

3.12 Module 28 Law of Banking and Finance

3.12.1 Headline information about the module

Module title	Law of Banking and Finance
Module NFQ level (only if an NFQ level can be demonstrated)	8
Module number/reference	Module 28
Parent programme(s) the plural arises if there are embedded programmes to be validated.	LLB (Hons)
Stage of parent programme	3
Semester (semester1/semester2 if applicable)	Semester 1 or Semester 2
Module credit units (FET/HET/ECTS)	ECTS
Module credit number of units	5
List the teaching and learning modes	Full Time, Part Time
Entry requirements (statement of knowledge, skill and competence)	Successful completion of Stages 1 and 2 of the programme
Pre-requisite module titles	None
Co-requisite module titles	None
Is this a capstone module? (Yes or No)	No
Specification of the qualifications (academic, pedagogical and professional/occupational) and experience required of staff (staff includes workplace personnel who are responsible for learners such as apprentices, trainees and learners in clinical placements)	Lecturers expected to hold at least a level 8 legal qualification, preferably with a professional legal qualification. It is an advantage to have completed the Certificate in Training and Education provided by Griffith College
Maximum number of learners per centre (or instance of the module)	60
Duration of the module	One Semester, 12 weeks
Average (over the duration of the module) of the contact hours per week (see * below)	2
Module-specific physical resources and support required per centre (or instance of the module)	Lecture room with internet access and digital projector.

Analysis of required learning effort (much of the remainder of this table must also be presented in the programme schedule—take care to ensure consistency)										
Effort while in contact with staff										
Classroom and demonstration		Mentoring and small-group tutoring		Other (specify)		Directed e-learning (hours)	Independent learning (hours)	Other hours (specify)	Work-based learning hours of learning effort	Total effort (hours)
Hours	Minimum ratio teacher/learner	Hours	Minimum ratio teacher/learner	Hours	Minimum ratio teacher/learner					
24	1:60						101			125
Allocation of marks (within the module)										
				Continuous assessment	Supervised project	Proctored practical examination	Proctored written examination	Total		
Percentage contribution							100	100%		

3.12.2 Module aims and objectives

In this module, learners are enabled to undertake specialized learning in the commercially important area of Banking and Finance Law. The module examines the historical development of banking and finance law as well as its present context. This module aims to provide learners with a knowledge of the theoretical principles governing this area and how they relate to modern banking practice.

Learners are also enabled to understand the regulation of banking and finance and the specific legal effects of key banking transactions and practices including, banking lodgements, interest charges, setting-off and tracing. Learners build on their knowledge and are enabled to critically analyse non-contractual liability, vitiating factors and guarantees. Finally, learners are enabled to apply the law to hypothetical, factual scenarios.

3.12.3 Minimum intended module learning outcomes

On successful completion of this module, learners will be able to:

- (i) Critically analyse core legal issues pertaining to the banker-client relationship, banking operations and lending;
- (ii) Identify and critique the fundamental legal principles employed in banking and finance law;
- (iii) Interpret statutory provisions and apply and appraise case law in the banking law context;

- (iv) Apply knowledge of banking and finance law in realistic, hypothetical scenarios;
- (v) Critically assess the importance and effects of banking and finance law and practice in society.
- (vi) Explain and critically evaluate the Irish banking and financial services regulatory framework.
- (vii) Conduct detailed research in banking and finance law and present analysis of this research in a clear manner;

3.12.4 Rationale for inclusion of the module in the programme and its contribution to the overall MIPLOs

From simple lending structures to complex regulatory regimes, banking and finance law has become a complex legal framework that underpins borrowing and lending, both nationally and in the global economy. This area of law is one where specialisation is recognised as a distinct advantage. This module provides learners, who wish to engage with this area of law in a more specialized manner, the opportunity to do so.

This module serves to directly underpin programme learning outcomes 1, 2, 3, 4, 5, 6.

3.12.5 Information provided to learners about the module

Learners will receive the following resources and materials in advance of commencement including:

- Learner Handbook;
- Module descriptor;
- Module learning outcomes;
- Assessment strategy;
- Reading materials;
- Class Notes (on a weekly basis).

Additionally, this material will be made available through Moodle, the College Virtual Learning Environment, along with other relevant resources and activities.

3.12.6 Module content, organisation and structure

Law of Banking and Finance is a 5 ECTS credit module taught and assessed over one academic semester. The module is delivered over 12 lecture sessions of 2 hours duration.

The Learning Outcomes for this programme have been aligned with the knowledge, skills and competencies indicated as appropriate for Level 8 on the NFQ. They have been explicitly articulated using the *Quality and Qualifications Ireland (QQI) Awards Standards for Honours Bachelor of Laws and Master of Laws (July 2014)* and for *Generic Higher Education and Training (July 2014)*.

