

9. 2009 Property and Mortgage Law Reforms

Overview

In July 2009, the Land Law and Conveyancing Reform Act was passed. This represented the most significant change in property and mortgage law in over 125 years. The Act was the result of several years of planning and was not linked to the financial crisis. A number of late amendments were introduced into the Act which arose from the financial crisis.

Specific changes which will apply under the Act, are dealt with throughout this guide. The purpose of this chapter is to highlight the main changes that will apply. Throughout this guide, we refer to the changes made in the 2009 Act as the 2009 law reforms.

The 2009 law reforms will only apply to mortgages signed after the Act is commenced. The commencement date will be fixed by an order signed by the Minister for Justice. It is likely to some time in late 2009. Some procedural rules will apply immediately after commencement.

Prior to the 2009 law reforms, many of the details of the "default" mortgagee's rights could be modified, so as to be more favourable to the mortgagee, by the terms of the mortgage deed. After the 2009 law

reforms, this will be possible only in the case of mortgage loans, other than housing loans. In the case of housing loans, the mortgagor's rights under the default rules cannot be reduced, irrespective of what the mortgage deed says.

Many of the changes in the 2009 Act are modernisations of the existing position. In these cases, the changes alter the existing position in relatively minor ways. Other changes are more significant and fundamental.

Court Orders for Possession and Sale

A court order will be necessary both for obtaining possession of the property and for sale of the property. This is a significant change as a court order is not necessarily required to obtain possession at present, although it is often necessary. A court order for sale is not generally required under the present law for a sale provided there is a power of sale in the mortgage deed. The court order for possession and sale can be applied for in a single court application.

A mortgagee will not be allowed to take possession of a property without a court order. This will be the position, unless the mortgagor consents in writing, not less than seven days in advance. A mortgagee will be able to apply to court for

possession and the court may grant possession, if it thinks fit, on such terms and conditions as it sees fit.

A mortgagee in possession must take steps within a reasonable time to sell the property. If this is not appropriate, he must lease the property and use the rent or other income to reduce the mortgage debt and interest. The power of sale can only be exercised for the purpose of protecting the property or realising the security.

The power of sale will apply where one of three conditions is satisfied:

- ◆ notice requiring payment of the mortgage money has been served on the mortgagor and default has been made in payment of the money or part of it for three months after service;
- ◆ the mortgage is arrears and unpaid for two months after becoming due and some interest under the mortgage is in arrears;
- ◆ there has been a breach of the provisions in the mortgage deed on the part of the mortgagee other than payment of the mortgage money or interest

The above conditions are much the same as under the existing law. However further new provisions will apply. 28 days notice in a prescribed format must first be served on the mortgagor warning of the

possibility of sale. The power of sale may not be exercised without a court order, unless the mortgagor gives consent in writing at least seven days in advance. At any time, 28 days after notice, the mortgagee may apply to court for an order authorising sale.

The court may, if it thinks fit, grant the application on such terms, if any, as it thinks fit. The application to court for an order for possession and an order for sale may be made in a single application or separately. Significantly, the court has discretionary powers to adjourn or suspend orders. This new power changes the current law by which discretionary adjournments or suspensions are not a right and lack a clear legal basis.

It will also be possible to apply to the District Court in the case of abandoned property to protect the security. This is separate to an application for the purpose of sale. If there are reasonable grounds for believing the mortgagor has abandoned the property and urgent steps are necessary to prevent deterioration, damage or entry by trespassers or unauthorised persons, the mortgagee will be able to apply to the District Court for an order authorising possession.

The District Court order may be granted on such terms as the court decides. It may state the period during which the mortgagee may retain possession and it

may specify works which may be required to protect the property. It may specify the costs and that they may be added to the mortgage debt. The mortgagee does not have the duties of a mortgagee in possession to account ~~strictly~~ during the period in possession.

Discretionary Powers of Court

In an application for payment, possession or an application for sale or a joint application for sale and possession, the court will have discretionary powers to adjourn or suspend the application or order for possession or sale. These powers are specifically granted by law and do not depend on the court exercising its inherent discretion to withhold an order. There has been a debate over whether and to what extent a mortgagee has an absolute entitlement to a court order for possession and/or sale or whether the courts had a discretion to postpone or refuse an order.

This legislation is similar to legislation which has been in force in England and Wales for many years. See our separate charter in relation to the manner in which this discretion might be exercised, having regard to the experience in England and Wales over the last 40 years.

Where it appears that a mortgagor is likely to be able, within a reasonable time, to pay arrears, including interest due, under the mortgage or to remedy any breach of

the agreement, a court may adjourn the proceedings or make an order. This may be done at any time before enforcement and implementation of the order. Any one or more of the following orders may be made;

- allow time for payment of the mortgage debt;
- suspend the enforcement or implementation;
- postpone the delivery of possession;
- suspend the order for such period or periods as the court thinks reasonable;
- if an order is suspended, the court may subsequently revive it.

Any adjournment, suspension or postponement may be made subject to such terms and conditions with regard to payment by the mortgagor of annual sums secured by the mortgage or remedying any breach as the court thinks fit. Any order or its terms or conditions may be varied or revoked by the Court later.

