

MORTGAGING YOUR PROPERTY

1. Transfer of title

The mortgage deed or similar document is a transfer of title to the property to the bank, building society or other lender. In effect, the property will belong to the lender while the mortgage deed remains in place, but the lender will allow you to continue to enjoy your property so long as you do all that is required of you under the terms of the mortgage.

If the property belongs to two or more people, each will be required to enter into the mortgage deed.

2. The right to sell

The main purpose of the mortgage is to give the lender the right to sell the property if any liability is not discharged, that is to say if the loan is not repaid when demanded by the lender. Usually, the lender can demand payment whenever it thinks fit to do so. The lender will require you to vacate so that the property may be sold. You risk losing your property (even if it is your home) if the mortgage payments are not made.

If the lender sells, the proceeds of sale are used firstly to discharge the costs of sale, secondly to discharge the liability to the lender, and thirdly to discharge any other liability that may be secured against the property. Only then is the balance paid to you, the owner.

If the proceeds of sale are not sufficient, you remain liable to the lender for any balance that remains owing. This is so even if the lender is insured against loss. The insurance company may still look to you for payment as it is only the lender who is insured even though you may have paid the premium under any mortgage indemnity policy. You may not be allowed to sell the property unless you can discharge the mortgage out of the proceeds of sale.

3. All debts

The liability to the lender secured by the mortgage deed includes not only the loan, but also all interest due and the costs and expenses that the lender may incur.

Mortgage deeds are usually entered into when you are taking a specific loan. However, most mortgages in favour of banks do not cover merely that loan, but all and any liability that you may have to the bank, whether already existing or incurred at a later date. The bank is under no obligation to tell you that it is relying on the mortgage deed to cover any other liability. **We advise that all guarantees, particularly if not given for a company which you wholly own and control, must be limited to such modest amount as you can afford to lose.**

4. Other people's debts

The mortgage covers the liability of the owner or joint owners of the property. Each joint owner will be individually responsible for the entire debt, and each remains liable to the lender for the entire balance if the proceeds of sale are not sufficient to discharge the indebtedness.

These notes relate only to the Law in England and Wales. They are by no means exhaustive but we hope that they will help avoid some of the difficulties which may arise. Please raise any queries with us as soon as possible.

A mortgage in favour of a bank may be intended to cover the liability of a third party such as a company owned by the owners of the property or one of them. You run considerable extra risk by mortgaging your property for the benefit of a third party, particularly if you have little or no control over the third party, who may not discharge its liability or may even increase it at your eventual expense.

Think very carefully before guaranteeing the indebtedness of a third party. We strongly advise you to limit the liability to a fixed amount if you are securing the liability of a co-owner or third party, particularly if to a bank. However, even then the bank will be entitled to recover its interest and costs on top of that fixed amount, and they tend to grow rapidly: the liability may turn out to be far larger than you had anticipated.

5. Additional promises

By entering into the mortgage deed you are making various promises to the lender. First and foremost, you are promising to repay all indebtedness to the lender as soon as called upon to do so. Joint owners each make that promise separately, so each is liable for the entire debt. Each remains liable for all of the debt if debt remains after the lender has sold the property. Even if you die your estate may still be liable to the lender.

You also make other promises such as to insure the property, to maintain and decorate it, not to develop it without the lender's consent, and not to let it or otherwise deal with it without the lender's consent.

6. Defeating the lender

Please do not think that you may be able to defeat the interests of the lender. Lenders have had since 1925 in which to perfect their mortgage conditions. If you don't co-operate the lender may simply call in its loan. The lender can often act in your name, for by the mortgage deed you may have appointed the lender your Attorney for that purpose.

7. Business property

The above notes apply whether the property is your home or business or investment property. However, in the case of business property there is the additional risk that by entering into the mortgage deed with a bank you may have assigned to the bank any goods you may have in the property and the benefit of any business you may be conducting in the property.

8. Discharge the mortgage

We strongly advise that as soon as the indebtedness has been paid off the mortgage deed should be discharged.

Banks may suggest that the deed be left in place to cover future borrowings. That should be resisted, and the bank required to start again, particularly if you are not the sole owner and borrower.

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9. Undue influence

Many, in particular the wives of businessmen, may be under pressure from their partner or others to mortgage their property. They should not lightly put their property at risk, or enter into the transaction for reasons they do not fully understand, or for purposes they cannot control, particularly if the loan is not being used only to purchase or improve their own home.

If you are under pressure from anyone to sign the mortgage deed, tell us.

If you feel you may not fully understand what is involved, tell us.

If you will not personally benefit from the loan, tell us.

Our litigation Director is a specialist in this latter area: for specific advice please contact Hilary Messer on 0118 9842266

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April 2005

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