Module Curriculum:

- Financial Regulation
- The Banker-Customer Contract
- Guarantees

- Vitiating Factors
- Non-contractual Liability
- Legal Incidents of Bank Accounts
- Payment Mechanisms

3.12.7 Module teaching and learning (including formative assessment) strategy

The module uses participative lectures, which consist of tutorial-style discussions, group work sessions and exercises. The lectures are supplemented by structured on-line resources and directed reading. Formative assessment is provided in the form of interactive exercises such as directed class discussion topics which reference current affairs pertaining to Banking and Finance Law at the time of instruction. Formative assessment is also provided through tutorial-style discussions, group work and exercises. These focus on specific case law and problem-based learning requiring learners to analyse the law and apply it to practical banking and finance law disputes or issues.

Learners also engage in collaborative work in pairs or small groups to brainstorm what learning has been achieved at the end of lectures. In order to support learners through the examination process, they engage in the answering of sample examination questions and correction of their own or peer's papers, thereby familiarising themselves with the marking criteria. Learners also engage in activities where they draft their own exam questions in order to recap and consolidate a particular topic.

Learners undertaking the course via blended learning benefit from varied and additional options for engagement to compensate their reduced attendance of campus. These include webinars, screencasts (recorded lectures), discussion fora, and increased use of the College's VLE (Virtual Learning Environment), Moodle.

3.12.8 Work-based learning and practice-placement

The Law of Banking and Finance module is a class based 5 ECTS credit module and does not require work-based learning and practice placement.

3.12.9 E-learning

Moodle is used to disseminate notes, advice, and online resources to support the learners. Moodle can be accessed in the learner's home, various open labs on campus and in the library. The learners are also given access to Lynda.com as a resource for reference.

3.12.10 Module physical resource requirements

Requirements are for a fully equipped classroom. The classroom is equipped with a PC and Microsoft Office; no other software is required for this module.

The College library has a dedicated law section and online legal research tools (Justice One, Westlaw, Hein Online).

3.12.11 Reading lists and other information resources

Primary Reading:

Breslin, J. & Corcoran, E. (2019) Banking Law. Dublin: Round Hall

Donnelly, M. (2015) The Law of Credit and Security. Dublin: Round Hall

Secondary Reading:

Hudson, A. (2015) The Law of Finance. London: Sweet and Maxwell

Johnson, W. & Beausang, N. (2019) Banking and Security Law in Ireland. Dublin: Bloomsbury

Andrews, G. & Millett, R. (2015) Law of Guarantees. London: Sweet & Maxwell

3.12.12 Specifications for module staffing requirements

Lecturers expected to hold at least a level 8 legal qualification, preferably with a professional legal qualification. It is an advantage to have completed the Certificate in Training and Education provided by Griffith College

Learners also benefit from the support of the Programme Director, Programme Administrator, Lecturers, Learner Representative, Students' Union and Counselling Service.

3.12.13 Module summative assessment strategy

Theoretical knowledge will be assessed by a summative end of year examination (100%). The examination will consist of both essay and problem style questions. Essay style questions will place emphasis on the demonstration of understanding pertaining to Law of Banking and Finance. Problem Style questions will enable learners to apply the principles of Banking and Finance Law to a factual scenario.

Module assessment consists of:

No	Description	MIMLOs	Weighting
1	Exam	i, ii,iii,iv,v	100%

3.12.14 Sample assessment materials

Sample Examination

Answer any three of the following questions.

All questions carry equal marks.

QUESTION 1

“If . . . a breach by a lender of provisions of the [Consumer Protection Code] does not afford a borrower any civil claim or remedy against the bank, then, beyond a complaint to the [Financial Services Ombudsman], one could ask what tangible benefit accrues to a borrower where there is a material breach of the Codes by a lender in circumstances where the borrower has suffered a loss but cannot enforce these rights under the [Consumer Protection Code] as against the lender in the context of civil litigation?”

(Trevor Murphy, ‘A Shield or a Sword of just Soft Law? An Analysis of the Banking Regulatory Codes of Conduct on the Bank/Customer Relationship’ [2013] CLP 163)

Discuss this statement with reference to the approach of the Irish courts to the question of whether breaches of the Central Bank’s codes of conduct will influence the inter-partes rights of banks and their customers. What impact (if any) will the new statutory right of action under section 44 of the Central Bank (Supervision and Enforcement) Act 2013 have on the analysis?

