Solicitors Undertakings and Commercial Property Transactions

By Stephen Chessher and Michelle Kilroy

Background

We wrote last year about changes to the Irish Minimum Terms for solicitors’ professional indemnity insurance for the year commencing 1 December 2009. Those changes were in part intended to address the concerns of insurers over the level of professional indemnity claims arising out of commercial property transactions.

In residential property transactions, a well established practice had developed whereby the purchaser's solicitor would provide undertakings to the lender, amongst other things as to title and to stamping and registration of the mortgage. This avoided the need for the lender to instruct its own solicitor.

During the boom years of the Celtic Tiger, a similar practice developed for commercial property transactions. However, by their nature, commercial property transactions tend to be more diverse and complex than residential transactions and there was no uniformity as to the undertakings required by lenders. In particular, the Law Society did not issue any standard form of undertaking which could be used as a benchmark by the profession.

Further, the typical value of commercial property transactions was far higher than for residential transactions and there was a perception that solicitors providing such undertakings were exposing themselves to high risk (and in circumstances when they were not being paid by the lender). It was also the case that the reliance by lenders on solicitors instructed by the borrower on occasion facilitated fraud.

The Law Society partially addressed this issue last year by amending the Minimum Terms so as to exclude claims arising out of undertakings given to financial institutions in respect of commercial property transactions. It was anticipated that solicitors which wished to continue providing undertakings to lenders would obtain additional cover from insurers for that purpose. It is estimated that about 30 – 40% of solicitors’ firms obtained such top-up cover.

The Law Society has now gone one step further and (subject to a de minimis exception) the provision of undertakings to lenders in commercial property transactions will in future be prohibited.

The New Regulations

The new prohibition is contained in the Solicitors (Professional Practice, Conduct and Discipline – Commercial Property Transactions) Regulations 2010 (SI no 366 of 2010) which come into force on 1 December 2010, to coincide with next renewal.

There are two main elements to the new Regulations:

Regulation 3 prohibits a solicitor from acting for both a borrower and financial institution in a commercial property transaction. The Regulations contain a comprehensive definition of ‘Commercial Property Transaction’ which includes a mortgage, acquisition or refinancing of land or buildings in connection with any trade or business. This will include buy to lets. This will address the perceived conflict of interest in a joint retainer.
Regulation 4 prohibits a solicitor acting for a purchaser/borrower from giving undertakings to lenders in respect of commercial property transactions.

There is a somewhat curious de minimis provision whereby solicitors will still be able to give undertakings provided that the solicitor’s liability is expressly restricted to €75,000 or less. Under the current Minimum Terms such undertakings will not be covered. It remains to be seen whether financial institutions will agree to limit their liability in this way and whether insurers will offer this limited top-up cover.

**Consequences of New Regulations**

In future lenders on commercial property transactions will retain their own solicitors to investigate title and ensure that effective security for the loan is put in place.

The lender’s solicitor (it may be assumed), is likely to be more familiar with the lender’s requirements which may of itself mean that less issues with unenforceable security will arise in future.

As the lender’s solicitor will also investigate title and a transaction will presumably not proceed unless or until the lender’s solicitor has satisfied himself that title is in order, the Regulations may also have the effect of reducing the incidence of claims brought by purchasers against their own solicitors.

The new Regulations may be a case of closing the stable door after the horse has bolted. Lending on commercial property transactions has now slowed to a trickle but at least more stringent safeguards will be in place for when the recovery comes.

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