in common is a very elastic concept. A joint tenancy will not exist in the absence of the so-called "four amities". Unless each of those unities are shown to exist, a joint tenancy will not arise. In contrast, in the case of a tenancy in common, such a tenancy will arise if only one of those four unities exist - namely the "*unity of possession*". The existence of the unity of possession is not questioned in the present case.

3. The elasticity of the concept of a tenancy in common is reinforced by the fact that, for example, one tenant in

common may only have a life interest in the property while another may have an interest in fee simple, and there may be another with solely an interest in remainder. All of these interests can live together in one tenancy in common. Similarly, one tenant in common may be entitled to 1/80th of the freehold while the other might be entitled to 79/80th's in other cases, there may be 80 (or more) tenants in common all of whom own different shares in the property; each of the tenants in common may not even hold shares of identical sizes. One may own 1 acre; another 30 acres; another 300 acres; and there may be 77 of them who hold half an acre each. Alternatively, each of the 77 may hold shares of unequal sizes. There are almost an infinite number of different variations and combinations which may exist. I-r is submitted that the fact that a tenancy in common may exist with such a Wide extent of different interests subsisting together underscores the elasticity of the concept of a tenancy in common.

4. The only other requirement (i.e. other than the "unit}, of possession than must exist before a tenancy in common can arise is that each tenant must hold an undivided but distinct or specified share. In the present case, it is submitted that the Banks will clearly each hold an undivided share in the mortgaged property. Moreover, it is submitted that each of them will also hold a distinct or specified share. In this context, the fact that their respective shares may vary as between themselves from time to time does not mean that they are not "distinct or specified ". It is submitted that each of their respective shares can be ascertained, and that being so, they will be sufficiently "specified" or "distinct". In this context, there does not appear to be any difference in principle between the meaning of the word -distinct" and the meaning of the word "Specified". A helpful authority on the meaning of the word "specified" is to be found in the decision of Nourse J. in *Re: Green's Will Trusts* [1985] 3 All ER 455. In that case, a testatrix stated, for the purposes of section 1(1) of the Perpetuities & Accumulations Act, 1964 (U.K.), the perpetuity period under her will was to be from the date of her death to 1st January, 2020. She died on 1st February, 1976. It was argued that the relevant period was not "specified" since one could only arrive at the relevant period by knowing the date of death of the testatrix and making an arithmetical calculation. This argument was rejected by Nourse J. who said (at p 460):

> "Counsel for the Attorney General accepts that in order to be valid, a charitable gift, like any other, must vest it in interest within a period permissible by rule against perpetuity …
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> Counsel for the second to fifth defendants submits that the attempt [made in the will] was unsuccessful, on the ground that what was here specified was not a number of years but a period expiring on a particular date. .... What he said -was that a period which can only be reduced to a number of years by making a calculation is not a specified number of years. For that he relied on *White v. Whitcher* [19281 1 KB 453, the once well-known authority on the meaning of "some specified age" in what later- became S. 228 of the Income Tax Act, 1952. 1 find that authority to be of no assistance in the present case. There is plenty, of other authorities, including that of common sense, to the effect that "specified" merely means "unambiguously identified" or "made clear". Speaking from Mrs. Green's death on 1st February 1976 and looking forward to 1st January 2026, I think that the codicil unambiguously identified, or made clear, the period of 43 and 11/12 years as the perpetuity period for the purposes of the trusts of residue. In any judgment, that was a specified number of years within section 1(1) of the 1964 Act ".

5. There is a very clear parallel between that case and the present case in that there, the relevant specified period could not be identified unless one knew the date of death of the testatrix and then made a calculation (according to the formula set out in her will). The parallel with the present case is that here, one needs to know the amounts due to the lenders before one can make a calculation in accordance with the formula supplied to the land Registry by the Bank. Under that formula, one can always ascertain what is the respective shares of the individual Banks in the mortgaged property. Once one knows how much is owed to the lenders, one can make that calculation (in the same way as one could make the calculation in the Green case once one knew the date of death), and therefore the relevant shares are, in fact, stated for the purposes of Rule 67.

