

## 9. Mortgage Conditions

### General

A mortgage deed of land in England and Wales is technically a “legal charge” over the borrower’s registered ownership of the land. Strictly, a mortgage deed relates to unregistered title, which would now rarely be encountered in lending in England and Wales. However, the expression “mortgage” deed is more commonly used and we use it here for convenience.

The loan agreement and the mortgage deed together set out the legal rights and obligations of the lender and borrower. It is possible to have all matters comprised in the mortgage deed. However, convenience and practical considerations usually make a separate loan agreement and mortgage deed more convenient.

The loan agreement is more general and contains the key commercial terms of the loan advance. The mortgage deed deals mainly with issues relevant to the security. Sometimes there is duplication on issues in the two documents.

There may be inconsistencies between the loan agreement and mortgage deed. Generally the loan agreement may prevail. In some cases, the inconsistencies may be

problematic and are likely to be interpreted against the lender’s interests.

### Form of Legal Charge / Mortgage Deed

It is possible to have a legal charge in a very short form. The minimum required is the format and information set out in Land registry Form CH1. This is a short 2 page document. However, it almost always incorporates other more detailed terms and conditions. Many lenders have standard mortgage terms and conditions which have been filed in the Land Registry. They are “incorporated” in every case in the CH1 charge signed by the borrower which refers to the lender’s Land Registry MD number, which is the code for the lender’s standard terms.

There are different styles of mortgage terms and conditions. There is a “statutory” form of mortgage which incorporates automatically, certain terms and provisions of the Law of Property Act, as if they were set out in detail. This is rarely used in modern bank lending.

A lender’s form of mortgage deed may vary in accordance with the status of the borrower (company or individual) the security (property and / or other assets) and the transaction type (e.g. development as opposed to an investment loan).

The mortgage deed will very often be in a standard non-negotiable form. The clauses inserted will often be in a standard omnibus form, which deal with multiple possible scenarios, so that only those relevant in a particular case, take effect.

A mortgage deed may be negotiated in higher value or more unusual transactions. The variations relevant to the commercial terms of the case are more often contained in the loan agreement.

Many of the terms and conditions which apply to mortgage deeds are set out in the Law of Property Act 1925. In many cases, it is possible to change these terms and conditions so as to make the position more favourable to the lender. This is usually done.

### **Unfair Contract Terms Regulations**

The Unfair Contract Terms Regulations apply to mortgages with consumers in the same way that they apply to loan agreements. A consumer is a borrower who is not acting in the course of a business. Under the Unfair Terms Contract Regulations, a clause in a loan agreement can be deemed void or can be modified to the extent that it is unfairly prejudicial to the consumer.

A clause in a mortgage deed may be capable of a wide meaning which gives sweeping powers to the lender. The Unfair Contract Terms Regulations may require it to be interpreted in a narrower way that is fairer to the consumer borrower.

Apart from the Unfair Contract Terms Regulations, most mortgage deeds will be interpreted in favour of the borrower under common law principles of interpretation. These principles apply when a legal document is produced by one party, the lender, in a standard form. Any ambiguity is to be interpreted against the interests of the party who has prepared the document.

Subject to these general principles, a mortgage deed and loan agreement may contain anything the parties can lawfully agree. There are some further restrictions in consumer cases.

### **Payment**

A mortgage requires an underlying loan debt. If there is no debt, the mortgage can be redeemed by the borrower. The mortgage must therefore contain, refer to or imply a covenant to pay the loan monies.

In some mortgages, the details in relation to repayments of principal and interest are specifically set out. More commonly, the mortgage refers to the loan agreement

which sets out the commercial repayment terms.

The monies secured by the loan and agreed to be paid may be those under a particular loan agreement or may extend to monies due on all accounts between the borrower and lender (an all sums due mortgage). This usually covers all accounts present or future actual or contingent, alone or jointly, whether as debtor, as principal or as guarantor.

An all sums due clause may give the lender security over the mortgaged property for a wide range of present and future liabilities and not just the immediate debt in relation to which it was created. The wide terms of a mortgage deed may be restricted by the loan agreement which may limit the mortgage to the monies advanced under it.

## **Security**

The security in many cases, will consist of a specified property only. In the case of a mortgage of a business, even one granted by an individual, the mortgage deed may include charges over certain non-movable business assets such as goodwill, contracts accounts and debts.

In the case of a company charge over

business assets (e.g. a construction and development business) the mortgage deed may include a “floating charge” over all movable plant, machinery, equipment and other assets present and future which the company may have or acquire. See our separate note in relation to security by companies.

