



EQUITY RELEASE SCHEMES – A FOLLOW UP

The Conveyancing Committee published a preliminary Practice Note on these schemes in the May 2001 Gazette. During the intervening period representatives of the Committee have been in negotiation with the Bank of Ireland in the hope of securing modifications in some aspects of their Life Loan Scheme. Regrettably little progress has been made in achieving such modifications. The Committee has serious concerns about some of the requirements and provisions of the Scheme, some of which appear more relevant to commercial property mortgages. The Committee appreciates that this scheme is a novel one in the Irish market, but notes that it has more stringent requirements than are imposed in a similar scheme operated by a major U.K. lending institution.

The Committee's principal concerns relate to the following aspects of the Scheme:

1. (a) The requirement that the Borrower(s) make wills and appoint executors.

While the making of a will would normally be advisable, there are circumstances where a person may decide, on a fully informed basis, that they should not make a will. Thus, for example, a person might elect to protect the estate against a claim under S.117 of the Succession Act, by allowing the intestacy rules to apply when he or she had good reason to anticipate a claim under that Section from a child disappointed by the provision made for that child.

- (b) The requirement that the Borrower(s) disclose the names of their chosen Executors, and any replacement Executors to the Bank and that the Bank is entitled to contact such named executors and require them to enter into an agreement to co-operate with the Bank and to contact them further during the term of the loan, and not just after the death(s) of the Borrowers.

Apart from the basic principle that an executor has no legal status until the testator's death, this requirement involves the Borrower(s) in a waiver of confidentiality which seems quite unnecessary.

2. The requirement that the named executors enter into a consent to co-operate with the Bank after the death(s) of the Borrower(s).

It is not clear to the Committee that the Bank really needs such consent, nor what real strength such consent has. The Bank will, after the Borrower(s) death(s) be a Mortgagee with an exercisable power of sale. The Bank have indicated that their concern is to be able to sell the house speedily in order to stop the interest accruing. While this is clearly desirable the Committee believes that this object is capable of



being achieved without such a requirement which it feels is somewhat draconian. The Borrower's personal representative, whether an executor or administrator, has, in any case, to swear to administer the estate and pay the deceased person's lawful debts. Any further assurance required by the Bank on this point is superfluous.

3. The requirement that the Borrowers disclose the names of their beneficiaries and next-of-kin to the Bank.

This requirement involves a further invasion of the privacy to which a person making a will is entitled, but appears, having regard to the obligation to make wills and disclose the names of executors to be a belt-and-braces provision in case the executors don't co-operate with the Bank. The Committee is very concerned that the consent given to the Bank to contact named beneficiaries and next of kin will in some cases create or increase pressures on the Borrowers to vary the provisions of their wills, particularly if the next-of-kin is not a beneficiary. The Committee is aware of a number of cases where elderly peoples' twilight years were blighted by wrangling between members of their family who had become aware of the provisions of a will.

4. The inclusion as one of the events of default of "the appointment of a receiver over the whole or any part of the property or any other property assets or revenue of the Borrower".

Such a provision might well be reasonably included in a mortgage where interest and/or repayments of capital is payable at regular intervals, since such events of default would cast doubt on the borrowers ability to make such payments. It is central to this scheme that interest is rolled up until the death(s) of the Borrowers. The creditworthiness of the Borrowers during the course of the loan should be irrelevant to the Bank

The Committee's principal concerns are to ensure that solicitors acting for persons contemplating entering schemes are fully informed about the advantages and disadvantages of them, in order that they may give effective advice to their clients and that solicitors are aware of the heavy obligations that will fall on them in advising their clients, and of the importance of maintaining adequate records of their advices, bearing in mind that any questions as to the quality of such advice is only likely to arise after the death(s) of the client(s).

The Committee has in the past found it necessary to criticise mortgage packages issued by other lending institutions and will continue to offer such criticism where it believes that

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such packages contain excessive restriction or provisions which are not in the interest of clients or are just not fair.

The Committee has had lengthy negotiations with the Bank with a view to modifying the conditions which seriously concerned it. While the Bank were prepared to make some changes the Committee's concerns were not allayed because the outstanding requirements included those about which the Committee had the most serious reservations.

The Committee believes that equity release schemes can be a useful method of releasing "dead capital" which is tied up in residential property. However, since all such schemes involve the elderly in disposing of some interest in their homes, it is critical that the procedures involved are fair and reasonable and that solicitors are able to advise their clients accordingly. The stringent provisions identifying "events of default" are not in the Committee's view fair, reasonable or necessary, while the obligation to inform the names of chosen executors, beneficiaries and next-of-kin involves the borrowers in waiving aspects of their privacy to which they are entitled are objectionable and quite unnecessary.

The Committee wishes to emphasise that it has not agreed to the use of the Certificate of Title scheme forms in connection with this scheme.