6. Having regard to the meaning of the word "specified" as explained by Nourse J. in the *Re: Green's Will Trust* case, it is submitted that the shares of the Banks in the present case are clearly "specified" and, therefore, there is no reason why a tenancy in common should not be said to subsist between them. Accordingly, in circumstances where there is a unity of possession between the Banks, the relevant requirements for the existence of a tenancy in common are satisfied. Furthermore, that is entirely consistent with the intention of all parties to the Mortgage Deed. It is clear from the terms of the Mortgaged Deed that all parties envisage that the Banks would hold their respective shares as tenants in common.

7. It is also submitted that there is no policy reason why a tenancy in common should not be said to subsist between the Banks. For the reasons already explained in paragraph 4 above, the arrangement proposed in the present case is clearly in the interests of all of the parties to the Mortgage Deed. The arrangement does not in any way undermine the rationale underlying the 1964 Act. Nor does it cause difficulty or damage for any person. On the contrary, in circumstances where the 1964 fact does not recognise equitable interests, the arrangement proposed is the only means by which those inspecting the Register can be informed of the true situation that there are, in fact, a number of parties whose interests are secured by the mortgage deed.

8. The essential purpose behind any system of Registration of Title is to record the ownership of property, and these are main reasons for same:

> (a) To save individuals the trouble and expense of investigating the history of a title, see *Gibbs v. Messer* [1891] AC 248, *Mulhern v. Mulhern* [19311 IR 700,
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> (b) The prevention of fraud;
>
> (c) Simplification of the transfer process with the consequent savings for a purchaser. The Memorandum to the Registration of Title Bill, which subsequently became the Registration of Title Act 1891 stated the intentions of same as follows:
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> > "To provide a simple, inexpensive and easily accessible Land Registry, for all occupiers of land in Ireland..... and to substitute for the Record of Title an approved system of registration which may be made use of by any landowner who preferred the system of Registration of Title to that of Registration of Assurance carried out in the Registry of Deeds. "

9. A conclusion that the 1964 Act does not permit the Banks to proceed in, his way would seriously limit the flexibility of the Land Registry and fly in the face of its expressed purpose. As mentioned previously, there is a clear commercial rationale for the creation of the single mortgage. It is in the Interests of both banks and consumers. If all interested parties have agreed to execute a mortgage in these terms, and, if no one is damaged by the registration of a mortgage in these terms, a conclusion that the 1964 Act did not permit the registration of this charge would expos, a very serious lacuna in the Act. What would happen in a case where the mortgage has already been created and acted upon in relation to unregistered land in a county which subsequently becomes subject to compulsory registration? How would the Land Registry deal with the mortgage in those circumstances?

10. It is respectfully submitted on behalf of the Banks that there is nothing in the 1964 Act or the Rules made thereunder which should cause a difficulty for the proposed registration. In this context, section 91(l) of the 1964 Act simply provides that:

> "The owner of any one or more undivided shares in any land or charge may be registered with the addition of the prescribed entries in the Register for the purposes of showing the share which he holds in the land or charge ".

This is clearly an express recognition that land may be held in undivided shares by more than one person.

In the present case, each of the Banks are clearly the owners of undivided shares in the land. For the reasons already advanced, they are tenants in common. Section 91(1) says that the respective shares of the owners should be "shown" by means of prescribed entries in the Register. For the reasons given below, it is submitted that the relevant rules prescribing the particulars to be provided will be satisfied in the present case.

11. Rule 48 is simply the basis upon which tenants in common are registered and it is submitted that its provisions will clearly be satisfied in the present case by the provision of the formula to the Registrar. By providing the formula to the Red stray. he will be it a position to `ascertain" that the respective interests the Banks as tenants in common are to be calculated by reference to a formula, and he will be in a position to stake an entry to that effect in the Register. In principle, it is submitted that there is no difference in substance between what is proposed here and what would occur where, for example, land is registered in the joint names of 80 different tenants in common and the Registrar notes the respective shares held by each of those persons.

12. In the course of the dealings between the Banks and the Land Registry in relation to the single form mortgage, the Land Registry also raised an issue in relation to Rule 67. That rule provides as follows:

> "An application for registration as owner by a person claiming as tenant in common of an undivided share in property shall state the share to which he is entitled, where the share does not appear from the instrument lodged. 7-he entry in the Register shall be that the applicant is full owner or limited owner, as the case may be, of a specified undivided share of the property ".

