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**SOLICITORS**

# GUIDE TO PURCHASING YOUR HOUSE

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## PREFACE

*Whether you are purchasing your first home or an investment property, this will be one of the most important decisions you make in your life. The whole process, from signing Contracts to applying for a Mortgage to getting possession, can be very stressful, particularly where you are not properly prepared or have not sought correct advice.*

*What if I lose my Deposit? What if my Bank withdraws the Loan Approval? What if there are issues with Rights-of-Way, with Boundaries, with Planning Conditions? When will we get possession of the dwelling? What if the structure of the house deteriorates? What is Stamp Duty? How much Stamp Duty will I be obliged to pay? Will I be able to sell my house in the future if I want to trade-up, or it just simply gets too small for my needs?*

*This is why it is so important that you have a solicitor in your corner in whom you can place your full trust; who will take you through the transaction with the minimum fuss. When you instruct Morgan McManus to act for you in your property purchase you can be assured of a friendly and efficient service.*

*The purpose of this Guide is to give you some introduction to the process involved; to demonstrate to you that we understand that all of this is new to you and that it is up to us to explain the process involved.*

*We look forward to providing service to you.*

*Brian Morgan*

*Morgan McManus Solicitors*

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## CHAPTER 1 – DEALING WITH AUCTIONEERS / ESTATE AGENTS

The Auctioneer or Estate Agent is retained and paid by the seller of the property. The Auctioneer's obligation is to secure for the seller the best possible price for the property. **As such the Auctioneer owes a Purchaser no direct legal obligation.** Therefore, any representation he makes to you about the property would be based on what the Seller has told the Auctioneer/Estate Agent. The Auctioneer is under no duty to independently verify or confirm what he has been told is accurate. For this reason practically all Auctioneer's Brochures (website Online Properties for Sale) will contain a disclaimer to say that the Purchaser is not entitled to place any legal reliance whatsoever on anything contained within the Brochure. Indeed, any representation made to you by the Auctioneer cannot effectively be relied upon in any dispute that subsequently arises. This is because practically all contracts to purchase a property state that any representation made prior to the entering into of the Contract cannot be relied upon unless that representation is specifically recorded in the Contract. **For this reason, it is vitally important that you inform your solicitor of any representations made to you in the course of you negotiating the purchase of the property which were critical in your decision to buy the property.**

In our experience, all Auctioneers/Estate Agents act honestly and to the best of their ability when they do make representations to potential purchasers, but once again, we warn you that they do not owe any obligation to independently confirm the accuracy of what they are saying to you - as their duty is owed to their client, the seller and to nobody else. A classic example would be that an Auctioneer could claim that there is a right of way serving a property. The seller may have told the Auctioneer that such a right of way exists but only subsequent investigation of title by your solicitor will confirm whether there is actually

any legal basis for saying there is a right of way. If it transpired there was no such right of way, then the Auctioneer cannot be held liable.

## CHAPTER 2 – PRIVATE TREATY OR AUCTION?

### SALE BY PRIVATE TREATY

Most dwelling houses in Ireland are sold by Private Treaty. This means that the Auctioneer or Estate Agent will advertise the property and accept offers for it on behalf of the seller. When the highest bid has been received, the Auctioneer/Estate Agent would then revert to the seller to ascertain whether the seller will sell the property for the highest bid. It should be noted that there is no obligation on the seller to sell for the highest bid. If the seller is prepared to sell to the highest bidder, then the Auctioneer will require the highest bidder to immediately pay a “Booking Deposit” in order to secure the property. **The Booking Deposit is usually about 5% of the value of the property.** It should be noted that the payment of a Booking Deposit creates no legally binding obligation between you and the seller. In effect, the payment of a Booking Deposit is a goodwill gesture by the Purchaser to show that they are willing to move to the next stage of the procedure. **Despite the fact that you have paid a Booking Deposit, the seller is still free to turn around and withdraw the property from the market or indeed sell it to some other party.** This is known as “gazumping” and there is no law that prevents a seller from acting in such a way. That is, the Booking Deposit does nothing more than exert moral pressure on the seller to confirm the

sale of the property to you at the price agreed. The Auctioneer/Estate Agent would ordinarily encourage the seller to stick by the original “deal”.

After the payment of a Booking Deposit, the Estate Agent will notify the Seller’s Solicitors by sending a Sales Advice Note to them advising them of the Sale price and related details. A copy is generally sent also at that time to the purchaser’s solicitor. **The seller’s Solicitors will then issue Contracts for Sale and Title documents to the purchaser’s Solicitors and provided those Contracts and related documents are in order, you, the purchaser, will then sign those Contracts and pay a balance deposit to bring the entire Deposit paid up to 10%.** As, ordinarily you would have paid a 5% Booking Deposit to the Auctioneer, you will ultimately pay another 5% to the Seller’s solicitors. It should be noted that the 5% Booking Deposit and the 5% balance Deposit are in the normal course held by the Auctioneer and the Solicitor respectively as “Stakeholders” i.e. these amounts will not be released to the seller until such time as the sale is completed. While all Solicitors carry appropriate levels of Professional Indemnity insurance to protect you in respect of any monies paid to them, it is important that the Auctioneer in question is also bonded, so as to provide security for the Deposit paid. All Auctioneers/Estate Agents should be “bonded” but it is not unknown for certain persons to hold themselves out as Auctioneers/Estate Agents even though they do not carry appropriate insurance protection for monies held by them. If however the Auctioneer holds a Licence from the *Property Services Regulatory Authority (PSRA)*, and most do, then the Auctioneer will

be appropriately bonded. Check however that the PSRA Licence exhibited in the Auctioneer's premises is up-to-date. For more information on the PSRA, you can visit their website at [www.psr.ie](http://www.psr.ie) .