Sample Answer 1

Students should introduce the CBI’s codes of conduct and, using relevant case law, explain that breaches of the codes are unlikely to have an impact on the enforceability of a contract despite earlier case law suggesting that breaches might preclude an order for possession. Students should explain that code breaches can form the basis of successful complaints to the Financial Services and Pensions Ombudsman and may fall within the remit of the private right of action under section 44 of the Central Bank (Supervision and Enforcement) Act 2013. The parameters of section 44 should be explained and it should be highlighted that it is arguable that the codes fall within its remit but this is not yet clear. Students might indicate that obligations under the codes can shape the duty of care of an adviser, for example, so breaches may sound in negligence in appropriate cases. The student’s perspective on whether the approach taken by the courts in this regard is sufficient and appropriate should be set out and/or should deal with whether the section 44 right of action remedies the situation.

Relevant case that should be discussed includes:

- *Zurich Bank v McConnon [2011] IEHC 75;*
- *Stepstone Mortgage v Fitzell [2012] 2 IR 318;*
- *IL&P v Duff [2013] 4 IR 96;*
- *IL&P v Dunne and IL&P v Dunphy [2015] 2 ILRM 192;*
- *Bank of Ireland v Quinn [2016] IECA 30.*

QUESTION 2

Derek has a current account in his own name with Bank First with a large overdraft limit. Derek struggled financially after the economic crash and, as of January 2016, his overdrawn balance stood at €200,000. At this point, Bank First decided to prevent him from withdrawing any more money. In February 2016, Bank First wrote to Derek demanding repayment of the entire overdrawn balance of €200,000 but Derek was unable to pay this. In March 2018, Bank First issued proceedings against Derek for judgment in the sum of €246,000, plus continuing interest.

Derek couldn't believe that the sum has jumped so high in the space of two years. He has looked at his contract with Bank First and saw that a normal interest rate of 1% per annum is applied by Bank First to all overdraft amounts (which Derek has no issue with). It appears that an additional surcharge interest rate of 12% per annum is also added by the Bank on default, i.e. once 30 days has elapsed after repayment of the overdraft amount has been demanded. Derek is aghast that the Bank has applied this surcharge interest rate of 12% and feels it is completely unjustifiable.

Derek has a second account with Bank First in the joint names of himself and his wife, Tanya. This account is currently in credit in the sum of €300,000 as Derek has recently won a cash prize from a National Lottery scratch card. Derek lodged the prize money in the joint account as he was advised that it was the most tax efficient way to share the winnings with his wife. The joint account mandate allows for either Derek or Tanya to withdraw funds at any time without the prior consent of the other. Bank First has sent notice to Derek that it proposes to set off the balance of the joint account against the overdrawn amount of Derek's current account, including the accrued interest, as it considers Derek to be the owner of the funds. Advise Derek whether Bank First is: (a) entitled to charge 12% surcharge interest on the overdrawn amount; and (b) entitled to set off the balance of the joint account against the overdrawn balance of Derek's current account.

Sample Answer 2

(a) Students should consider the rule against penalty interest and recent case law on the test to be applied. Students should explain that the Irish courts have accepted that the costs to a bank increase in the event of credit default but ask whether the surcharge rate represents a genuine pre-estimate of loss. The UK courts have recently taken a divergent approach (with a focus on whether clause is penal and whether the detriment is out of all proportion to legitimate interest of bank) but it is as yet unclear if the Irish courts will follow suit. Relevant case law includes:

- *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79*
- *Lordvale Finance Plc v Bank of Zambia [1996] Q.B. 752*
- *ACC Bank Plc v Friends First Management Pension Funds Ltd [2012] IEHC 435*
- *AIB plc v Fahy [2014] IEHC 244*
- *Sheehan v Breccia [2016] IEHC 67*
- *Cavendish Square Holding v Talal El Makdessi; ParkingEye v Beavis [2015] UKSC 67*

- (b) *Students should also consider when the bank's right to set off will arise and, in particular, discuss the concept of mutuality. Set off is not generally possible between a sole account and a joint account; O'Meara v Bank of Scotland Plc [2011] IEHC 402.*

QUESTION 3

"While there is no doubt that marriage of itself does not give rise to any presumption of undue influence . . . , where a wife stands surety for her husband, the circumstances may give rise to such a presumption, and this may also be so in the case of cohabiting couples, whether heterosexual or homosexual, and whether married or unmarried."

(Ronan Keane, Equity and the Law of Trusts in Ireland, 3rd edn (Dublin, Bloomsbury, 2017) para. 28-47)

Discuss this statement with regard to relevant case law and consider the potential impact of a plea of spousal undue influence by a wife standing as surety for her husband's business debts on the enforceability of the guarantee.