13. In this context, attention has already been drawn to the meaning of the word "specified " as explained by Nourse J. in the *Green's Will Trusts* case. Essentially, the word "specified" means nothing more than capable of being ascertained. It is submitted that the word "state" in Rule 67 has a similar meaning. The word "state" and the word "specified" are interchangeable. In the circumstances, having regard to the explanation of the word "specified" given by Nourse J., it is submitted that the application to the present case does; in fact, state the share to which each of the Banks is entitled as tenants in common. It does so by reference to the formula from which the respective shares of the Banks can be ascertained. In the circumstances, it is submitted that the respective shares will be "stated" for the purposes of Rule 67 by reference to the formula which the Banks have already supplied to the. Land Registry. It is therefore submitted that the provisions of Rule 67 will be complied with.

Conclusion of the Board's Submissions

14. Having regard to the reasons outlined in paragraphs 7 to 16 above, it is submitted that the answers to the questions raised by the Registrar pursuant to section 19(2) of the 1964 Act are as follows:

(a) the Banks are clearly owners of undivided shares in the charge created by the deed of mortgage and therefore their ownership of that charge may be registered pursuant to section 91(1) of the 1964 Act;

(b) insofar as Rule 48 is concerned, it is submitted that, for the reasons given in paragraph 14 above, its provisions will clearly be satisfied in the present case by the provision of the formula to the Registrar. By providing that formula to the Registrar, he will be in a position to ascertain the respective interests of the Banks as tenants in common, and he will be in a position to make an entry to that effect in the Register;

(c) for the same reason, it is submitted that the description of the nature of the share in the Register will comply with the requirement both in Rule 48 and section 91(1) that the Registrar enter in the Register the share of each tenant in common;

(d) it is submitted that the fact that the shares of the Banks may potentially vary does not have the effect that they are incapable of being registered under the 1964 Act. For the reasons already given, it is submitted that the mortgage deed clearly creates a tenancy in common in that there is a unity of possession between the Banks and, in addition, each of the Banks holds a specified share. Those are the only criteria that must be satisfied before a tenancy in common can be said to exist. In those circumstances, it is submitted that there is no reason why the registration cannot be effected. For the reasons given in paragraph 13 above, the provisions of section 91(1) of the 1964 Act are satisfied. For the reasons given in paragraph 14 above, the requirements of Rule 4' are satisfied. In addition, for the reasons given in paragraphs 15-16 above, the requirements of Rule 67 are satisfied. Given that the 1964 Act was intended to facilitate the registration of land rather than the converse, it would defeat the purpose of the 1964 Act if a tenancy in co=or, of this l<-inc could not be .registered. It would mean that the 1964 Act was incapable of dealing with a form or' mortgage which is commercially desirable, in the interests of customers, and

clear and logical in its terms.

Written submissions of counsel for the Registrar of Titles
The written submissions of counsel for the Registrar of Titles were as follows:

1. Object of the title registration system

1.1 The substance of the reference must, it is submitted, be considered in the context of the object and function of the title registration system. The object of the registration of the ownership of legal interests in registers maintained by the state in perpetuity is the protection of 'purchasers'. The function of the registers is to provide 'purchasers' of registered property with the means of ascertaining with certainty the ownership of the property and the burdens affecting the ownership and to protect him/her against any other claims to the property except those burdens which affect without registration.

1.2 Since 1891 the system has provided a simple, clear, and secure system of title registration. Major beneficiaries of the system are lenders and financial institutions who avail of the certainty afforded by the conclusive state guaranteed registers and can proceed to safely advance monies on foot of same.

1.3 Ambiguity or uncertainty in relation to the title registration matters is clearly not in the interests of 'purchasers'.

1.4 The law of property applies in the usual way to registered land with two main modifications as follows:

(i) There can be no equitable interest, in registered land - the registers are registers of legal interests in land;

(ii) An ownership created by a deed vests not on the delivery of the deed (as it would if the property was unregistered) but on the entry of its ownership on the register.

