

## 8. Priorities

### Overview

Priority issues arise where a property is mortgaged to more than one mortgagee. The earlier mortgagee usually has prior entitlement to the proceeds of sale of the security in the event of enforcement. The earlier mortgagee has primary rights to enforce the security.

Generally, a lending institution will expect to have a first legal mortgage or charge pursuant to a Certificate of Title or its own solicitor's work. However, issues can arise in connection with second mortgages / charges. A property may become subject to a second legal mortgage, without the bank's consent. A bank may have given consent to a second mortgage in the past. The bank itself may be offered a second ranking mortgage over another property as security or additional security.

### Registry of Deeds

Where there are conflicts between deeds, mortgages or other documents affecting property or land, the order of registration in the Registry of Deeds usually decides priority of entitlement to the proceeds of the sale of the property.

The date on which the mortgage is signed does not necessarily determine priority.

The mortgage deed which is registered first, usually has priority. Therefore, the mortgagee under this deed would have first entitlement to the proceeds of sale. However, if the second mortgagee was actually aware of the first mortgage, either personally or through an agent (such as a solicitor), it does not obtain priority. The courts take the view that actual knowledge of the earlier deed makes it unjust that the prior registration of the later deed should prevail.

These rules do not apply to mortgages that cannot be registered because there is no document. Therefore, a mortgage by deposit of deeds does not need to be registered, unless there is a written document or receipt setting out the terms of the mortgage. If a mortgagee's advisers do not obtain the title deeds, they are deemed aware that there may be an earlier mortgage which has priority.

If none of the deeds have been registered, the earlier deed normally prevails.

### Land Registry Title

The Registration of Title Act sets out the rules in relation to the priority of mortgages (or more correctly charges) over registered land. Generally registered charges rank in the order in which they are entered on the Register. The date of signing of the charge is not the determining factor. Unlike with

unregistered title, knowledge of the earlier registered charge, will not generally matter in determining priority.

Certain rights affect registered land, without the necessity for registration. These rights are exceptions to the requirement for registration. They include the rights of those in actual occupation of the property such as under a short lease (less than 21 years), a squatter, or persons acquiring rights (e.g. rights of way) by long use. Usually, the more significant types of rights in this category can be detected from an inspection of the property.

A charge must be registered in the Land Registry in order to be effective. The various rights which apply to a mortgagee, such as the power of sale etc., apply only once registration has been completed.

Formerly, it was possible for the registered owner to apply for and obtain a Land Certificate for any title. Once issued, the Land Certificate had to be produced on every transfer, mortgage/charge, lease or other dealing with the Land. This was an additional protection against fraud. Since 1st January 2007, new Land Certificates are no longer issued.

The Land Certificate is akin to the title deeds and could be used to create a mortgage by deposit, in the same way as a deposit of the deeds in the case of

Registry of Deeds title. It was also possible to have a certificate of charge issued. This document had to be produced on any transfer or cancellation of the mortgagee's registered charge.

The obligation to produce the Land Certificate on dealings with the land terminates on 1st January 2010. After that date, it will not be possible to mortgage the land by deposit of the land certificate or certificate of charge. After that date, all such documents cease to have any legal significance.

The holder of an equitable mortgage by deposit of the Land Certificate may apply to the Property Registration Authority for registration of the deposit on the Register. This must be accompanied by the Land Certificate itself. The application must be made for protection with the three years period from 1st January 2007.

If the charge holder by deposit fails to do so and later his rights are lost to another registered transfer or mortgage, the charge holder may be entitled to compensation from the Property Registration Authority. The court may give compensation only if it is satisfied that the mortgagee was prevented from applying for registration in the three-year period because of a disability or other exceptional circumstances, that it has suffered financial loss for which all other avenues for compensation have been exhausted

and that it would be unjust for it to suffer the loss.

## Notice of Later Mortgages

Actual notice of a later mortgage is required to prevent further advances being secured by an earlier mortgage which allows for further advances (e.g. a charge for all sums due, present and future). It is not enough that the second or a later mortgage is registered. If the first mortgagee makes further advances, these will have priority until that first mortgagee becomes actually aware of the second mortgage. The second mortgagee needs to give a notice to the first mortgagee in order to ensure that it does not lose out to later advances by the first mortgagee.

In the case of a family home, each further advance itself requires consent of a non-owning spouse. This is because each further advance eats into the owner's equity.