**It goes without saying that it is extremely risky to pay the Deposit or any part of the Deposit to the seller directly and no Professional Adviser would recommend that you do this.**

Always bear in mind that legally binding Contracts do not come into existence until the following has happened:

1. You have attended with your solicitor to sign the Contracts in duplicate and paid a balance Deposit, to bring the total to 10%,
2. The signed Contracts have been returned to the Seller's Solicitors with the balance Deposit, and
3. The Contracts have been signed by the Seller and one part Contract returned to your Solicitors. There is no legally bounding Contract in existence until it is signed by the Seller and returned to the Purchaser's solicitors.

As such, it would be quite common for some weeks to elapse before a Purchaser can be positive, in a legal sense, that they are definitely going to get the property. Even when irrevocable legally binding Contracts have come into existence there are no absolute guarantees, for reasons that will be explained later, that the transaction will complete as the Contract will provide for certain circumstances to allow each party to walk away from the deal. That said, 999 out of every thousand transactions complete without such problems arising.



## **SALE BY PUBLIC AUCTION**

When a dwelling is put up for sale by Public Auction, this means that on the appointed day, an invitation is issued to members of the public to attend and bid for the property in order to buy it. When the property is advertised, it will normally have, what is known as, a Guide Price. This is an indicative price the Auctioneer will give, so that the Purchaser has some idea whether or not they are likely to be able to afford the property. There has always been a concern regarding the fact that the Guide Price can sometimes be significantly lower than the ultimate selling price. This can however often happen at Public Auctions, particularly where 2 very anxious Purchasers get into a public “bidding war”. It is sensible therefore in advance of an Auction to decide a final figure beyond which you will not bid.

Just because a property is put up for Public Auction and the Auction commences does not mean that the property will be sold to the highest bidder. The bidding on the property must reach the “Reserve Price”. It is normal practice not to disclose to the bidders what the Reserve Price is, but usually when the Reserve Price has been reached, the Auctioneer will announce to the bidders that the property is now “on the market”. Thereafter, it will then be sold to the highest bidder. In the event that the bidding for the property does not reach the Reserve Price, then it is common practice for the Seller to enter into private negotiations with the highest bidder to see if a deal can be reached but this is only done after the Auction has ended. This is common practice but the highest bidder

at an Auction, where the property fails to meet the Reserve, has no legal right to enter into exclusive negotiations with the seller.

If the property reaches its reserve and ends up being sold to the highest bidder, the highest bidder will be expected to sign a legally binding Contract immediately after the Auction and pay a 10% Deposit. The Contract is also signed at that point by the Seller. Once the contract has been signed by both Seller and Purchaser, the Purchaser has entered into irrevocable legally binding Contracts to purchase the property. As such, they will be obliged to complete the purchase regardless as to the fact that the title to the property could be completely defective or indeed the structure of the property could be defective or dangerous. **Therefore, it is absolutely essential that prior to bidding for a property at Auction, you would have retained your solicitor to examine the title to the property and the Contracts under which the property will be offered for sale.**

Secondly, it is equally vitally important to have the property inspected by an Architect or Engineer to confirm that it is structurally sound **in advance of the Auction**. Failure to follow this advice has in the past resulted in Purchasers buying properties that either had defective titles, were structurally defective or had huge Planning Permission difficulties; but and because they had signed legally binding Contracts, they were unable to get out of the purchase transaction. Indeed it can sometimes occur that if a property has some defect, it will be offered for Public Auction. In those circumstances, Purchasers rather foolishly do not get legal advice about the nature of the Contract being entered into or do not

retain an Engineer or Architect to inspect the property in advance and effectively are left with a very expensive mistake!

## CHAPTER 3 – SURVEYS

Where we talk about Surveys we mean surveys which are undertaken by an Architect and Engineer to ensure that, as far as can be ascertained, the building is structurally sound. Apart from the practical reasons for requiring a Survey, there are plenty of legal ones. There is generally no right to sue the Seller for defects discovered **after Contracts become binding unless the Seller is the builder**. The Seller can be sued for misrepresentation if false information about the condition of the property is given in replies to written enquiries from the purchaser's solicitors. Those replies are usually worded with reference to the Seller's knowledge. For example, an enquiry would ask "*Has the property ever suffered from dry rot?*" and the answer would be "*Not to the Seller's knowledge*". The answer is usually genuine. However, even if it is not, proving what the Seller knew or did not know is likely to be very difficult. Apart from that practical difficulty, suing an individual is often a hazard. He may be difficult to trace or may not have any assets which make him worth suing. It should be noted that it is not common practice for a Purchaser's solicitor to raise Pre-Contract Enquiries about the structural integrity of a second hand property as the Seller's solicitor will simply refuse to reply because they would be exposing the Seller to being sued if the reply turned out to be incorrect. The general legal principle of "Caveat Emptor" applies to purchaser of second hand property – "**Let the Buyer Beware**".

## SECOND HAND PROPERTY

**We always advise any client purchasing a second-hand property to have a Survey carried out by an Architect, Engineer or Chartered Surveyor and to have a written Report prepared.** The usual Survey carried out for a house Purchaser will involve a superficial visual examination of the property by one of those professionals. As such, there are certainly limits to the value of these Reports as there may be any number of hidden structural defects in a property that could only be identified by stripping back floor boards, stripping away plaster or unearthing hidden foundations. The best that one can hope to achieve from the usual visual inspection Survey is that it will reveal any tell-tale signs of major structural defects such as subsidence, cracks in walls, defective roofs etc.

Sometimes a full structural Survey of a building may be warranted. This is often the case in a more expensive property, where the cost of such a Survey (which would tend to run to a couple of thousand euro) is justified. Such a Survey would also be carried out if the visual inspection revealed any tell-tale signs which should prompt a more vigorous Structural Report. A full structural survey is much more expensive because it will usually involve digging around the foundations of a building to reveal those foundations, lifting floor boards, excavating, digging into walls in order to check for dry rot and other such matters.