1.5 The basic principles of precision and certainty for 'purchasers' is reflected throughout the Land Registration Rules 1972.

Rule 4(2) provides that every entry shall be clearly expressed and shall state with precision the particular property or interest that it is intended to affect and no entry shall refer to matters that are not the subject of registration under the Act;

Rule 53 provides inter alia that an application or instrument which does not indicate with sufficient precision the particular interest or land which it is intended to affect …. or is otherwise expressed in a manner inconsistent with the principles upon which the register is to be kept may be refused;

Rule 64 (1) of the Land Registration Rules 1972 inter alia provides that where it appears to the Registrar that an application or instrument is not expressed so as to indicate with sufficient precision the property or part of the property in the register to which it relates or the ownership, burden or notice to be entered in the register, he may refuse to make any registration.

2. Relevant rules and statutory provisions

2.1 Rule 2 of the 1972 Rules provides that 'property' includes land the ownership of which is or may be registered in the registers established by the Act and Rules 3(4)(b)(i) & 224(ii) provide that the ownership of a charge may be so registered.

2.2 The Act of 1964 prescribes the entries that can be made on the register and no other entry other than an authorised entry may be so entered (Rule 4(2) of the Land Registration Rules 1972 refers).

2.3 Section 62 of the Registration of Title Act 1964 provides the mechanism of the creation of a charge and section 62(2) provides that until the owner of the charge is registered as such the charge will not confer on the owner of the same any interest in the property. Section 62(6) provides that once the owner is so registered then the instrument of charge will operate as a mortgage deed within the meaning of the Conveyancing Acts and the owner will have all the statutory and other rights of a mortgagee.

2.4 Section 64 of the Registration of Title Act 1964 and Rule 113 of the Land Registration Rules 1972 provides for the transfer of registered charges.

2.5 Section 91 (1)of the Registration of Title Act 1964 provided that the owner of any one or more undivided interests in any land or charge may be registered with the addition of the prescribed entries in the, register for the purpose of showing the share which he holds in the land or charge.

2.6 Rule 48 of the Land Registration Rules 1972 (registration of tenants in common on first registration) provides that where it appears that two or more tenants in common are found entitled their shares must be ascertained by the Registrar and entered in the register.

2.7 Rule 67 (Registration of a tenant in common) provides that an application for registration as owner by a person claiming as tenant in common of an undivided share in property shall state the share to which he is entitled, where the share does not appear from the instrument lodged. The entry in the register shall be that the applicant is full owner or limited owner, as the case may be, of a specified undivided share of the property.

The subsidiary register

2.8 Section 8 (b) (ii) of the Registration of Title Act 1964 provides for the maintenance of a register of owner of such other rights as may be prescribed and Rule 224 of the Land Registration Rules 1972 *inter alia* prescribes pursuant to section 8 (b) (ii) that the ownership of any charge, whenever created, registered as burden in land may be entered in the register maintained under section 8.

3. The Reference to Court under Section 19(2)

3.1 The central issue before the Court is whether a fluctuating share in property (in the case of the application, a charge) is an interest which may be registered on a Register maintained under the Registration of Title Act 1964 and, if so whether the registration sought is allowable.

3.2 It is respectfully submitted that this application should be refused on a very basic principle. The Applicants seek to be registered not in respect of fixed shares in the charge but upon fluctuating charges therein by reference, to the amount owed to each of them. In our submission this cannot be done for the fundamental reason that the only basis upon which such registration could be effected would be of equitable interests and not of legal interests and, of course, equitable interests cannot be registered.

3.3 It is arguable that no difficulty would arise on the first registration of the two companies even if the exact division of the property was not specified as proportionate shares. But when that proportion happens to change there would have to be a transfer from one company to the other and that transfer, in the absence of a deed, could only take effect in equity, a deed being, of course, required by Section 3 of the Real Property Act, 1845, which provides inter alia that "*a feoffment made after the said 1st day of October 1845..... shall be void at law unless evidenced by deed* .....