Sample Answer 3

Students should explain the concept of undue influence and the difficulties that arise where a person enters into a contract with a bank having been unduly influenced by another. Students should point out that no presumption of undue influence arises between spouses; Irish Bank Resolution Corporation v Quinn [2011] IEHC 470. The following cases should be discussed and analysed:

- *Barclays Bank v O'Brien [1994] 1 AC 180*
- *Royal Bank of Scotland v Etridge (No. 2) [2002] 2 AC 773*
- *Ulster Bank v FitzGerald [2001] IEHC 159*
- *Ulster Bank Ireland Ltd v Roche and Buttimer [2012] 1 IR 765*
- *Ulster Bank v De Kretser [2016] IECA 371*
- *Bank of Ireland v Curran [2016] IECA 399*

Students must explain that a bank will be on inquiry in the case of a non-commercial guarantee and obliged to take necessary steps, eg where a spouse guarantees the debts of her husband or his business and had no involvement therein. The necessary steps (eg independent legal advice on the nature of the transaction) should also be mentioned. Irish courts will not examine whether the banks took the necessary steps, however, unless undue influence has actually been established on the evidence.

QUESTION 4

In 2013, Barry inherited €300,000 on the death of a distant relative. Barry decided it was a good opportunity to start thinking about his future financial needs for his eventual retirement. He viewed a number of potential investment brochures and was particularly taken with the 'Bad Bond'. To invest in the Bad Bond, Barry needed a minimum investment

of €600,000. He decided to approach his local bank, the People's Bank, to borrow the additional €300,000 he required to invest in the Bad Bond.

The loan documentation from the People's Bank classified Barry as a business customer (which he thought was ridiculous since he had never made an investment before) but he signed the loan documents presented to him because he was so excited about the investment.

Unfortunately for Barry, the Bad Bond has not proved to be a good investment. The current valuation of his investment is only €100,000, though Barry remains convinced that this will go up over the next few years if he can leave his investment where it is. Barry has struggled to keep up with his monthly loan repayments to the People's Bank but is not yet in arrears. Despite this, the People's Bank has been concerned with the value of the underlying investment and has demanded repayment of the full outstanding balance of the loan. As Barry does not want to touch his investment and has no additional savings, he cannot afford to repay the loan. The People's Bank has now issued proceedings against Barry for judgment in the amount of the loan.

Barry has questioned how the Bank can demand repayment since he has kept up with his monthly repayments. The People's Bank has relied on the terms of the loan contract. Clause 3 of the loan agreement provides that the People's Bank can demand repayment of the loan on the occurrence of a listed event of default, such as the default of the borrower in the payment of monthly instalments. Clause 6 provides that '*notwithstanding anything contained herein, it shall be lawful for the Lender at any time or times hereafter to sue for and compel payment of all simple contract debts on which the Borrower shall be liable.*' The People's Bank has relied on Clause 6 in calling in Barry's loan.

Barry feels that this Clause 6 is very unfair. He is also concerned that he cannot remember ever receiving a copy of the loan agreement. He feels that he should be entitled to the protection of consumer legislation as the Bad Bond was his first ever investment, despite the People's Bank having classified him as a business customer.

Advise Barry on whether he could be considered as a consumer under relevant consumer legislation and what, if any, defences might be open to him.

Sample Answer 4

Students should consider the definition of a consumer under EU consumer legislation and the relevant case law in deciding whether Barry might meet the definition. Relevant cases include:

- *Benincasa v Dentalkit [1997] ECR I-3767*
- *AIB plc v Higgins [2010] IEHC 219*
- *Ulster Bank v Healy [2014] IEHC 96*
- *Stapleford Finance (as substituted) v Lavelle [2016] IEHC 385*

As regards the Unfair Contractual Terms Regulations 1995, students should note that a contractual term in a consumer contract will be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer; Reg 3(2). If a term is deemed to be unfair, then that term is not binding

upon the consumer under Regulation 6(1). Students should explain the effect of a potential finding that Clause 6 is unfair ie the clause would not be binding against Barry and the Bank would not be entitled to demand repayment of the loan until an event of default under Clause 3. Students might point out that the court is obliged to consider the question of unfair terms of its own motion. Students might note that it is difficult to prove that a term was unfair. Relevant case law includes:

- *Aziz (2013) Case C-415/11.*
- *Start Mortgages Ltd v Hanley [2016] IEHC 320*
- *Director General of Fair Trading v First National Bank plc [2000] 2 All ER 759*

Students should also consider the Consumer Credit Act 1995. Section 30 directs that consumers are to be provided with a written copy of any credit agreement or guarantee at the time of signing or within 10 days of same. Section 38 renders unenforceable any credit agreement if section 30 has not been complied with. If Barry can be considered as a consumer, and if he was not provided with a copy of the agreement, he would not be liable to repay the loan.