The court will have power to direct a sale on such terms as it sees fit. It may also, at its discretion, do any one or more of the following;

- require lodgment of monies to meet the expenses of sale;
- give directions in relation to costs and require the giving of security;
- direct a sale without previously determining priorities;

- give the conduct of the sale to a party;
- make an order vesting the property in a purchaser or authorising a third party to do so.

Obligations on Sale

The mortgagee must ensure, in so far as reasonably practicable, that the mortgaged property is sold for the best price reasonably obtainable. Within 28 days after the sale, the mortgagee must serve a notice in the prescribed form on the mortgagor containing information in relation to the sale.

A purchaser from a mortgagee is protected, notwithstanding any defect in the way the sale took place. Any persons suffering loss as a consequence of the right not being properly exercised, has a right of compensation against the person exercising the power.

The proceeds of sale must be paid as follow;

- in discharge of prior encumbrances (mortgages and charges) if any, to which the sale was subject;
- payment of all charges, costs and expenses properly incurred by the mortgagee as an incident to the sale or any attempted sale;
- in discharge of the mortgage debt,

interest, costs and other money (if any) due under the mortgage;

- the balance, if any, to lower ranking mortgagees in the order or priority;
- the balance to the mortgagor, if any.

The charges, cost and expenses include those incurred in recovering and receiving the money or security or in conversion of the security into money as well as those of those incidental to the sale.

Receiver

Where any of the above conditions, that apply to exercise the power of sale, apply, the mortgagee will (still) be able to appoint a receiver of the income of the property in writing. The receiver may demand and receive all income and income of the property. He may exercise any powers delegated by the mortgagee under the terms of the mortgage deed. The receiver may insure the property under comprehensive buildings cover.

A receiver may be removed and a new receiver appointed by the mortgagee or other person in writing. The receiver may retain money for remuneration and in satisfaction of costs. The commission will be at a rate to be prescribed by Ministerial Order.

The receiver must apply money received

as follows

- in discharge of rates, ground rents, taxes and other outgoings of the property;
- in payment of interest and all sums which have priority to the mortgage under which the receiver was appointed;
- in payment of the receiver's commission;
- in payment of insurance;
- In payment of the cost of repairs;
- in paying interest due on the principal sum under the mortgage;
- in payment of the principal sum, if directed by the mortgagee;
- the residue to be paid to the person who but for a receivership would have been entitled to the income of the property.

Leasing

A mortgagor will be entitled to lease the mortgaged property, with the consent of the mortgagee. This consent is not to be unreasonably withheld. In the case of a lease made without consent, it may be set aside by a mortgagee, who proves that the lessee had actual knowledge of the mortgage and that the grant of the lease prejudiced it.

A mortgagee or a receiver may lease the land, provided that it is for the purpose of preserving the land, realising the security

or raising income to pay interest to reduce the debt. It may also lease, if this is otherwise an appropriate use of the land pending sale if the mortgagor consents or if the court makes an order permitting the lease. This increased power of leasing will apply to new mortgages. It will not apply to home loans.

A lease granted by a mortgagor, mortgagee or a receiver must reserve the best rent reasonably obtainable, taking account of any premium and the relevant circumstances. It must be on the best terms reasonably available in accordance with good commercial practice. A lease which fails to comply with these requirements is void.

The mortgagor must within one month of making the lease, deliver a copy to the mortgagee. Failure to do so, does not invalidate the lease. Where a capital sum is paid by the lessee, then the capital sum, or so much of it as is required for that purpose, is to be applied in discharge of the debt. Whether or not the date for redemption has arisen, a mortgagee is to apply it as if was the proceeds of a sale.

A mortgagor, mortgagee in possession, or a receiver may surrender a lease of the whole or part of the secured property. This is only permitted if it is for the purpose of granting a new lease under the above powers or as authorised by the mortgage. The term of the new lease is to be not less

than the unexpired term of the surrendered lease. The rent is not to be less than the rent that would have been payable under the surrendered lease.

A surrender in return for a payment is void, unless in the consent of the mortgagee is obtained and certain other conditions are complied with.

Foreclosure

Foreclosure, which is a common method of mortgage enforcement in other jurisdictions, was rarely, if ever available in Ireland and has been abolished by the 2009 law reforms. Foreclosure involves a court application to extinguish the mortgagee's equity i.e. its right to redeem.

Consolidation and Redemption

The right of consolidation is abolished for housing loans. A mortgagor is entitled to redeem any housing loan mortgage without having to pay money due under any other mortgage, irrespective of whether that mortgage is of the same or other property. It will still be possible to provide for an all sums due mortgage.

Insurance

The default power to insure has been modernised. There will be power to insure against loss and damage from fire, flood,

tempest and other risks commonly covered by a policy of comprehensive insurance. Most mortgage deeds make specific provision so that the default power will rarely be necessary.

The mortgagee will be able to insure any building or any other insurable property comprised in a security. This may be for the full reinstatement cost and may be against the usual damage, destruction and risks commonly insured. The cost is deemed to be part of the mortgage debt. A mortgagee may require money received for insurance to be applied by the mortgagee in making good loss or damage or towards discharge of the mortgage debt.

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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