The rules in relation to registered land are almost identical. Where a mortgage is registered for the purpose of securing further advances, it has priority over subsequent mortgages, except those made after the date, notice in writing has been given to the first mortgagee.

## Stamping

Prior to 1st January 2007, it was

necessary to stamp mortgages at a rate of 0.1% of the secured amount up to a maximum stamp duty of " 630. This is still the case for mortgages signed before that date. Once the mortgage or charge was stamped for this amount, no further stamping was required. Stamping does not affect the validity of the mortgage, but rather its enforceability. It is always possible to stamp a document late, by paying penalties, notwithstanding that it was offence not to stamp within thirty days.

In the case of Land Registry title, the folio usually states the amount for which the mortgage deed was stamped. The effect of non-stamping is that the mortgage deed can not be relied on in legal proceedings until it was properly stamped, by payment of arrears of stamp duty and penalties, if necessary. It was possible to remove a deed from the Land Registry for the purpose of stamping up.

This is not necessary in respect further advances made after 1st January 2007 provided that the deeds were properly stamped at this point in time. However mortgage deeds signed before that date, must be properly stamped before they can be relied on in court.

## Intercreditor Agreements

It is desirable that when a mortgagee agrees to a second mortgage, that an

intercreditor, priorities or subordination agreement is put in place to govern the relative priorities and rights of each mortgagee. The expressions have broadly similar meanings.

The intercreditor agreement will usually deal with priority of entitlement to enforce the debt (i.e. the personal obligation to repay) and may also deal with priority of entitlement to sale proceeds of the security. The first mortgagee will usually have priority in respect of payments of capital and interest. Generally, there will be restrictions and pre-conditions on payment of interest to the second mortgagee (for example, a condition that the first mortgage is being serviced and there is no default).

There may be priority for the respective mortgagees within certain bands. For example, the first mortgagee may have priority for "300,000, the second mortgagee for "200,000 and the first mortgagee for any further surplus on sale.

The circumstances where priority will matter most is where the borrower is insolvent and the security is insufficient to cover one or more secured debts. Where a secured creditor's debt exceeds the value of its security, it is an unsecured creditor in respect of the shortfall.

Insolvency rules prescribe that unsecured creditors are treated equally and that each

obtain the same proportionate part of the proceeds (if any) available from the sale of the borrower's unsecured assets. It is possible for the subordinated lender to agree to turn over its share of the insolvency proceeds to the other lender.

There are a good deal of provisions which can be provided and negotiated in an intra-creditor agreement. Each party may wish to limit the extent to which further advances can be made, without the consent of the other. Provision should be made in relation to what happens on a winding up. The higher ranking creditor will ideally want the second ranking creditor to turn over his share out of the proceeds received in a bankruptcy, to the first mortgagee in case the security is inadequate.

There are a number types of inter-creditor agreement. Some unexpected consequences can occur for the second mortgagee (or so-called junior creditor) on the basis of certain wording which can place them in a very weak position. Under one type of inter-creditor agreement, the subordinated lender agrees that the liability of the borrower to it, is conditional on the other (senior) lender being first repaid in full. By another type, the subordinated creditor agrees to hold his share of insolvency distribution on trust for the senior creditor. See our chapter on Intercreditor Agreements

## Unregistered Beneficial Rights

A borrower usually enters a loan agreement contemporaneously with the purchase of the property. The bank will hold an equitable charge over the property by reason of its agreement to take security in return for the advance. This equitable charge will generally have priority over any interest the borrower later agrees or become subject to.

The borrower cannot usually grant an interest having priority over the mortgage because he has made a prior agreement to grant the mortgage and has thereby created an equitable charge. This will generally protect bank against a claim to a beneficial interest by reason of a third party's contributions to purchase price.

A more problematical situation is where the borrower already owns the property. There may be a beneficial owner of land who has made contributions towards the purchase price, which has not been disclosed to the bank and of which the bank does not become aware. If the bank has no reason to know of the beneficial interests, it will generally take free of them. If the beneficial owner is aware of the further advance, he will not be able to claim priority over it, in any event.

If the bank is dealing with a known beneficial owner, a consent, deed of priority or waiver should be obtained. It is

usually desirable to arrange that the beneficial owner obtains independent legal advice, so that it is not later claimed that his consent was obtained by undue influence.

*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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## CONTACTS

Paul McMahan [pmcmahan@lavellecoleman.ie](mailto:pmcmahan@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)