No matter what Survey you obtain, whether it is a visual inspection or a full structural Survey, the professional providing that service

will usually try to insert as many Disclaimers as possible into the Report, to prevent you suing them at a later date should the Report turn out to be inaccurate and you consequently suffer loss. As such, it is obviously worth while to retain a professional whom you trust or who has been recommended to you as being vigorous and professional in their approach. Nevertheless there are limitations to the protection it will offer you. **The basic fact is that purchasing a property is not a risk-free transaction but, with the use of good professional advisors, you can limit that risk as much as possible.**

## **BANK SURVEY / VALUATION**

Finally, it should be noted that if you are getting a Mortgage, the Banks will sometimes send out an Auctioneer or some other professional person to value the property. Under no circumstances should you confuse the Bank sending out someone to view the property as being any sort of examination of the property to reveal any defects. Firstly, the Bank is merely sending out someone to look at the property to ensure that it is worth what the Borrower is paying for it. More than often, it is an Auctioneer (not an Architect or Engineer) who is retained by the Bank to value the property. The Auctioneer in question will usually issue a short Report to the Bank about the property, saying it has x number of bedrooms a garden etc. This Report is produced for the benefit of the Bank and you are not entitled to place any legal reliance on it. Secondly, it does not purport in any way to confirm that the property is structurally sound. Thirdly, it is usually carried out by an Auctioneer who possesses no skills whatsoever in engineering and who is not in a

position to make any statement as to whether the property is structurally sound or otherwise.

## **DOES MY HOUSE INSURANCE NOT COVER STRUCTURAL DEFECTS?**

Unfortunately, in this situation, Building's Insurance Policy is no source for comfort. A Buildings Insurance Policy will cover perils such as fire, storm and flood but they are quite specific about the fact that they do not cover defects in the construction of the building.

## **WHAT IF THE SURVEY REPORT REVEALS PROBLEMS THAT I DID NOT ANTICIPATE?**

Obviously, one of your options is to pull-out of the transaction. Some people do not want to be obliged to carry out repairs to a property. The dilemma for a person who still wants to proceed with the purchase is that they will be obliged to consider accepting the situation as it is or renegotiating the Contract with the Seller. This can at least be done where you have not yet entered into a legally binding Contract.

In any transaction, renegotiating is always a risky policy. Some Sellers can be quite offended by this exercise. Others are philosophical and accept that a person buying the property would not know these things without the assistance of a Surveyor. The Seller may consider that the property market is so weak that he is better off accepting whatever proposals are put to him by the existing Buyer.

## **SHOULD THE SOLICITOR SEE THE SURVEY REPORT?**

The answer is an overwhelming "yes". Although the purpose of the Survey Report is to find out defects to the property, the Solicitor can often use the information in the Report to make further enquiries which have a legal dimension. For example, if the Report reveals that structural work has been carried out, this may prompt the Solicitor to write to the Seller's Solicitor for copies of the appropriate Certificates relating to Planning Permission or Building Regulations on foot of which that structural work was undertaken.

Sometimes, where it is ascertained in advance that certain structural work is required or that the Seller has not complied with the Conditions in a Planning Permission, it is then possible to incorporate Conditions into the Contract of Sale that the Seller will be required to carry out certain work to the property before Completion. This however will only be possible where these defects are discovered **in advance of the Purchaser signing a legally binding Contract.**



## CHAPTER 4 – NEW PROPERTY

### LIABILITY FOR DEFECTS

In respect of a newly erected property being purchased from a Builder/Developer, a different set of criteria applies. The law implies that a Builder owes certain duties to the Purchaser of a newly erected property. **For instance, the Purchaser would be entitled to sue the Builder if the Builder had negligently constructed the property or had not used proper building materials etc.**

**Also, it almost always the practice for the Builder to give some form of Structural Defects Indemnity which usually lasts for a period of between eighteen months and six years.** The advantage of a separate Structural Defects Indemnity is that it is easier to sue a Builder on foot of an Indemnity, as opposed to suing him under the general legal obligations implied by the law. It is now extremely rare to get a Structural Defects Indemnity from a builder in his personal capacity; **nearly always the Indemnity comes from a limited liability company.** Therefore there is always the danger that the Company which gave the Structural Defects Indemnity will be wound up (cease to exist) as soon as the project is completed or perhaps the company no longer trades and as such has no assets. **Therefore the Indemnity may be worthless.** The reputation of the Builder and his company is therefore of crucial importance.

## HOME BOND

In light of these risks, a scheme known as “**Homebond**” was established by the Construction Industry. This effectively provides a ten year Insurance Policy against major structural defects in the property. The insurance premium is paid by the Builder at the time he builds the house. This, in effect, means that if there is a major structural defect in the property, the Homebond Insurance Company will effectively pay for the property to be repaired. **There are however limitations under the Homebond Scheme as to the maximum payout that will be made in respect of any one builder or any one claim. Furthermore, Homebond only covers major structural defects.** In any event, if a property comes with a HomeBond Guarantee, then there is a certain degree of Quality Assurance involved in the construction of the building. The Homebond Officials will have inspected the property in the course of construction to ensure that it has been constructed in accordance with their requirements. In effect, they will insist that the Builder has built the house to a certain minimum standard before they will put the property “on cover”. As such, it is of significant benefit if a property is covered by a HomeBond Guarantee. Indeed, Banks will look much more favourably on a new property that has a Homebond Guarantee when it comes to considering whether to lend on the property.

## PREMIER GUARANTEE

In 2002 a new Structural Guarantee Scheme was introduced to the Irish Market known as “**Premier Guarantee**”. This Guarantee or policy is provided by an insurance company and, like Homebond, the premium paid is by the builder. This offers similar protection to the

Homebond Scheme and should be an acceptable alternative to Homebond. Premier Guarantee is more akin to an Insurance Policy as it does not entail the periodic inspection elements to ensure minimum standards that forms part of the Homebond Scheme. Your Solicitor may, in those circumstances, need the approval of your Bank to the adoption of the Premier Guarantee cover in place of the standard Homebond Scheme.

