

49. Title Insurance

Overview

Title insurance involves an insurance company insuring the owner or lender against loss arising from title defects, absence of title and legal compliance risks. Title insurance is fundamentally different to a solicitor's Certificate of title.

Title insurance has not played a significant role in the process of putting mortgage security in place and in ensuring good and marketable title in Ireland until relatively recently. For the most part title insurance in Ireland has been used to cover specific known problems or shortfalls with the property, rather than the entire title. A policy might be taken out to cover a particular risk, so as to provide a satisfactory compensation if that particular risk later manifests itself and causes loss.

Title insurance is very prominent in the United States and is commonly used in place of title investigation. This is largely because most US States do not have a Land Registry and have a system similar to the Irish Registry of Deeds. Title insurance grew up because of the incompleteness of records and the costs and difficulty in vouching title. In many parts of the United

States, title insurance has largely replaced title investigation.

Some Irish lenders use title insurance in place of a solicitor's certificate of title in certain categories of cases. There are commonly low-risk cases, where title has already been investigated in a recent transaction, for example, remortgages or top-up mortgages.

A number of American title insurance companies have set up in the United Kingdom and some of them have entered the Irish market as a development of their UK business. A number of other UK based insurers have established a base in Ireland. The title insurer's agents in Ireland provide the mortgage processing services.

As set out in the previous chapters, there are two key elements to putting the security in place. The first element is the creation of a valid mortgage. This involves ensuring that the purchase deed, (if applicable), the mortgage deed, guarantee and other security documents are explained to the borrower, signed, stamped (where necessary) and registered.

The second element is the title insurance policy itself. This is insurance against the risks that there is no title, defects in title or

other risks which will affect the ability to sell the secured property for full value. These two-steps are analogous to the solicitors undertaking and certificate of title, under the more conventional system.

A single premium is paid at the outset. Most of the cost covers the services under the service agreement, rather than the risk element under the policy itself.

Title Insurance Service Agreement

There will usually be a service agreement between lender, the title insurer and the title insurer's agents in relation to the process of putting security in place. Typically local Irish based agents will provide this service. The title insurer will agree with the agent and lender to issue insurance cover once the agent approves the case. The agent is not an agent in the legal sense that everything it does binds the insurer. The terms of the agent's authority will be set out in the service agreement.

The insurance policy will usually only cover title defects. It will not usually cover breaches of the service agreement. For example delays and failures in stamping and registration may be only be enforceable by recourse under the services agreement,

unless there has been actual financial loss within the terms of the title policy.

The title insurer and their agent use risk analysis methods in relation to the extent of investigation they make. They are not likely to make a full investigation of title. The process will typically involve examination of the public registries only. Commonly, the insurance will issue, before the title deeds are available.

Some title insurer's agents have their own in-house underwriters. A panel of solicitors may be involved to some extent. The panel of solicitors provides only minimal services, generally in having the mortgage explained and executed. The panel solicitor gives undertakings to the insurer and not to the lender.

Title Insurance Policy

Most title insurance providers in Ireland use a form of insurance policy, based on the American Land Title Association precedent policy as modified for England and further modified for Ireland. Some of the policies reflect this adaptation and are tailored more to the US or English conveyancing system, than the Irish process.

The terms of the title insurance policies vary from insurer to insurer. The policy may be

separately negotiated with each lender. The basic insurance cover covers the key lender's requirements/risks that the title is vested in the mortgagor and is a good and marketable title, free from defects. Some policies contain general cover on the above matters together with a list of further specific insured risks such as the following:

- planning legislation and building regulation compliance;
- legal rights of access for persons, vehicles and services;
- no encroachment by or onto the property;
- absence of adverse central or local governmental action or proposals;
- no adverse statutory process.

There are typically a list of excluded liabilities from the policy. The following matters are generally excluded;

- environmental risks;
- risks arising from physical conditions;
- matters not evident from public searches at the date of the policy;
- defects or risks known to or assumed by the insured and not disclosed to the insurer;
- matters resulting in no loss or damage;
- events happening after the policy.

The scope of exclusions may vary from policy to policy. There may be exceptions which have been inserted on a case-by-case basis. These may relate to risks specifically identified in relation to the property and which were disclosed prior to the insurance being put in place, in the same way as a qualification of title in the case of a certificate of title.

Procedure for Claims

The procedure for a claim on the policy differs to a legal claim for breach of undertaking or duty by a certifying solicitor or indeed the lender's own solicitor. This has certain implications in relation to the way a claim is handled. In particular there may be strict obligations to notify prospective claims very quickly, as this will usually be a strict condition of the policy. The failure to do so may prejudice the insurer in relation to the claim. The policy may allow the insurer to avoid a policy in whole or in part to the extent it has been prejudiced.

The insurer will typically have options in relation to the way it handles claims. The insurer will want the primary right to deal with the particular matter, defect or claim. The insurer will typically be entitled to buy off or resolve the problem itself. This may mean taking legal action in the lender's name, defending action, undertaking

rectification or issuing another specific insurance policy to cover the problem.

The insurer will have the right to conduct any litigation that arises in relation to the claim. The lender must make its officers and employees available. They must co-operate with the insurer. The lender may be obliged to submit its employees to examination and must make all records and documents available to the insurer. The lender may be obliged to give proof of loss or damage in a prescribed format within a certain period.

A title insurance policy, as with most insurance cover, is a policy of indemnity. This means that it will only pay out for actual monetary loss sustained. In some cases, the loss will be clear and unambiguous. In other cases, the lender may be obliged to suffer the loss (e.g. sell a secured property at a discount because of the defect) and prove for the loss. The insurer may have discretion as to the extent that to which it insists on realising a loss.

There will typically be limitations on the extent of liability. There will be a maximum liability per claim under the policy. The insurer will generally have an option to pay the maximum amount of insurance or to pay and settle with third parties, as necessary.

As with other insurance policies, the insurer will be entitled to subrogate. That is, it will be entitled to take action in the lender's name to recover sums it has paid the lender. This will involve using the lender's rights of compensation against third parties

Most title insurance policies typically have an arbitration clauses in event of a dispute over the meaning of the policy. This means that it is necessary to refer any dispute regarding the interpretation of the policy, to an arbitrator, instead of to court.

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 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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