3.4 This is echoed in Rule 52 of the Land Registry rules under which a transfer must be sealed and executed by the transferor and attested by a witness as required by Rule 54 – Rule 54 does not refer to a deed except by inference but Form 19 makes it quite clear that a transfer must be signed, sealed and delivered.

3.5 It is submitted that -in. effect what the Banks propose in the present case is that an equitable transfer under a trust or contract should be recognised by the Land Registry. In our submission there is no basis for this because the registration system permits only the registration of legal interests and there cannot be legal interest where a share passes by act of law or by virtue of a contract. Of course it can be protected by a caution and in certain cases by an inhibition but that is not what is applied for in the present case.

3.6 There is, of course, no doubt that Section 91 of the Registration of Title Act recognises that a charge over registered land can be held by more that one person - but that is not what is proposed in the present case: what is proposed in the present case is that the interest in the charge should be registered and that the registration should follow the proportionate amount advanced by each of the parties from time to time.

3.7 Again Rule 67 is specific - it requires that the application for registration "*shall state the share*" to which the person seeking registration is entitled. This is very different from merely giving means of calculation by which the share can be ascertained and in our submission it is not sufficient that the mathematics can result in the share being ascertained - that is not a statement of the shares, particularly where one cannot ascertain the share without applying to the two mortgagees which will entail looking outside the Register (by reference to the- respective statements of account with the relevant lenders) which would be directly contrary to the entire policy of the Registration of Tile Act and the Registration of Titles.

3.8 In our submission there is no analogy between this present application and the decision of Nourse, J., in In *re Greens Will Trusts* [1985] 3 All E.R. 455. The reason for this is that the word "state" as used in Rule 67 is far more demanding than the specification of a number of years which is what Nourse, J., was considering. The formula of words used by the testatrix in the Greens Will Trusts case could only ever give rise to one period of years dating from the death of the testatrix. It is for that reason, it is submitted that Nourse J. was able to conclude that perpetuity period in question was "unambiguously identified". The formula suggested by the Banks in the present case is, by its very nature, cannot give rise to a single "stated" or, even ascertainable, share of the property (charge). Rather the respective shares of the lenders will ambulatory and shifting in nature.

3.9 It is further submitted that the analogy with charges in relation to future advances on foot of an existing mortgage is inappropriate. Whereas section 75 of the 1964 Act makes specific provision for such charges that is not what is proposed in the present case and in any event there is no variability of interest on the part of the mortgagee in the case of such a charge.

3.10 Rule 67 is very specific - it requires that "*the entry in the Register shall be that the Applicant is full owner or limited owner, as the case may be, of a specific undivided share of the property*". Section 91 (1) of the Act of 1964 is even more specific - it provides:

> "The owner of any one or more undivided shares in any land or charge may be registered with the addition of the prescribed entries in the Register for the purpose of showing the share which he holds in the land or charge."

3.12 The acquisition of an additional share by one tenant in common must it is submitted be a transfer to or inheritance by the tenant in common whose share is increased but in the present case it is not proposed that there be any transfer or inheritance.

4. Summary and conclusion

4.1 The Banks are, in effect, seeking to register equitable interests and not legal interests. Such equitable interests cannot be registered.

4.2 The registration is not expressed in a manger consistent with the principles upon which the register is to be kept. It breaches the basic principles of precision and certainty. Indeed, on a true analysis it introduces uncertainty and ambiguity onto the registers maintained under the 1964 Act as 'purchasers' could not 'ascertain' from an inspection of the register what was being purchased.

The Oral Submissions

Counsel for the banks in furthering the written submissions in oral hearing argued strongly that the requirement that in the case of a

charge registered against registered land owned by an individual, the charge itself did not on the face of the register show the extent of the interest to which the owner was entitled under the charge in terms of value: it was always necessary to make enquiries within the individual or the institution entitled to the charge. The ascertainment of the share of the owner in common of a charge would similarly have to be ascertained. He argued that the respective shares of common owners of a charge may be registered, firstly on the basis of an ascertained percentage share, ascertainable on the face of the instrument and thereafter determined by way of a formula derived from the charging instrument. Counsel for the Registrar argued that even if the shares could be ascertained in this way, the end result would be shifting or ambulatory interests, varying from the share first registered or ascertained, and thereby created a situation where one part owner would be an implied trustee of the other thereby giving rise to the registration by the Registrar of equitable interests in a manner forbidden by the land registry code.