### **NO HOMEBOND OR PREMIER GUARANTEE COVER**

It should be noted however, that not all new properties are covered by the Homebond Guarantee Scheme or “Premier Guarantee”. This is particularly the case in respect of “once-off” housing or small developments that are built by Builders on a speculative basis. If a property is not covered by a HomeBond Guarantee or the “Premier Guarantee” then it is the practice for the Builder to, not only give a Structural Defects Indemnity as referred to above, but also to arrange the supervising Architect to give a *Certificate of Supervision*. A *Certificate of Supervision* will effectively confirm that the Architect inspected, for instance, the open foundations of the property as they were poured, and that periodic inspections were carried out regarding the property at various stages of construction. The Certificate will also confirm that good and proper materials were used in the construction and other such matters. The benefit of this to the Purchaser is that, in the event of subsequent structural problems at the property, the Purchaser is likely to have a right of action against the Architect in the event that the Architect negligently confirmed that the property was constructed in accordance with good building practice. It is for this reason that it is important to establish that the Supervising Architect is

properly qualified and carries proper insurance cover, in the event he was sued at a later date. It should be noted that any legal action against the Architect for negligently giving such a Certificate, generally speaking, must be taken within six years from the date of the construction of the property.

The Lender will require us as, your Solicitor, to confirm that the property is covered by HomeBond or Premier Guarantee prior to releasing the mortgage cheque. In the event that it is not covered by such a Guarantee, the Banks will then usually insist on having sight of the builder's Architect's *Certificate of Supervision* to ensure that they are satisfied with the wording of it together with a copy of his insurance cover. It should be noted that at all times the Lender will be as interested as you are in ensuring that the property will be free from structural defects. The Lender will be lending money on the security of the property and in the event the Lender was obliged to sell the property, they obviously need to know that the property is going to be structurally sound.

## **SNAG LIST**

The upshot of all of this is that when a Purchaser is buying a newly erected property, there is no necessity to have an Architect do a full structural survey. Normally the preparation of a "Snag List" is the only thing that is required to be done. A Snag List is effectively a brief inspection of the property by an Architect/Engineer/Surveyor to identify minor defects in terms of finish in respect of the property. It is not an inspection of the structural integrity of the building. It

effectively offers an opportunity to make sure that all jobs have been completed by the Builder prior to the Purchaser handing over their money for the property.

## **BANK SURVEY/VALUATION**

Finally, (as already pointed out in Chapter 3) it should be noted that if you are getting a Mortgage, the Banks will sometimes send out an Auctioneer or some other professional person to value the property. Under no circumstances should you confuse the fact that the Bank's sending out someone to view the property as being any sort of examination of the property to reveal any defects in your newly-constructed house. The Bank is merely sending out someone to look at the property to ensure that it is worth what the Borrower is saying it is worth. The Valuer in question will usually issue a short Report to the Bank about the property saying it has x number of bedrooms a garden etc. Firstly, this Report is produced for the benefit of the Bank and you are not entitled to place any legal reliance on it. Secondly, it does not purport in any way to confirm that the property is structurally sound. Thirdly, it is usually carried out by an Auctioneer who possess no skills whatsoever in engineering and who is not in a position to make any statement as to whether the property is structurally sound or otherwise.

## CHAPTER 5 – SUMMARY OF THE CONVEYANCING PROCEDURE

Under the system of buying and selling houses, there are two fundamental stages – the binding of Contracts and Completion.

On the binding (signing) of Contracts, both the Purchaser and the Seller are legally bound under a written Contract to buy and sell the property. Under the written Contract, a date is fixed for completion. On Completion, the Seller's solicitor hands over the Deeds and keys to the Purchaser's solicitor and the Purchaser's solicitor hands over the balance purchase money. Once Completion takes place, the Purchaser can take possession of the property. Only at the point of Completion does the Purchaser become the owner of the property.

### **PRE-CONTRACT ENQUIRIES**

Before the binding of Contracts, it is the Seller's Solicitor's duty to draft the Contract and provide whatever information he can about the property to the Purchaser's Solicitor. Some of this information will be apparent from the title deeds but he will also need to ask his client some questions about the property before he answers any enquiries. It is the Purchaser's Solicitor's job to find out as much as he can about the property. He will look at the documents and information provided by the Seller's Solicitor and advise his client before the Contract becomes binding. The Seller's Solicitor's responses must then be

examined so that no detail is left unattended by the Purchaser's Solicitors.

If the Purchaser is taking out a Mortgage to enable him to buy the property, the Purchaser's solicitor looks at the Mortgage Offer to check whether or not there are any difficult Conditions with which he is obliged to comply. Sometimes, the Mortgage Offer results in the Purchaser's Solicitor being obliged to raise further enquiries. Any difficulties with the Mortgage Offer must be cleared up before the binding of Contracts unless the Contract is conditional on the buyer receiving a satisfactory Mortgage Offer before completion. Contracts conditional on a satisfactory Mortgage Offer are now quite rare because it has been a Seller's market for some years now. Very few Sellers want to go to the effort and cost of entering into Conditional Contracts only to find out weeks later that the deal is not proceeding because the Purchaser cannot get a Mortgage.

### **THE LAW SOCIETY CONTRACT FOR SALE 2019**

Before the 2019 version of the Contract for Sale, the recommended practice of the Law Society was that the only documents that should be produced with the Contract were relevant Title Deeds and all issues with regard to Planning Permissions and related matters were deferred for investigation until after the Contract for Sale had been signed by both the Purchaser and the Seller.

Now, since the issue of the current (2019) version of the Contract for Sale, the required practice is that Title should be investigated by the Purchaser's solicitor prior to the Purchaser being required to sign the

Contract for Sale. This means that all of the work with regard to the investigation of Title by the Seller's Solicitor must be undertaken prior to delivery of the Contracts for Sale to the Purchaser's solicitor. Accordingly, it is now necessary to send out, not only the Contract for Sale and relevant Title, but it is also necessary to send out *Requisitions on Title* with Replies and documentation vouching those Replies.

