

Distressed Purchasers - Beware, you could be pursued.

Brian Morgan, Litigation Partner with Morgan McManus, advises client Purchasers not to abandon their Loan obligations.

Distressed purchasers, namely those who have bought investment properties, have contacted this office seeking advice with regard to their liability to the Bank believing that, because they cannot afford their Mortgage repayments, they might be forced by economic circumstances to forego the investment and discontinue their Bank repayments. This has happened in the current climate in situations where clients have purchased houses which they then cannot rent out or where clients have bought development sites for the purpose of construction of an investment dwellinghouse and then run into financial difficulty with the project. From hereon, we'll call the Purchaser a "Debtor", because that is effectively what he has become once he has taken on a Mortgage. A number of questions generally arise.

Can the Debtor cease paying his Mortgage?

The difficulty for the Debtor in doing so is that the Bank, holding a Charge/Mortgage over his property, will issue Proceedings against him for payment of the arrears and seek an Order for Possession of the property from the Court with a view to selling the property to pay off any arrears. The Bank will also obtain an Order for Costs in such Proceedings. These could be quite substantial.

But the bank can then clear the Mortgage and everyone is happy?

Not necessarily so! In the event that the sale proceeds of the property are not sufficient to cover the arrears (and there is every likelihood that this would occur in the current economic climate) then the bank would be entitled to pursue the Debtor directly for payment of the balance due.

Debtor's Credit Rating.

A further difficulty for the Debtor would be that the registration of a Judgement Debt against him would affect his Credit Rating for the future and would inhibit his ability in the future to source Bank Finance. More significantly, even if a Debtor falls behind in the repayments of his Mortgage this fact will appear on his Credit Rating Report. That is, this will occur even without the issue of Proceedings against him.

But what if the Debtor owns no assets other than his Family Home? Sure they can't take blood from a stone?

The Debtor may believe that, because he owns no other assets and his Family Home is in joint names with his spouse, that the Creditor would not be able to pursue him. Not so! The likelihood is that the Creditor would register a Judgement Mortgage against the Debtor's interest in the Family Home. The effect of this is that if the Debtor subsequently decides to sell the Family Home he will be obliged to pay the debt together with legal costs and interest (at the rate of 8% per annum) from the proceeds of sale. More importantly, if the Debtor seeks to remortgage his Family Home at a later date (for instance, to release funds to assist him in getting through the current credit crisis) he will not be able to do so without first discharging that Judgement Mortgage.

Regardless of this, the Judgement Creditor has many other means of pursuing the Debtor for payment, one of which would be to seek to have him adjudicated a Bankrupt, where the Official Assignee in Bankruptcy would take charge of the Debtor's assets with a view to discharging the Debtor's liabilities to his Creditors.

But I live in Northern Ireland - sure they could not get a Republic of Ireland Judgment against me in Northern Ireland?

Because a Debtor lives in Northern Ireland does not mean that the Bank could not pursue him for payment. It has always been possible to register a Judgement obtained in one Jurisdiction in another Jurisdiction for the purpose of enforcement. This has been made even more simple for Creditors by reason of the introduction of Regulation No. 805/2004 by the European Parliament and the Council on the 21 April 2004 which has created a European Enforcement Order ("EEO") for claims throughout the EU. The EEO avoids the necessity to go through complicated procedures which previously existed and this will now make it easier for creditors in one jurisdiction to pursue a Debtor in another Jurisdiction.

What should I do?

We never wish to alarm client Purchasers but it is important that they realize the consequences of any decision made in haste and particularly where they might take free advice from a non-lawyer (very often the worst advice possible!). It is our experience that where a Debtor approaches his/her Bank and explains their difficulties the Bank will usually come to some arrangement with a view to assisting the Debtor, such as deferring capital repayments for a period of time. Afterall, the banks have been obliged to eat humble pie recently and know too well what it is to be cash-strapped!

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