

2. Overview of Guide

General

This guide gives a broad overview of the issues involved in managing and enforcing mortgage loans and security in Ireland.

Most of the same considerations apply to mortgages and charges of property, irrespective of whether the security is the borrower's dwellinghouse or is a residential or commercial investment property. Many similar considerations apply to construction and development finance and security.

Mortgage security over property gives the lender property rights over the asset concerned. Property rights give the mortgagee sufficient ownership to enable the mortgaged assets to be sold in the event of enforcement. Because a mortgage gives property rights to the lender, many aspects of its creation, validity and priority are determined by property law rules.

In this guide, the word **mortgagor** refers to the borrower and the **mortgagee** refers to the lender, with the benefit of the security. In the case of Land Registry title, a **charge** deed is used instead of a mortgage deed. There is very little practical difference between a charge and a mortgage and most

lenders use a single deed which is both a mortgage deed and a charge deed in one.

Throughout this guide, the word **mortgagor** also refers to a **chargor**. The word **mortgage** also refers to a Land Registry charge and the word **mortgagee** also refers to the **chargee** or charge holder (i.e. usually a financial institution) taking the charge. These are the everyday descriptions which are usually used, even though the strict terminology and position is slightly different.

Regulatory

Chapters 3 and 4 deal with regulatory requirements which may apply to loan management and enforcement. Irish Regulation is enforced by the Financial Regulator and through complaints by consumers to the Financial Services Ombudsman. The relevant standards go beyond legal rules and prescribe standards of fairness and reasonableness etc. The regulatory standards must be borne in mind in all dealings with customers and consumers.

Chapter 3 deals with Irish Regulation and Consumer Protection. There are principles which apply to dealings with all customers and to consumers (including small businesses) which are of significance in loan management and enforcement. Chapter 4

deals with the Consumer Credit Act. There are provisions in relation to housing loans and certain other non-housing consumer loans which are relevant to the variation of loan agreements and their enforcement.

Loan Agreements and Security

Any variation agreement or arrangement or enforcement must start with an understanding of the current position. The starting point for the lender's legal rights and obligations is the existing loan agreement and mortgage deed and their respective terms and conditions. Typically, in a loan management and enforcement scenario, there will have been a breach of the loan agreement and / or mortgage deed.

Chapter 5 gives an overview of loan agreements. The loan agreement is the legally binding contract setting out the terms on which money has been lent and is to be repaid.

Chapter 6 gives an overview of mortgage security in the context of property law. It deals with the process by which a first legal mortgage or charge is put in place.

Chapter 7 looks at standard mortgage conditions. The mortgage document is a legally binding agreement between the borrower and lender. The terms and

conditions of the loan agreement and the lender's mortgage deed largely decide the lender's rights in relation to the management and enforcement of the security.

Issues with Security

A borrower may create a number of mortgages over the same asset, either with or without the first mortgagee's consent. Issues of priority of entitlement arise in relation to further advances made, after the second mortgage is put in place. Where a borrower is in financial difficulties, a second mortgage over another asset or other security may be offered. Conversely, the lender may encounter second mortgages and priority issues in relation to its own security. These may limit the lender's priority. Chapter 8 deals with issues of priority of entitlement to secured assets, where there is more than one security holder.

Chapter 9 deals with the very significant mortgage law reforms contained in the Land Law and Conveyancing Reform Act, 2009. Most of this law will become operative in late 2009. The Act will radically affect the enforcement of mortgage security entered after the Act commences. It will also have an impact on the enforcement of mortgage security entered prior to the Act commencing.

Chapter 10 looks at security over non-property assets. The borrower may offer additional security over non-property assets. Many loans which are primarily secured on property, may already provide for other security, such as a charge on a life policy, bank account or shares.

Chapter 11 looks at guarantees in the context of loan variation and enforcement. In loan variation, care needs to be taken that an existing guarantee is not restricted or invalidated. Guarantees raise a host of legal issues and are particularly vulnerable to challenge.

Chapter 12 deals with family legislation and similar rights. These rights are primarily important in the case of security over family homes. The legislation contains important provisions which are of relevance to loan variations and enforcement.

Chapter 13 looks at various circumstances and factors which may invalidate or limit the effectiveness of a mortgage security. It discusses matters which may be raised by the borrower by way of a defence or in an attempt to bargain down the strength of the lender's positions. Most of these issues should be covered by the initial due diligence on taking the security, either by the

lender's solicitor's investigations or under the borrower's solicitor's certificate of title.