These *Requisitions on Title* are effectively a list of several hundred detailed questions regarding the title to the property which will relate to matters such as Boundaries, Rights-of-Way, Tax Clearance Certificates, Planning Permission compliance, Building Regulations all ancillary Declarations and documents relating to Property Taxes and Roads and Services etc. This means that a lot of the legal work is conducted before the binding of Contracts.

This inevitably slows down the issue of Contracts in the first instance and Purchasers can often now be mystified as to why it takes so long for Contracts to be signed. While this element of the Conveyancing transaction does now take longer to complete, the benefit to both parties is that once Contracts are signed it is generally possible after the signing of Contracts to agree an early Completion date.

## **BINDING OF CONTRACTS**

As stated earlier, legally binding Contracts are not entered into until such time as the Purchaser signs the Contract in duplicate. Those signed Contracts are then sent to the Seller's solicitors together with a 10% deposit in total (to include any Booking Deposit the Purchaser may have already paid). The Seller signs the Contracts at their



Solicitor`s office and one copy of the signed Contract is returned to the Purchaser`s Solicitor`s office. Up to the point where the signed Contract is sent back to the Purchaser`s solicitor`s office, the Seller is still free to pull out of the deal. In that event the Purchaser is entitled to be refunded any Deposit already paid, but there is no entitlement for other out of pocket expenses such as legal and surveyors fees accrued to that date.

### **POST CONTRACT ENQUIRIES**

As the review of the title to the property has already been conducted by the Purchaser`s solicitors prior to the Purchaser signing the Contracts after the return of signed Contracts the Purchaser`s solicitors is entitled only raise limited enquiries.

This now means that there is less work to be done between the signing of binding Contracts and Completion. It also gives the Purchaser the benefit of being aware of all defects and problems in respect of the property prior to signing the Contracts. The downside for the Purchaser is however that should the deal fall apart just before the signing of Contracts the Purchaser will have incurred cost which he cannot recover.

Prior to the new 2019 Contract procedure, under the Contract the Seller would have agreed to furnish the Purchaser with “good and marketable title” on Completion. What happened if the Seller could not subsequently give satisfactory replies to all the Requisitions on Title e.g. he could not produce a Tax Clearance Certificate? The Seller had a contractual obligation to furnish all Tax Clearance Certificates on Completion. If the Seller was not subsequently able to comply with

his contractual obligations then the Contract could be rescinded i.e. both parties were entitled to walk away from the deal.

This was not very satisfactory as the Purchaser had at that point in time signed what he thought was a legally binding Contract and he had invested at that point in time, not only a full Deposit, but emotional energy in the property. Under the new system, this is less likely to occur. The new system does offer the Purchaser the comfort of identifying any problems at an earlier opportunity.

### **COMPLIANCE WITH CONTRACT CONDITIONS**

Just because a Purchaser has investigated the title and signed legally binding Contracts does not mean that problems will not arise in the period between Contract stage and Completion. It can happen that the Contract will be rescinded if the Seller fails to comply with the Conditions of Sale, but it is less likely to happen. The rescinding of a Contract happens extremely rarely but a Purchaser must be aware of the possibility that he could expend a lot of time and emotional energy in pursuing a property and incur expense in terms of legal costs, Engineer's Reports, other out of pocket expenses only to be obliged to pull out (rescind) at the very last minute because the Seller cannot comply with the terms of the Contract. The Seller's inability to comply with the terms of the Contract may be completely outside his control and not his fault. In such a case there is no contractual term to provide that the Seller must compensate a Purchaser. **At its most basic, there is a financial risk in purchasing property.** Of course, it is entirely a different matter if a Seller deliberately seeks to avoid living up to his contractual obligations – in that scenario the Purchaser

can go to Court to oblige the Seller to perform his part of the Contract and the Purchaser can seek appropriate compensation.

## **MORTGAGE DRAWDOWN AND OTHER PRE-COMPLETION MATTERS**

In the period between Contracts and Completion the Loan Offer and Mortgage documents will usually have been signed and will be returned to the Bank in order to requisition the Loan cheque. This is often a very busy time for the Purchaser as he will be obliged to organise house insurance, life insurance and other matters, which are normally conditions of his Loan Offer. Very often borrowers will be obliged to go for medical check-ups before they will be given life insurance. This can often add significant delays to the process and can delay Completion.

During this period we, as your Solicitor, will be busy on your behalf drawing up formal documents (including the Deed of Transfer), making final title searches, providing an Undertaking to the Lenders (to deliver Title Deeds registered in your name after completion of the transaction), obtaining the Loan proceeds and any other funds needed from you for completion and preparing our Statement of Account for you. It should be noted that Title Searches are required in order to ensure that the Sellers are not bankrupt or that no Judgements have been registered against them or the property that would prevent the Purchaser obtaining good legal title to the property in sale. **Equally, if you are getting a Mortgage, the Lender will require us to conduct Judgement and Bankruptcy Searches against you, the Purchaser, to ensure that there is nothing that**

**will prevent the Bank getting a First Legal Charge over the property.** Therefore, if there are any Judgments registered against you it is very important that you inform us of this immediately, so that we can take action as soon as possible to alleviate the problem.

## **COMPLETION**

Before completion, the Solicitor acting for the Purchaser arranges for the balance purchase money to be sent to the Seller's solicitor. Whereas in the past this was done by sending a letter in the post with a Banker's Draft so that it was received by the Seller's solicitor by the Completion date, nowadays the funds are generally transferred by Credit Transfer between the Solicitors' Banks. It is therefore very important that you also are in a position to transfer funds to your Solicitor's Bank Account. In other words, don't arrive at your Solicitor's office on the day of Completion with a cheque (which would require Bank Clearance) thinking you can get possession that day!

Once the Seller's Solicitors have received the balance purchase money, Completion usually takes place when the Purchaser's solicitor receives the Title documents that will have been forwarded by the Seller's Solicitor and the Purchaser's solicitor is satisfied with the Law Searches and any explanations that have been furnished by the Seller's Solicitors in respect of those Law Searches. Remember that at this point in time your solicitor has a duty, not only to protect your position but also to ensure that he can comply with his obligation to your Bank to provide proper Title in accordance with his Undertaking. Please therefore bear this in mind at the time of Completion, where it might occur to you that your Solicitor is being "over-cautious"!

