

## 6. Property Mortgages and Charges

### Overview

A mortgage or charge creates property rights over the secured asset. Therefore, the rules in relation to its creation, transfer and the relative priorities between different mortgages and charges, are determined by property law rules.

There are two systems for recording property ownership in Ireland. The first and older system is so called **unregistered** title. This involves ownership being established by deeds which prove a chain of previous purchases and transfers, with the last transfer deed to the present owner. Ownership is proved under conveyancing practice by production of the deeds proving a chain of ownership since a sale of the property for full value, at least 20 years beforehand.

### Registry of Deeds

Security over unregistered title land is created by a deed which transfers title or grants a long lease to the mortgagee, subject to the right of the mortgagor to have ownership transferred back upon repayment of the secured monies. The term **unregistered** title is misleading to some extent, as it is necessary to register mortgages and other deeds in the Registry of Deeds in order to secure their priority

over other deeds. The Registry of Deeds is now part of the Property Registration Authority.

Registration of a deed is not necessary to ensure its validity and effect. However, failure to register, runs the risk that a person who transferred or mortgaged the property under the deed may later transfer, mortgage or create some right by a later deed or mortgage, inconsistent with the transfer or mortgage. This later transfer or mortgage is likely to obtain priority over the earlier transfer or mortgage by being registered first in the Registry of Deeds.

Although both transfers and mortgages are valid and binding on the person who created them once signed, sealed and delivered, the deed or mortgage which is first registered is valid against all other people. In a contest for entitlement to the proceeds of sale of a security, the rights of the mortgagee who is first registered is likely to prevail. The mortgagee may (or may not in the circumstances) have personal rights to enforce against the person who wrongfully granted the two mortgages. However, the security may be lost to the mortgagee whose deed is first registered.

Registration in the Registry of Deeds is a critical part of the creation of security over unregistered title in Ireland. The mortgage is immediately valid on signature and can

be enforced in court, if there is a breach. However, the mortgagee who fails to register runs the risk that it will rank behind mortgages, transfers, leases, easements and other rights which are created later, but which are registered first.

Rights later granted by the mortgagee might completely or partly undermine the mortgage, if they are registered before the mortgage. These later rights need not necessarily be created fraudulently. An easement (e.g. a right of way) or a lease might be created by the owner after the mortgage is granted. If the mortgage is registered, this would normally have priority over any later mortgage, easement or lease, unless the mortgagee consented. It would be binding on the owner but if the mortgage was enforced, it would fall away and yield to the mortgagee's rights. However, if the mortgage was not registered and the later mortgage, easement or lease was registered first, then it may obtain priority so that the mortgagee could only sell, subject to them.

## Registered Title

Registered title refers to title (or ownership) which is registered in the Land Registry. Registered title is the more modern system of proving ownership of land and buildings. Eventually, it is expected that registered title will entirely replace unregistered title.

Most agricultural land bought out by the Land Commission had to be compulsorily registered in the Land Registry. Therefore, almost all farm land in rural areas or urban areas, that were farm land more than 50 years ago, have registered title. Voluntary registration has been encouraged for over one hundred years.

Compulsory registration has been extended over time, particularly in the last five years. Where registration is compulsory, then on the next sale or transfer of the property, an application must be made to register the title in the Land Registry. When this is done, the Land Registry examines the deeds and other documents and issues a Land Registry folio or file, which becomes the proof of ownership. From then on, the title must be dealt with through the Land Registry only.

Three counties have been subject to compulsory registration since 1970. As a result of a series of designations, it is now the case that all counties, except Dublin and Cork, are subject to compulsory registration. Most counties have only been designated for compulsory registration in the last five years (and most, very recently). Title to land will only become registered when it is transferred. Therefore, unregistered title will remain for a considerable period of time.

Registered title involves a state guarantee

of the validity of ownership, subject to certain practical limitations. The Land Registry holds a file called a folio for each title, which proves the ownership rights in the land concerned. Ownership is proved by production of an official copy of the folio.

The Land Registry file or folio contains three parts. The first part contains a description of the land and sometimes states the land area. The first part is cross referenced to an Ordnance Survey map of the property concerned. The map is an extract from the official Land Registry map.

The second part sets out the owner or owners of the property. This is the legal owner, who may be a trustee. The information may be out of date because the registered owner is dead or has lost title to a squatter. There are various rules to ensure this limitation does not cause difficulties.

The third part sets out rights affecting property. This may include leases, easements (such as rights of way in favour of adjoining properties), and most importantly from the lender's perspective, registered charges. A registered charge is the equivalent of a mortgage in the case of unregistered title. Strictly speaking, security can only be created in the case of registered land, by a legal charge.

## Registered Charges

A charge over registered land is for most practical purposes, the same in content and effect as a mortgage. The mortgagor is called a chargor and the mortgagee is a chargee or charge holder. However, for convenience in this guide, we use the words mortgage, mortgagor and mortgagee for both registered and unregistered title as they are traditional descriptions and are the ones most commonly used.

Strictly speaking, a charge does not involve the transfer of ownership, in the same way as a mortgage of unregistered title. The charge holder is deemed to have all the legal rights of a mortgagee. However, some mortgagee rights depend on ownership, such as the inherent right to take possession. A charge holder does not have the same automatic right to possession as a mortgagee. However, it is often the case that the terms and conditions of a charge of registered land, grant a right of possession to the mortgagee, by the terms of the charge deed.

## 2009 Act Reforms

Irish property and mortgage law remained virtually unchanged for nearly 130 years, until the passing of the Land and Conveyancing Law Reform Act in July 2009. This legislation will be commenced

(most likely in parts) by Ministerial Order in late 2009. When the legislation comes into force, it will change many aspects of property and mortgage law.