The Decision
I consider that it is helpful in examining how the arguments of the banks and on behalf of the Registrar may be analysed to set out in the first instance the differences, (if any), between shares held in common in a charge or mortgage and shares held in common in land. Shares held in common in land have been always regarded as actual shares in the land and by reason of the doctrine of unity of possession the actual land which may be attributed to these shares is not yet ascertained. A charge is an instrument whereby the actual portion of the land is made available as a security for the payment of money advanced by the person charging the land. Generally at equity at least, joint lenders took their shares in the mortgage in the proportion to which they lent their money and expected it to be paid as noted in Wiley on "Irish Land Law" para. 7.20 p. 364, Wiley Irish Land Law (1st Ed). On the execution of a mortgage or charge, it is quite plain to see that the share in the charge is equal to both the money which is advanced and the money (principal and possibly interest) expected to be repaid. However this proposition changes as the payment period for the mortgage or charge continues.

In relation to what happens factually during the payment period, it is illustrative to take a simple case of four mortgagees charging land with the payment of a principal sum with or without interest over a particular period. The mortgage instrument might provide for a quarter share of each of the joint mortgagees in the mortgage on the basis that the money was advanced equally by them. No joint account clause is expressed or implied, is provided for in the mortgage in such a simple case and the mortgagor and each co-owner of the mortgage are free to deal with each other as they wish. In relation to each co-owner, the mortgagor may redeem in full or in part the money which that co-owner of the mortgage has advanced to him under the mortgage. The mortgagor may fall into arrears in respect of payments of principal and interest to another co-owner and may make payments to the other two co-owners exactly in terms of the mortgage. The result of such a payment history over time will result in some co-owners of the mortgage been owed nothing or some considerably less than others. The question has to be asked, what is the impact of the inequality of the money owed to each of the co-owners who, at the commencement of the mortgage had equal shares. The reality is that the mortgagees now have different shares in the mortgage. Such an outcome might be presented by constituting each joint mortgagee the trustee of the others either under the instrument or as in the case with English legislation, by statute whereby each of the trustees would pay any money received by way of mortgage repayment into a joint account on behalf of all the trustees. However the outcome of unequal shares by reason of unequal payments in the absence of the intervention of trust arrangements between the trustees arises in my opinion not as a matter of equity but as a matter of fact arising from the factual presumption that a person who advances money on a loan expects to have it repaid by the borrower in accordance with ordinary commercial practice.

The simple case scenario described above could relate to a loan secured by a registered charge on the Folio of registered land, with each owner registered with a quarter share at the end of the payment period a situation described. In the simple case of inequality of money owing could arise factually. If one of the charge owners had agreed to redeem the share of moneys advanced by that charge owner, the number of charge owners would then be three. On a factual basis their shares in the charge would be one third each, notwithstanding the fact that they were registered and remained registered on the folio as owners of one quarter of the charge. This new one third ownership cannot be ascertained from a perusal of the register: it must be ascertained by obtaining the payment information from the four co-owners of each share of the charge. The shares of the charge have been shifting or ambulatory over the payment period. Such change, however, has not been by reason of the intervention of equity, it arises from the factual nature of a mortgage or change. No one could argue that this outcome on the simple case scenario is not possible in the case of a co-owned charge registered against registered land or that the prohibition of registering equitable interests prohibits such an outcome.

On the other hand in the case of the co-ownership of registered land as distinct from a change the co-owner registered in respect of an undivided fraction of the land as tenant in common continues to have the right to sell such share to a purchaser for value without notice, notwithstanding that arrangements may have been made with a third party for the diminution of that interest along the lines of the diminution of the interest of a co-owner of a charge who has been paid. As long as that third party did not have the rights of a person actual possession such as might be protected without the registration of burden, the purchaser for value from the registered owner could take a ? by virtue of the provisions of the Registration of Title Act 1964. The private arrangements between the registered, co-owner and the third party might involve as argued by counsel for the banks a progressive diminution of the fraction of the co-owner down to a lower level over a particular time period and thus be ascertainable. I do not accept that this process whereby the ownership could diminish could be registered by the registering authority as such progressive diminution of the share that would involve at each successive period a transfer of a share in the land which may only be affected by a duly registered deed of transfer. The right of the third party to an increasing incremental share would thus clearly be an equitable right enforceable between the registered co-owner and the third party but not permitted to be registered under the Act of 1964.