Once the transaction has been formally completed the Seller's Solicitor arranges for his client, or the person holding the keys (usually an Estate Agent), to release them to the Purchaser.

## **POST COMPLETION**

When you are now luxuriating in your new home and assuming that your Solicitor's work is now complete there are a number of other matters to which the Solicitor must attend.

After Completion, the Purchaser's Solicitor attends to the stamping of the Deed of Transfer by the Revenue Commissioners and subsequent registration of the Deed at the Land Registry or the Registry of Deeds. After registration, the solicitor sends the deeds to your Bank, if there is a Mortgage, together with a Certificate of Title. If the Purchaser is a cash-buyer (no Mortgage), the Purchaser's solicitor will either retain the Title deeds in his safe or deliver them to the Purchaser, depending on the Purchaser's instructions.

And you wondered why the Solicitor was charging you all those fees!

## CHAPTER 6 – THE SYSTEM OF OWNERSHIP OF LAND

This is another issue which mystifies property purchasers and is worth a Chapter of its own! I don't intend to get too technical, but it will answer questions which do arise during the purchase process.

### TWO SYSTEMS OF LAND OWNERSHIP

There are two systems of land ownership registration in existence in Ireland. The older system requires that Deeds are registered in the Registry of Deeds. If the title to a property is registered in the Registry of Deeds, it means that the determination of title to the property is made by establishing a continuous unbroken chain of ownership in the Deeds and documents held by the owner. Property subject to this type of registration would normally have a large bundle of title documents stretching back many decades and, in some cases, hundreds of years. This Registry of Deeds system is also called, quite confusingly, “**unregistered land**”.

The Land Registry (now known as the *Property Registration Authority* of Ireland (PRAI) was established in 1892 with the intention of providing a central, simplified and state guaranteed title registration system. In effect, a record is maintained in the Land Registry of the owner of the land and if the ownership is to be changed then the appropriate documents are sent into the Land Registry who will then instigate the appropriate changes. Property registered in the Land Registry is commonly known as “**registered land**”.

Registry of Deeds fees tend to be less expensive than the Land Registry as the Registry of Deeds does not provide any title guarantees and effectively you must rely on the professional skill and judgment of your solicitor to confirm to you that the title is all present and correct. In respect of Land Registry title, the fees are more expensive but the Purchaser has the comfort of knowing that the title does carry what is, in effect, a state guarantee once they become the registered owner.

There are a number of agencies outside the owner's deeds and documents which have a bearing on the quality of the title. It is part of the solicitor's job to investigate information held by those agencies.

Of particular importance, for instance, is that the property in question complies with Planning Permission and Building Regulations and certain other statutory framework requirements such as stamping by the Revenue Commissioners.

## **THE LAND REGISTRY**

If property is registered land, ownership of that property depends upon what is stated on the Land Register (often referred to as “the folio”) and the folio map. Each title to a property has a separate folio number. For each folio number, the Land Register will show names of the owners, a description of the property, details of rights which the property has the benefit of over neighbouring land (in most cases) and third party rights to which the property is subject (often described as “encumbrances”). Third party rights include rights which the neighbouring property has over the property, restrictions on the use of the property and Mortgages. The Land Registry also keeps a central map showing all land in Ireland which is registered. Each folio number is represented on that map. A copy of the Land Registry map (also known as the “File Plan”) can be obtained from the Land Registry for any particular folio. Examination of the folio map is an essential part of the Conveyancing Solicitor’s job.

It is worth mentioning here that the Land Registry is often confused with the Registry of Deeds. The latter organisation concerns only unregistered land and is not the deeming agency of ownership.

## **THE REGISTRY OF DEEDS**

The Registry of Deeds is the oldest currently operating land ownership registration system in the world. It is unique to Ireland and was created by Act of Parliament in 1707. Under the system, a new owner of unregistered land sends to the Registry full particulars of the deed which enable him to become the owner. Whereas previously those particulars were sent in a document called a “Memorial” which was kept permanently by the Registry, this is no longer the case. Not all changes of ownership are recordable. At one time, a Will could be registered in the Registry of Deeds but this is no longer the case. However, all Mortgages are also recordable. Unlike the Land Registry, ownership is not determined by registration. However, failure to send particulars of the transaction to the Registry of Deeds promptly after the deed is signed can result in losing priority of rights

and in some cases losing ownership. For example, in a case of fraud, a former owner might sell property he has already sold taking advantage of the fact that the first buyer failed to register the transaction.

## **THE PROPERTY REGISTRATION AUTHORITY (PRAI)**

Both the Land Registry and Registry of Deeds systems are administered now by the PRAI. Further information on their services is available on their website at [www.prai.ie](http://www.prai.ie) .

## **COMPULSORY REGISTRATION OF TITLE**

Effectively since January 2010 all Conveyances on Sale (ie, where you are purchasing a property) are now subject to Compulsory Registration of Title. This is a long-term plan to ensure that ultimately all title in Ireland will be registered in the Land Registry and therefore more easily ascertainable. This plan has been progressed further by the creation of an Integrated Title Management System and digital mapping. It will be assisted further in coming years by the introduction of *eConveyancing* (an electronic system of Conveyancing in planning stage by the Law Society).

In practice, what now occurs is that, where a property which is registered in the Registry of Deeds, is sold there is an obligation on both Seller and Purchaser to ensure that the property transaction (the Deed of Transfer) is registered in the Land Registry on Completion (ensuring of course to register the transaction for a final time in the Registry of Deeds). This does add to the legal cost of the transaction in that particular instance. The Seller`s Solicitor is obliged to have a Land Registry Compliant Map of the property sold marked by a professional mapper (Surveyor, Architect or Engineer) and in turn the Purchaser`s Solicitor is obliged to ensure that after Completion of the Purchase the Deed is registered, by way of First Registration Application, in the Land Registry.