Most of the changes will only apply to mortgages executed after the Act comes into force. Executed in the context of a property document means that the document has been the signed, sealed and delivered (i.e. executed) as a deed. This is simply signing in a more formal sense, generally with a witness.

After the 2009 Act commences, the only means to create a security over land or buildings will be by way of a legal charge, as is now the case with registered title. The holder of a charge (the mortgagee) has the same powers and rights as a mortgage by deed. The Act modernises and sets out in detail the rights and obligations of mortgagors and mortgagees. The same law will apply to all legal charges of unregistered and registered title property.

## Equitable Mortgages

An agreement to create a mortgage, such as a solicitor's undertaking or a loan agreement may create an equitable mortgage. It is necessary that the agreement is sufficiently clear and unconditional, so that it would be enforced by a court. An equitable mortgage creates a security which is weaker than a

mortgage or charge created by full adherence to the required formalities. It may need court action to enforce. It may be vulnerable to a later legal mortgagee who is unaware of it and who registers and / or completes the necessary formalities first.

A document agreeing to create a charge or mortgage over land (even an equitable mortgage) must be proved in writing signed by the person against whom it is to be enforced or someone authorised to sign on his behalf. A verbal agreement for security over land and buildings is unenforceable. A written agreement such as a signed loan agreement or solicitor's undertaking will generally be enforceable.

## Mortgage by Deposit of Deeds

It is possible to create a mortgage over land in Ireland by deposit of the title deeds with a lender. This is an exception to the requirement for a note in writing signed by the borrowers. It is necessary that all the documents required for dealing with the land are deposited. This would be all, or at least, the key title deeds. Neither a signed document nor registration in the Registry of Deeds is required. The reason this is an exception to the requirement for registration, is that a mortgagee who does not obtain the key deeds upon a mortgage is deemed to be aware that there may be an equitable deposit.

The mere leaving of the deeds with the lender does not necessarily create an equitable mortgage by deposit. The deeds may be lodged for safe keeping. There must be an intention to create an equitable mortgage.

Sometimes a memorandum is created when deeds are lodged. There are risks with this. It might be decided that the document is an agreement to create a mortgage which has not been completed. This means that the document is registrable and therefore must be registered in order to be protected. It is possible to register the note accompanying an equitable deposit in the Registry of Deeds.

In Land Registry cases, a mortgage by deposit can be created by depositing the Land Certificate. The Land Certificate is an official document issued by the Land Registry for a particular folio. It does not automatically issue. There may or may not be a Land Certificate for a particular title. The official folio will state whether a Land Certificate has issued. It is not possible to deal with land without production of the Land Certificate, where it has issued.

Land Certificates are being withdrawn by the Land Registry over a period. This is part of the move to ~~de~~materialise+ the Land Registry for an eventual complete move to an internet based system. Land Certificates are no longer issued. After 1<sup>st</sup>

January 2010, a Land Certificate will no longer be required to be produced to the Land Registry on transfers, mortgages and other dealings. Therefore, mortgages by deposit of the Land Certificate will no longer be effective. It is necessary for such mortgagees to register their charge before 2010.

## Security Creation Procedure

In the case of owner occupier or residential investment properties, most lenders act on the basis of a certificate from the borrower's solicitor in the standard Law Society form. See our chapter on the significance of the certificate. Alternatively, a lender may retain its own solicitor to investigate the borrower's ownership of the land and other legal issues, to ensure the proper signing of the mortgage deed and the registration of the bank as owner of the mortgage/charge. In commercial cases many lenders use their own form of Certificate of Title, which is given by the borrower's solicitor.

Certificates of title consist of a series of confirmations to the lender in relation to a range of legal issues affecting the property, ranging from ownership, legal compliance issues, and issues which are relevant to the saleability of the property.

If the solicitor is not in a position to give all the confirmations contained or implied in

the certificate of title, then he is obliged to disclose any defects or shortfalls and obtain the bank's approval in advance. If the solicitor does not comply with the obligations in the Certificate or fails to make required disclosures, he may be liable to the bank for breach of duty and negligence, in the event that the bank suffers loss as a result.

## **Personal Liability on Mortgage Debt**

An individual borrower is personally liable for the loan, unless the lender specifically agrees that recourse is limited in some way. The loan is a personal debt which may be sued for in debt collection court proceedings. There are special, shorter more simplified Court procedures for a fixed sum debt. Where a court order for the debt is given it can be enforced against the borrower and all of his assets in a number of ways.

Most bank loans may be enforced under the debt collection court procedures in the District, Circuit or High Court, depending on the level of the debt. The loan offer may state where legal proceedings may or must take place. Generally, under European Union rules, a consumer must be sued in his home state. In the case of an Irish resident borrower, the debt will generally be enforceable in the Irish Courts.

Generally, there will be little defence to a claim on a debt against a borrower. A court order can usually be obtained declaring liability for debt without the need for a Court hearing, if the borrower does not defend the proceedings. This will usually be the case unless there is some real dispute about the debt. See our chapter on debt collection.

If the judgment (i.e. a court order) is obtained in Ireland it can be enforced in other EU countries. There are procedures under the EU Judgment Convention by which the judgment or court order obtained in one jurisdiction can be certified and have a full effect as if it was a judgment and Court Order of the other jurisdiction.

Once a judgment has been obtained, there are various remedies under Irish Law by which it can be enforced. See our chapters in relation to the enforcement of Court Orders and on the cross border enforcement of judgments.

*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 1<sup>st</sup> October 2009.*

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