## **Borrower Obligations and Restrictions**

Most mortgage deeds place obligations on the borrower with a view to protecting the security and the lender. The following restrictions usually apply;

- ❖ prohibiting any other charges or mortgages to another party;
- ❖ selling or transferring the property or any part of it;
- ❖ requiring payment of compensation monies payable to the borrower in relation to the property;
- ❖ prohibiting leasing or agreeing to lease let or share possession of the property other than as permitted.

There are will be covenants and conditions designed to protect the value of the security for the benefit of the lender.

## **Borrower's Obligations and Restrictions**

There are usually obligations on the borrower which have the purpose of protecting the value of the security. The following are typical terms contained or implied in bank mortgages:-

- ❖ to pay rents, ground rents and service charges;
- ❖ to observe covenant in relation to the title;
- ❖ to comply with statutory legal obligations;
- ❖ to personally occupy the property (in owner occupier cases);
- ❖ not to let the property without consent;
- ❖ not to create any further charges without consent;
- ❖ An obligation to keep the property in repair. If the mortgagor defaults, the mortgagee may generally enter and undertake the repairs and without becoming liable as mortgagee in possession.
- ❖ to keep the property fully insured
- ❖ to comply with the terms and conditions in any lease; This is often of vital importance as non-compliance with a lease could mean the borrower's interest in the property is forfeited and of no value;
- ❖ not to make any alterations or changes without the lender's consent;
- ❖ not to develop;
- ❖ not to apply for planning permission

without lender's consent;

- ❖ to produce information to the lender as is required;
- ❖ to enforce the terms and conditions of leases;
- ❖ to give the lender notice of a threat to forfeit a lease or any proposed public authority action (e.g. compulsory acquisition).

The mortgagee has power to insure and keep insured property against damage by fire and similar insurable risks, if the mortgagor does not do so. The amount of insurance effected must not exceed the amount specified in the mortgage deed or if none is specified two thirds of the amount which will be required in the case of destruction. Premiums paid for insurance are a charge on the property

Mortgage usually require monies received from the proceeds of an insurance claim to be laid out in the repair or restatement of the property. If the policy is in the name of the mortgagor pursuant to a covenant to insure, the mortgagor is entitled to the proceeds. However, the mortgagee has an interest by way of charge in the proceeds. In order to give full effect to this, notice must be given to the insurance company of the mortgagee's interest.

In the case of a structure such as an apartment block, the management company will typically be responsible for the repair, maintenance and reinstatement of the structure. The policy will typically be in its name and the interest of apartment owners and banks will usually be automatically noted.

By law, borrowers have statutory powers to grant and accept leases on certain terms and conditions, unless the mortgage otherwise provides. Because a lending institution will typically wish to control and limit leases. The consent of the lending institution will generally be necessary to leases and lettings. A lending institution may give a general consent to lettings within certain categories in its loan offer.

In the case of a commercial or development facility, there may be further covenants appropriate to the circumstances. These may include

- ❖ proper conduct of the business;
- ❖ keeping proper books of account and making them available;
- ❖ devoting time to the conduct of business;
- ❖ maintaining licences

There may be further covenants and obligations relevant to the type of security. In

the case of a residential or commercial investment property there may be specific obligations in relation to dealings with tenants.

### **Enforcement events.**

The mortgage deed will set out so called "events of enforcement". These are events which entitle the lender to enforce the security. Typically the entire loan monies become due or may be demanded and the lender may exercise its enforcement rights. They are typically as follows

- ❖ borrower fails to pay secured monies when due;
- ❖ borrower commits a breach of the terms of the loan with the lender believes is not capable of being remedied within a reasonable time;
- ❖ any representations or warranty made to the lender turns out to be untrue;
- ❖ any other lender is entitled to enforce against the borrower;
- ❖ an administrator receiver or manager is appointed to any part of the borrower;
- ❖ borrower becomes bankrupt or in the case of a company insolvent;
- ❖ the borrower dies
- ❖ the secured property is compulsorily acquired, damaged or destroyed.

## Variation of Default Rules

As is set out in later chapters in relation to the power of sale and power to appoint a receiver, mortgage deeds usually modify the conditions under which the power to sell and the power to appoint a receiver may be exercised, so as to make them less restrictive from the lender's perspective. The powers of receivers are usually extended.

*Lavelle Coleman is an Irish firm of solicitors with an England and Wales legal practice. Our England and Wales qualified and regulated solicitors provide a wide range of legal services from our Dublin offices. We have written legal guides in relation to a broad range of England and Wales legal matters as they relate to Irish based individuals and businesses. These guides are available on our website at <http://www.lavellecoleman.ie/England-Wales-Law.aspx>*

*This is an extract from our "Legal Guide to the Management and Enforcement of Security in England and Wales for Irish Lenders (2009). The Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. It should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances. While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in it. The reader should rely only on specific legal or taxation advice. This extract is based on the law as of 1<sup>st</sup> August 2009.*

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