Again, this adds to the bottom line in the Solicitor`s Bill of Costs at the end of the transaction, but please read the Bill carefully and you will see that it is not all going in profit cost to the Solicitor!



## **TYPES OF OWNERSHIP**

There are many different ways of owning land or part of land. That is very much the product of Feudalism from the Middle Ages and Trust law which has evolved since then. Much of the modern law relating to those matters is outside the scope of this Guide. For the modern homeowner, however, there are only two kinds of ownership which are important - freehold and leasehold (indeed they are now the only legal forms of title under the *Land and Conveyancing Law Reform Act 2009*). They are easily distinguishable. Freehold ownership is forever. Leasehold ownership is for a limited time (although that could be a very long time) and subject to a Ground Rent (usually a very nominal rent). For the homebuyer, the Lease (which usually relates to apartments) can have a considerable influence on the owner's use and enjoyment of property.

## **CO-OWNERSHIP**

Co-Ownership of a property can provide one of the most fertile grounds for a legal dispute. Unfortunately, at the time of buying a property, this is hardly ever obvious to the Co-Owner. There is no legal way of stopping a relationship from breaking down but we believe that the more people are aware of their legal responsibilities, the more likely it will be that the parties will be able to sustain co-operation when the breakdown occurs.

This area of law can be quite complex as it involves Trusts. However, we will stick to the assumption that all of the Co-Owners are registered owners. In other words, they have their name on the Deeds or Land Register.

A registered owner has all of the responsibilities which go with owning the property. That includes responsibility for paying the Mortgage. If two people are legal owners, they are jointly and severally responsible for the payment of the Mortgage even if they have agreed between themselves that only one of them is responsible for paying it.

## **WHAT HAPPENS IF ONE OF THE CO-OWNERS LEAVES THE PROPERTY AND REFUSES TO PAY THE MORTGAGE?**

Unfortunately, this is becoming more common. The Co-Owner who is left at the property "carrying the baby" is more than likely not financially able to maintain the Mortgage payments. Doing nothing leads to Repossession by the bank. The property therefore must to be sold. But what if the party who has left refuses to co-operate in a sale?

In that situation, the Co-Owner who wants a sale can get an Order for Sale in the civil courts. Unfortunately, that may prove to be so expensive that it makes bad matters worse. The party who refuses to sell will be liable for Court Costs but that party may be difficult to track down and his share of the sale proceeds (after payment of the outstanding Mortgage and legal costs) may not be large enough to compensate the owner who was to take the Court action in the first instance.

If the Co-Owners are husband and wife, the law has a different dimension because Family Law Statutes apply. The Court has the power to "chop up" assets - including shares in a property - in any way it decides. We cannot say any more about that branch of the law as it is outside the scope of this document. We do advise however that if any dispute arises about Co-Ownership, legal advice should be taken immediately.

**If the Co-owners are not husband and wife, it is advisable that a legal document is drawn up to evidence whatever arrangement has already been made about shares and outgoings.** Such a legal document is known as a *Co-ownership Agreement*. This may not solve the problems which we have illustrated above. However, having such a legal document is less likely to result in irresponsible action by a co-owner when a relationship breaks down.

## **JOINT TENANCY AND TENANCY-IN-COMMON**

These are two different types of Co-Ownership. A Joint Tenancy means that the Co-Owners have equal undivided shares in the property which pass automatically on the death of one Joint Tenant to the surviving Joint Tenant(s). A Joint Tenancy cannot be passed under a person's Will. This may have particularly important

implications for Co-Owners who are not married. A lot of people do not appreciate this.

A Tenancy-in-Common is a holding of a divided share. Such a share can pass on a Tenant In-Common's death under his Will or under his Intestacy (without a Will). Unlike a Joint Tenancy, the shares in a Tenancy In-Common do not have to be equal.

Creating a Joint Tenancy or a Tenancy-in-Common is a simple task for the Conveyancing Solicitor.

### **Should we have a Joint Tenancy or a Tenancy-In-Common?**

There are three levels of consideration here. Firstly, if the shares of the Co-Owners are unequal, they must have a Tenancy-In-Common. We advise that this should be evidenced by a Declaration of Trust.

Secondly, if the shares of the Co-Owners are equal, then a Tenancy-In-Common will still be desirable if any of the Co-Owners do not want their share to pass to the other Co-Owners on their death. Remember that a share in a Joint Tenancy cannot pass under a person's Will on their death if there are one or more surviving Joint Tenants.

Under the previously mentioned *Land and Conveyancing Law Reform Act 2009* a Joint Tenancy can only now be severed and converted into a Tenancy-in-Common by written consent of all the joint owners or by Court Order. This can be problematic where the parties purchased previously as Joint Tenants under a misunderstanding and now need to reconsider their respective positions.

# CHAPTER 7 – HOUSING ESTATES

## NEW ESTATES

When buying a newly built house in a new estate, it is always a good idea to check out other estates the Builder has constructed. How well are they finished and maintained?

When purchasing a newly erected dwelling house on an Estate you may be buying from the Plans, having seen the Show House only. Bear in mind that the Show House will have been done up to an impeccable standard. It is important that the house which is ultimately constructed for you is of a similar standard! The Purchaser`s solicitor will receive the following documents (among others) from the Builder`s solicitors:

### **1. The Building Agreement**

The Building Agreement is probably the most important document when dealing with a new house. In short, it provides details of how and what the builder is to build and how he is to be paid for doing so.

### **2. The Agreement for Transfer / Contract for Sale**

The Agreement for Transfer relates to the plot of ground on which the house will be built. It deals with technical matters, such as the Title to be shown.

There will be a map attached to the Contract for Sale. The house to be built is identified on that map. It is important that you are happy with the boundaries of the site as marked on that map. Discrepancies may often arise between the size of the site or location of the site on the map and this should be dealt with pre-contract. We would generally advise a Purchaser to have the site location and the boundaries independently checked by an Architect.