As is clear set out in the submission there is a clear requirement the Registrar of Titles would in the case of a charge, set out the share of the co-owner of a charge. I am satisfied that this requirement is quite consistent with the factual or commercial reality of the possibility of the share of co-owner of a charge changing or increasing over time, as illustrated in the simple case scenario above to allow for changing shares of the charge among co-owners, merely reflects the reality affecting a charge without such provision.

As is clear from the submissions in this case, the effects in relation to which the reference is made are more complex than the case of the simple charge relating to the simple case scenario or straightforward variations thereof. The instruments proposed to effect the charge of the two banks in this case envisage provision for future advances and differential interest rates as between the two co-owners. The additional sums owing to one co-owner over the other by reason of differential rates or future advances are to my mind no different in principle from differences arising in sums owing to co-owners by reason of the different payment record of the borrower with each co-owner as envisaged in the simple case scenario. The provisions of the rules obliging the registrar to ascertain the share of each co-owner of the security still apply, but by reason of my analysis of the simple case scenario as applied to land registry conveyancing, I consider that these shares must be capable of being ascertained and provided at the date of first registration to the registration with any formula to be used in their calculation.

The share of the registered co owner of land as distinct from a charge is a static share as shown on the register. But the share in a charge, although stated in static absolute terms on the register is in fact a variable share but which is ascertainable by ordinary conveyancing enquiries. For that reason I conclude that it is appropriate to apply the test described in the case Green Will Trust

[1985] 3 All ER 455 ascertaining the share of a co owner of a charge and that this test is entirely inappropriate in relation to ascertaining and describing the share of a co owner in land.

Section 64(4)(a) of the 1964 (dealing with the title obtained by a transferee) provides that the transfer of the charge has:-

> "The same title to the charge as a registered transferee of land under this Act has to the land, under a transfer for valuable consideration or without valuable consideration as the case may be."

This provision clearly draws the distinction between a "charge" and "land". The distinction between a charge and land under the Local Registration of Titles (Ireland) Act 1891 was noted by Glover on the Registration of Ownership of Land in Ireland (1933) p. 165:-

> "…The owner of a charge has no estate legal or equitable in the land; the only estate that can exist on the land is the estate of the registered owner. A charge owner is in the same position as the owner of a mere charge in unregistered land, who cannot recover possession of it from his mortgagor because his mortgage does not convey any estate to him…"

And at p. 167 saying that:

> "A person cannot be registered as 'full' or 'limited' owner of a charge. It is personal property; and in the death of the owner, the charge vests in his executor or administrator and for the purpose of discharging his duties as executor or administrator he is entitled to be registered as owner."

The provisions of s. 62 of the Act of 1964 and in particular subs. 6 thereof providing that on registration of the owner of a charge the instrument of charge shall operate as a mortgage by deed within the meaning of the Conveyancing Acts and the registered owners of the charge shall for the purpose of enforcing this charge have all the rights of powers of a mortgagee under a mortgage by deed, including the power to sell the estate or interest which is subject to the charge, have removed many of the shortcomings of the charge under the 1891 Act highlighted by Glover but do not place the registered charge on the same footing as "land within the meaning of the Act of 1964". The definition of land under s. 3 of the 1964 Act does not specifically include a charge. It would seem to me that a charge may not be included under the category stated in the definition as "land of any tenure "and that a charge should not be confused with land when stated in the Act but is a creature of statute only, with special properties which mirror but are not co-extensive with land" as defined in the Act. The reference in s. 6(2)(i) to the instrument (charge) not conferring on the owner "any interest in land" should not be taken as including a change in the definition of the Act of 1994.

In view of the foregoing I answer the questions in the reference by their respective paragraphs as follows.

Yes but only in the case of a charge

(a) Yes

(b) Yes

(c) No.