Chapter 14 deals with mortgage securities granted by companies. Special procedures and registration requirements apply to the grant of a mortgage by a company. Companies, unlike individuals, can grant a floating charge over all of their business assets.

Chapter 15 deals with the mortgagee's right to protect the secured asset during the loan period. A security may be in legal jeopardy under the terms of the title by reason of non-compliance with a lease or other obligations. A security may also be in physical danger of devaluation by failure to repair, fire damage etc. There are various options for the mortgagee, including the appointment of a receiver to protect the security. There are usually protections written into the mortgage deed.

Chapter 16 sets out certain legal principles which may assist lenders. The existence of cross security and all sums due charges can widen the available security. The principles of consolidation and marshalling can be of assistance to a lender when a mortgagor is seeking to redeem a security in a manner which might leave the lender exposed. Second mortgagees have certain rights to redeem earlier mortgages and

improve their security position. Quistclose trusts and subrogation may improve the lender's security.

Enforcement of Security

Chapter 17 gives a brief overview of the lender's enforcement rights over security, which kick in, in the event of default. The more important rights are then dealt with in further detail in the following chapters.

Chapter 18 deals with taking possession of mortgaged property. Possession may have been obtained by surrender by the borrower, by a peaceful entry or under a court order. Possession may be readily available, in the case of rented properties, where possession involves receipt of the rents, rather than physical possession.

Chapter 19 deals with fixed charge receivers. The Conveyancing Act provides a procedure which allows a lender to enforce a security through the appointment of a receiver, who is an independent third party agent. The lender has less onerous responsibilities than when it takes possession itself. A fixed charge receiver may simply receive rents and pay them to the lender. Depending on the powers in the mortgage deed, the receiver may be entitled to sell the mortgaged property to repay the mortgage debt.

Chapter 20 deals with the rights and obligations of a mortgagee in possession. Possession carries certain risks and costs for the lender. A cost v benefit comparison with a fixed charge receiver may be appropriate. Possession may be a longer or shorter term strategy. The lender may wish to let out the property to generate income. It may wish to improve the property or complete development and construction works in order to enhance its value. Alternatively, possession may be a short-term strategy until the property is sold.

Chapter 21 deals with leases and tenancies of mortgaged property. In the case of a residential or commercial investment property, the lender may be satisfied to enforce the mortgage with the existing lease of the property in place. The cash flows from the tenant may enhance the value of the security. In other instances, the lender may not have consented to the letting and may not be satisfied with it.

Enforcement of Security over Land and Buildings

The usual method of enforcing mortgage security over property is to obtain a court order for possession of property, unless possession is available by surrender or peaceful entry. Once possession is

procured, the lender may sell the property under the power of sale in its mortgage. The court is not involved in the sale.

Chapter 22 deals with a mortgagee's power of sale under standard mortgage deeds and legislation. This power gives a mortgagee a right to sell property free from all lower ranking security. The sale may be with vacant possession or with tenants in place. The mortgagee has considerable freedom to choose the timing and set the terms of sale, even if it is not the optimum time for sale, from the borrower's perspective.

Chapter 23 deals with the Financial Regulators Code of Conduct on Mortgage Arrears. This Code, published in February 2009, sets out certain steps which credit institutions must take prior to initiating legal action for possession. The Code is enforceable as a matter of regulatory conduct.

Chapter 24 deals with mortgage possession proceedings. Provided the mortgage has been properly created and the borrower is in default, then the lender is entitled to possession of the property, subject to a discretion which the courts exercise, particularly in owner occupied properties.

Chapter 25 deals with possession proceedings in the High Court. Chapter 26

deals with possession proceedings in the Circuit Court. Recent changes in the law will mean that a greater number of applications for possession will be taken through the Circuit Court.

Generally, where the mortgage has been properly created and the borrower is in default, the lender will be entitled to possession as a right. However, the Courts exercise discretion to adjourn and suspend applications for repossession in order to allow for rectification of the position or to relieve the potential hardship to the mortgagee. These powers are most commonly exercised in owner occupier cases. Chapter 27 looks at the issues involved. The 2009 Law Reforms provide for the exercise of these discretions on a statutory basis, for the first time.

Chapter 28 looks at Court Orders for sale. A court order for possession followed by a private sale is the usual means of enforcement. However, court orders for sale may be necessary where there is a defect in the security or where the security is over certain types of asset.

Chapter 29 looks at Court receivers. Court receivers provide a useful mechanism to enforce certain types of security, particularly where there is a threat to the security itself. They are also appropriate where the

ordinary security lacks sufficient teeth or flexibility.

