

Property charges in support of commercial loans – do's and don'ts



It's increasingly common for Asset Based Lenders to take legal charges over registered land by way of additional security. Typically, a legal charge is taken over a director's residential property in support of a personal guarantee.

Taking a charge over residential property can be fraught with difficulties and a number of important issues need to be addressed:

Is there sufficient value in the property?

Do your homework

As most residential homes are already mortgaged to a prior lender, ABL's will often be taking a legal charge which will be a second or third (or lower) ranking security. From a commercial perspective, as those prior ranking securities would be paid out first on any sale of the property you should satisfy yourself that there is sufficient value in the property. You should obtain a professional valuation of the property and up to date mortgage statements to assess whether there is sufficient equity in the property to make taking a legal charge worthwhile.

How long does it take?



“... this is URGENT!”

Realistically, 6 to 8 weeks. Inevitably, your client wants the deal done yesterday. Your client may want to avoid anything that may delay getting his financing facility in place and, often, will resist taking independent legal advice (as this costs money) and contacting their existing lender (whose consent may be necessary to a further legal charge on the property) as this causes delay.

To avoid delay, deal with these points as early as possible. You should instruct your client to identify a solicitor who can provide independent advice and make contact with their lender and give them authority to liaise with your solicitors.

What steps need to be taken before we can register our charge?

Risk limitation

Legal charges can be challenged for many reasons so, from the outset, it's important to limit the risk of a challenge to the validity of the charge. A crucial part of that process is ensuring that, where necessary, your client has taken independent legal advice in relation to the nature and effect of the legal mortgage. This is essential where there is a non-commercial relationship between the person giving the charge and your client company (for example, the spouse of a director who is not employed in the business) to minimise the risk of a later claim that he or she was pressurised into giving the charge.

Consent to charge

For a legal charge to be registered at the Land Registry, consent (to registration of the charge) is usually required from a prior lender (the Land Registry office copy entries will show whether a restriction to this effect has been registered in favour of the lender). Inevitably, awaiting consent to charge can cause delay: Often, applications for consent are not processed quickly.

To minimise the delay, you should deal with this at take on. Tell your client that its more than likely that consent will be required. Get the mortgage account number and contact details for the relationship manager so that we can make contact as early as possible. Get the ball rolling.

BEWARE – negative pledge clauses

Even if a prior lender does not have a restriction registered in his favour against the title, this does not mean that their consent is not required to your charge. Inevitably, their charge document will contain a clause prohibiting the granting of any further charges over the property without their prior written consent. If, therefore, a further charge is granted in breach of this prohibition you may be held liable to the prior lender for inducing the breach of a negative pledge. To avoid any risk of a dispute with the prior lender we always err on the side of caution and advise ABL's to make sure consent is obtained.

Where do we stand?

Get your priorities straight

Generally, the priority of charges over registered land is determined by the date of their creation. However, if a charge is protected by registration at the Land Registry, it will take priority over an earlier charge which has not been registered. It is important, therefore, not to delay in obtaining registration of a legal charge or by protecting its position by a notice.



Legal mortgages which are protected by registration rank, amongst themselves, in the order shown in the charges register of the property. As mentioned above, they take priority over a prior charge which does not appear in the charges register.

However, if consent to your charge is required from a prior lender and you have not obtained that consent, your charge can only be protected by a notice in the charges register of the property and whilst it will retain its priority over subsequently registered charges, it will not take priority over prior charges which do not appear on the charges register.

What does that mean in practice?

If all necessary consents from prior lenders have been obtained, a legal mortgage can be protected as a registered charge against the title to the property in question. That security will be subject to any prior charges appearing in the charges register, but will take priority over any prior, unregistered charges. It will also retain its priority over subsequent charges.

If the consent of a prior lender has not been obtained, and the prior lender has the benefit of a restriction on the title to the property, the Land Registry will not register a subsequent charge. That charge may only be protected by a notice. Although the charge will retain its priority against any subsequent charges, it will be subject to any prior registered charges and any (potentially unknown) prior, unregistered charges.

So, what should we be doing?

Do...

- Your due diligence in advance of instructing your solicitors
- Insist that your client (and any co-owner) obtains independent legal advice
- Obtain the consent of any prior lender where there is a restriction registered in their favour
- Obtain the consent of any prior lender where their charge document contains a restriction on granting further charges over the property (a negative pledge)
- Minimise risk of challenge and allow sufficient time for all the above to be dealt with

Don't...

- Cut corners; it may come back to bite you!

Taking charges over property can be complicated and time consuming. If you are considering taking a charge over a property as additional security you should start thinking about, and dealing with, the issues outlined above as soon as possible. There may be other considerations that have not been covered in this article, so please contact our Property Team and take their advice at the outset.

Preparation is key to minimising delay and the risk of challenge to your charge.



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