Question 5

“Bank-customer confidentiality is of significant importance but must yield to public interest concerns in appropriate cases.”

Discuss the duty of confidentiality that applies between banks and customers and the competing principle of disclosure in the public interest. Do you think that the courts have struck an appropriate balance in this regard? Give reasons for your answer.

Sample Answer 5

*Students should explain that the bank has a legal duty of confidentiality arising out of the banker-customer contract. Students should discuss the parameters of the duty, and whether it applies just to particular transactions or applies more broadly, with reference to the seminal decision in *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 and the Irish decision of *Walsh v National Irish Bank* [2013] 1 IR 294.*

*Students should explain that the duty of confidentiality is not absolute and may be qualified where it is required by a duty to the public. The cases of *National Irish Bank v RTE* [1998] 2 IR 465 and *O’Brien v RTE* [2015] 2 IR 130 should be explored in full. There is a public interest both in the maintenance of confidentiality between banker and customer and in defeating wrongdoing. It might be argued that publication of bank wrongdoing, for example, is in the public interest but that there must be a meaningful connection between the public interest identified and the customer’s information before disclosure will trump confidentiality (see *O’Brien* decision).*

Question 6

Sarah was approached by her brother Liam in May 2013 to guarantee a loan that he required to expand his business. As the siblings have always had an excellent relationship and as Liam has always been very supportive of Sarah, she agreed to do so. The business loan was provided to Liam in June 2013 by Bob’s Bank. Sarah did not sign the guarantee until August 2013, but was aware before the loan was granted to Liam that the loan would only be granted if she signed the guarantee. The guarantee contract made it clear that Bob’s Bank was agreeing to provide Liam with the business loan in exchange for the guarantee.

Unfortunately, Liam’s business has not succeeded and he has recently defaulted on his loan repayments. Furthermore, the siblings had a falling out in relation to the care of their elderly mother who passed away in 2016, leaving both Liam and Sarah with a considerable property inheritance.

Rather than pursuing Liam for the loan balance, Bob’s Bank has sought repayment of the entire debt from Sarah. As she refused to pay within the relevant demand period, the bank has now issued proceeding against her. Sarah is aggrieved that Bob’s Bank did not issue proceedings against Liam before it demanded repayment from her. Sarah wonders if the bank is entitled to proceed against her before Liam and if there is any way she can force Liam to repay the debt himself.

Sarah has a rudimentary understanding of contract law and is hopeful that she may be able to argue that the guarantee is void for lack of consideration. Sarah has also heard a rumour that Bob's Bank cannot locate a copy of the guarantee that she signed. While she remembers signing the guarantee, she has no intention of admitting this and wonders if the bank will be able to seek judgment against her if it cannot locate the signed guarantee?

Advise Sarah.

Sample Answer 6

Students should explain the nature of the guarantee contract – a secondary obligation entered into by a third party to a lending transaction whereby if the principal debtor fails to repay the loan, the creditor can seek repayment instead from the guarantor. Students should highlight the fact that there is no general obligation on a lender to exercise its rights against the principal debtor before suing the surety; Lombard and Ulster Banking Ltd v Murray and Murray [1987] ILRM 522 (unless the terms of the contract provide otherwise). Students should explain that as, guarantor, Sarah has a right of indemnity against the principal debtor (Liam) so she can seek to reclaim any amount that she has to pay to the bank from Liam.

Students should explain that consideration usually takes the form of the creditor agreeing to lend money to the principal debtor but that a guarantee given for past consideration will generally be void; Astley Industrial Trust Ltd v Grimston Electric Drills (1965) 109 SJ 149. Students should discuss the case of Pao On v Lau Yiu Long [1980] AC 614 and whether Sarah's guarantee might be seen to fall within the exception (ie where the loan is made at the guarantor's request, on the understanding that the guarantee would be provided as compensation for the loan). There is no suggestion of forbearance here.

Students should note that no action can be brought to enforce a guarantee unless the guarantee is in writing signed by the guarantor; section 2 of the Statute of Frauds (Ireland) 1695. Students might note that section 2 applies only to a guarantee and not a contract of indemnity. Students might suggest that an argument of estoppel is unlikely to be allowed to circumvent the Statute unless in very specific circumstances where the creditor has acted to his detriment on the basis of the guarantor's oral representation; Actionstrength Ltd v International Glass Engineering SpA [2003] 2 AC 541.