Chapter 30 deals with enforcement of security over non-property assets. This includes shares, debts, intellectual property, accounts, contracts and moveable goods. A court order may or may not be necessary. The method of enforcement depends on the type of asset and the way the security was created.

Chapter 31 deals with company receivers appointed under floating charges. This is the usual means of enforcing a security over business assets.

Debt Collection

Chapter 32 deals with the legal procedures for debt collection. A court order formally declares the borrower's personal liability to pay the debt. This opens the door to various means which exist to enforce court orders or "judgments" for money due. These may give significant additional options, where the security held is not sufficient.

Chapter 33 gives an overview of the enforcement of court orders in Ireland. It covers the enforcement of Court Orders for possession as well as the various methods to enforce a court order/ judgment for money due.

Chapter 34 deals with methods of enforcement directly against the debtor. They include committal to prison for deliberate failure to obey a Court Order. A person may not be imprisoned for non-payment of a debt he cannot afford. The Examination and Instalment Order procedure in the District Court, is a method of ascertaining a person's assets and obtaining an order for payment in instalments. There are also a number of other older methods of direct enforcement.

Chapter 35 deals with the enforcement of court orders for money due against property. It is possible to register a judgment mortgage against any real property assets owned by a debtor against whom a court order for money due is held.

Chapter 36 deals with the enforcement of court orders for money due against goods. The Sheriff and County Registrars have powers to seize goods for unsatisfied money judgements.

Chapter 37 deals with the enforcement of court orders against intangible assets. There are a number of mechanisms available. Because the assets themselves are intangible, the methods of enforcement themselves require a short form Court application and Order.

Chapter 38 deals with the cross border enforcement of court orders throughout the European Union. It is possible to enforce an Irish court order in any other European Union country using its domestic enforcement mechanisms.

Insolvency of the Borrower

Insolvency raises various issues for secured creditors. It limits the ability to enforce a debt against all of the borrower's assets. It will be most significant as an issue where there is a shortfall on the sale of the security. In this situation, the rules in relation to various insolvency arrangements will be of critical importance. Chapters 39 to 49 deal with the issues arising from the borrower's Insolvency.

A borrower's insolvency will not usually affect the lender's property rights to the mortgaged asset. However, insolvency has implications for the secured lender. Enforcement may be temporarily restricted. In some situations, the insolvency official can sell or acquire the secured asset, but will have to account to the mortgagee for the proceeds of sale.

If there is a shortfall in the value of the secured asset, the lender will be an

unsecured creditor in respect of this balance. Insolvency law is relevant to any additional security taken in the period before formal insolvency, because the new security may be set aside in some circumstances.

Chapter 39 deals with the interaction between a lender enforcing a mortgage and a bankruptcy trustee/assignee or liquidator acting in the insolvency of a borrower. Chapters 40 and 41 deal with personal bankruptcy and personal insolvency arrangements outside of bankruptcy. These are relatively rare and the legislation is not as flexible as in other jurisdictions.

Chapter 42 deals with company insolvency. Chapter 43 deals with examinership in Ireland. This is a legal mechanism to facilitate rescue of insolvent companies. Chapter 44 deals with the cross border aspects of insolvency. This is of importance where the borrower has connections with both Ireland and other European Union countries.

Adviser's responsibilities and Certificates of Title

Chapters 45 to 50 deal with issues which may arise in respect of professional advisers and services providers in relation to the original creation of the security. Chapter

45 deals with principles of negligence and breaches of duty by solicitors, valuers and others. It also deals with the legal regulation of solicitors and professional indemnity insurance.

Chapter 46 deals with the process of creating and validating security. This will be of key importance, if it later emerges that this was not properly undertaken. Chapters 47 and 48 deal with the two major types of Certificate of Title that are used in relation to security over Irish property. The Certificates of Title imply or contain a wide range of promises in relation to legal compliance and other issues affecting the security. If there is a defect in the security, there may well be recourse under the terms of the Certificates of Title.

Chapter 47 discusses the Law Society standard Certificate of Title. This is used in relation to residential property. Chapter 48 discusses various commercial property Certificates. There is no single standard commercial property Certificate.

Chapter 49 deals with title insurance. Title insurance is an alternative mechanism of securing the putting in place of security and providing for the risks in respect of title and legal compliance issues.

Variations, Workouts and Restructuring

Chapters 50 to 55 deal with various legal issues that arise in managing and varying non-performing loans.

Chapter 50 looks at the legal issues surrounding forbearance and variation agreements. Chapter 51 sets out the typical contents of variations agreements.

