

## 7. Mortgage Conditions

### General

Strictly speaking, a mortgage deed relates to unregistered title. A mortgage deed of registered title is technically a legal charge over the borrower's registered ownership of the land. 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. The mortgage deed deals mainly with issues relevant to the security. Sometimes there is duplication of issues in the two documents.

There may be inconsistencies between the loan agreement and mortgage deed. Generally the loan agreement will prevail. In some cases, the inconsistencies may be problematic and are likely to be interpreted against the lender's interests.

The court have criticised lenders whose loan offers are significantly inconsistent with their mortgage deeds.

### Form of Legal Charge / Mortgage Deed

Most lenders have their own standard mortgage terms and conditions. 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 Conveyancing Act, as if they were set out in detail. This is very 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) or 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 Conveyancing Act. 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. After the 2009 Act reforms take effect, this will only be possible for non-housing loan mortgages.

## 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 Contract Terms 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 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 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 expressly or impliedly limit the mortgage to the monies advanced under it.

## Security

The security in many cases consists 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 chapter 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 to dealings by the mortgagor with the property;

- ❖ prohibition on charges or mortgages to another party;
- ❖ prohibition on sales or transfers of the property or any part of it;
- ❖ requiring payment of compensation monies payable to the borrower in relation to the property;
- ❖ prohibition on leases, lettings or sharing possession of the property other than as permitted.

There are usually obligations on the borrower for the purpose of protecting the value of the security. The actual covenant will depend on the type of security involved. Clauses for a development loan will differ from those in a home loan. The following are typical terms contained or implied in most 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; (owner occupier cases only)
- ❖ 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 without becoming liable as mortgagee in possession;

- ❖ to comply with the terms and conditions in any lease; this is 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 without consent;
- ❖ not to apply for planning permission without lender's consent;
- ❖ to produce information to the lender as 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.

The standard mortgage will require monies received from the proceeds of an insurance claim to be laid out in the repair or restatement of the property or to be paid to the mortgagee. 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 may have 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 for each lease or letting. A lending institution may give a general consent to lettings within certain criteria in the case of investment property in its loan offer. They will usually be prohibited in the case of home loans.

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 at the lender's option 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 representation or warranty made to the lender turns out to be untrue;
- ❖ any other lender is entitled to enforce against the borrower;
- ❖ a receiver is appointed to any part of the borrower's assets;
- ❖ 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 set out in later chapters in relation to the power of sale and power to appoint a receiver, mortgage deeds usually modify the conditions in 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. This will not be possible in the case of home loans mortgages after the 2009 reforms become law.

*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.*

© Paul McMahon, Lavelle Coleman 2009

## CONTACTS

Paul McMahon [pmcmahon@lavellecoleman.ie](mailto:pmcmahon@lavellecoleman.ie)

Phone: (353) 1 6445800  
Fax: (353) 1 6614581

Lavelle Coleman  
Solicitors  
20 On Hatch  
Lower Hatch Street  
Dublin 2  
Ireland

[www.lavellecoleman.ie](http://www.lavellecoleman.ie)