Chapter 52 deals with standstill agreements with companies by which the lender, normally in conjunction with other creditors, agree to give breathing space in order that proposals for a reconstruction or work out can be undertaken.

A re-organisation can take place outside of insolvency legislation or under the auspices of examinership in the case of a company or voluntary arrangements in the case of an insolvent borrower.

Chapter 53 deals with restructuring agreements. Chapter 54 looks at debt for equity swaps. Chapter 55 deals with intercreditor agreements which commonly arise in restructuring and variation. Intercreditor agreements are contracts between creditors in relation to the priority of their debts in winding up and of their respective securities.

Managing Investment Property

Chapters 56 to 59 deal with practical legal issues which arise in managing residential and commercial property security. A lender may find itself obliged to manage residential and commercial property either through a receiver or directly as mortgagee in possession.

Chapter 56 looks at general legal issues which arise when a mortgagee takes control and management of secured property. It deals with the liabilities and responsibility of landlords. It summarises the radical reforms made in 2004.

Chapter 57 deals with the rights and responsibilities of landlords and tenants. These rights cannot be overridden by the terms of the letting agreement. It also deals with tenants' rights to new lettings and the exceptions available, when it is desired to sell.

Chapter 58 deals with termination of tenancies and procedures before the Private Residential Tenancies Board. If it is not possible to peacefully repossess a tenanted property unless the tenant consents. An Order of the PRTB is required.

Chapter 59 deals with various practical issues which arise in managing residential

property. Obligations will fall on the mortgagee in possession and receiver to varying extent. There are obligations to register tenancies, comply with minimum standards together with certain other potentially onerous obligations.

Chapters 60 to 63 deal with commercial property. Chapter 60 discusses the issues involved in holding and managing commercial investment property either through a receiver or directly as mortgagee in possession. Chapter 61 deals with certain important statutory rights of tenants.

Chapter 62 deals with significant management issues that arise in commercial investments. Tenants have important statutory rights in the areas of transferring leases, sub-letting, changing use and doing work. Failure to adequately police and manage the lease can significantly depreciate the value of the commercial property investment. Chapter 63 deals with the key commercial lease obligations in respect of repairs and insurance and the procedure in relation to termination and enforcement of the lease.

Development Loans

Chapters 64 to 72 deal with issues which arise in relation to development loans and uncompleted development projects.

Chapter 64 deals with terms and conditions commonly found in development loan agreements, mortgages and security documents. They should give the lender a variety of rights.

Chapters 65 to 70 deal with issues arising in managing and working out uncompleted development projects. Chapter 65 gives a panoramic overview of development in the context of a failed project. Chapter 66 deals with planning law implications and obligations. Chapter 67 deal with Building Regulation issues.

Chapter 68 gives an overview of the process of procurement of building, construction and engineering works. It looks at the various methods and types of contracts used.

Chapters 68 to 70 deal with important issues which arise under the common form Building Contract. The balance of rights and obligations under these contracts are of key importance in the development process.

Chapters 71 and 72 look at possible methods and structures for a work out of a development project which is capable of rescue. It looks at forbearance agreements and agreements used to implement the development workout itself.

Death, Taxes and Housing Rights

Chapter 73 deals with legal issues arising on the death of the mortgagor. The issues are of particular importance where an estate is or looks likely to be insolvent. A mortgagee may need to take prompt action to ensure its position is protected.

Chapter 74 looks at the tax aspects of mortgage enforcement. The effect of some of the tax rules is to give the Revenue Commissioners effective priority over the mortgagee in respect of certain taxes which apply directly to the sale transaction itself.

Chapter 75 deals with Housing law and Mortgage Interest Supplement. This will be of relevance in the context of possession proceedings against owner occupiers.

NAMA

Chapters 76 to 81 deal with the proposed National Asset Management Agency Irrespective of the final shape of the legislation, it is likely that a "bad bank" type agency will be set up, with "super" enforcement powers over development and other loans.

Chapter 76 looks as NAMA generally and at the procedures and process it will use in

loan acquisition. Chapter 77 looks at the proposed rights and powers of NAMA. These go well beyond the usual mortgagee rights. Chapter 78 looks at special development rights which NAMA will have to facilitate development work out.

Chapter 79 looks at the new NAMA statutory receivers which will have significantly greater powers than conventional receivers. Chapter 80 looks at NAMA's power to deal in land, to sell and give title. Chapter 81 looks at litigation issues in relation to NAMA and in particular the restrictions on taking legal action against it.

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 1st October 2009.

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This is an extract from our "Legal Guide to the Management and Enforcement of Security in Ireland" (2009). The Guide is intended as an overview and broad outline of the matters