### **3. Site Plan and Specifications**

The Seller's solicitors may state in the Contract that the Plans and Specifications are available for inspection at the Building Site on request. Do not accept that. Demand that you see a copy of the Plans and Specifications before you sign the Contract.

The Specification should set out in exact detail what materials, fittings and standards the builder is going to use in the construction of your house. The house plan should set out, not just the proposed floor plan, but also quite a lot of other details. It has been the increasing practice of builders to use Plans and Specifications of a general and vague nature. It is not unknown for them to contain inaccuracies and sometimes the Plans are not even for the correct house. You should read through them carefully and examine the Plans and compare them with the Show House, if there is one. You should ensure that these accurately represent what you believe you are buying. We, as your solicitors, will not in a position to offer you advice on the Plans and Specifications. You should seek advice from a qualified Architect / Engineer in relation

to the Plans and Specifications in order to satisfy yourself that they are in order and to establish whether or not you have any further requirements. When carrying out his inspection, after construction works are complete, the Architect will be able to verify that the Plans and Specifications are strictly adhered to. It is advisable that your Architect should attend on site on a number of occasions during construction of the house to ensure that all is proceeding in compliance with the Plans and Specifications. If you intend making any alterations to the original Plans, you should ensure that the necessary Planning Permission is obtained for any proposed development. The following items are often omitted from the Plans and Specifications:

- (a) Details of finish.
- (b) Allowances for wallpaper, fireplaces, sanitary ware.
- (c) Extent of tiling in bathroom and kitchen.
- (d) Boundary walls and fences.

Again, all of these issues should be resolved before you sign the Contract.

## **COMMON AREAS**

These are the shared areas, such as the access road, which are not owned individually by any of the house owners and are not taken in charge by the Local Authority. The Common Areas would ordinarily include roadways, footpaths, green areas, lighting and perhaps play areas. The Planning Acts 2000-2010 envisage that the Local Authority will take the Estate common areas in charge within 7 years

and that they would take Enforcement Proceedings against the Builder if he fails to properly complete the estate common areas within that period. The Local Authority will usually have taken a cash lodgement or an insurance bond from the Builder to ensure that the Common Areas are completed to the appropriate standard.

As mentioned in the last paragraph, under the Planning Act 2000 which was implemented in 2002, Local Authorities are now obliged to take over common areas in Housing Estates.

One of the largest risks one faces in buying a house in a new housing estate is whether the Common Areas will be completed properly and there are examples throughout the country of half-finished Estate Common Areas where the Builder has walked away from his obligations and the Local Authority has failed to pursue the builder to comply with his obligations under the planning permission (it should however be mentioned that there are cases where the Builder, for reasons beyond his control, has not been able to build all the houses envisaged and consequently where there are difficulties in getting the Local Authority to take the development in charge) . If you agree to buy a new house in a housing estate you are obliged to complete the purchase prior to all the Estate Common Areas being completed. The usual legal protection you have, in addition to the Enforcement role of the Local Authority, is an Indemnity from the Builder that he will properly complete the Common Areas and maintain them until they are taken in charge by the Local Authority.

It should be noted however that the Indemnity usually comes from a limited liability company and as such its enforceability depends on the

continued existence of that company and that company having assets worth pursuing. In addition, in order to legally enforce the Indemnity, you may be obliged to take Court Proceedings and this entails its own practical difficulties. For instance you may feel aggrieved that you are the one taking on the risk associated with any legal action when your neighbours have rights to take similar actions but they may be happy to let you do the running and pursue the Builder. Everybody may be happy to leave it up to everybody else, so that in the end nobody pursues the Builder through the Courts.

## **DEPOSITS AND ASSOCIATED RISKS**

If you buy “Off Plan” or at the launch of a new development, you will be required to sign Contracts and Building Agreements before the house is even started. This is standard practice. We as your solicitors will not allow you to sign Contracts unless we are happy with the title being offered to the property and that there are sufficient protections in place regarding unfinished Common Areas, services such as water and sewerage, structural defects etc. When signing the Contracts ordinarily you will be required to pay a Deposit of 10% of the purchase price and this is standard for 99.9% of purchases. Any Booking Deposit already paid to an Auctioneer will be credited to make up the 10%. This is not money which you can draw down from your Mortgage; you must already have this sum. When you sign the Contract and pay the Deposit we will forward it to the Builder’s Solicitors. It is only when the Contract is signed by the Builder that you become irrevocably contractually bound to each other. Up until that point, either party is free to back out of the deal.



Ordinarily the Deposit paid is held by the Builder's Solicitors as "Stakeholder". This means that the Deposit will not be released to the builder until such time as the house is completed and the sale is closed. This means that if the Builder went into liquidation or became bankrupt and could not complete the property you would not lose your Deposit. Sometimes the Builder will seek to have the Deposit released to him in order to assist him with cashflow. If the property is covered by Homebond or Premier Guarantee your Deposit will be guaranteed, subject to certain conditions. If the Builder is not covered by any of these schemes and the Deposit is to be released to him then you will be exposing yourself to the possibility of losing your Deposit if the Builder goes out of business before the house is complete and the sale closed. We will advise you of the position and the specific risks associated with your purchase in the event that your deposit will not be held as stakeholder by the builder's solicitor.

## **STAGE PAYMENTS**

The Law Society no longer recommend that the builder be paid in the course of construction because of the risks associated with a purchaser having substantially paid for a house and then the Builder going out of business before the house is signed over to the purchaser. Stage payments are still employed where someone is employing a Builder to build a house on their own site. We will give you specific advice if a property is to be paid for by stage payments but, as a matter of general principle, we advise against them.

## **SNAGGING AND COMPLETION**

The Builder will then let you know when the house is nearly completed or ready for “snagging”. We strongly recommend that you arrange for a professional Surveyor to inspect the finished property and draw up your “Snag List”. You would be surprised at the defects which even a careful layperson’s examination could miss. At this stage the Builder should complete all of the items on your Snag List to your satisfaction. You should note however that the standard Contract terms do not allow you to delay completion indefinitely if a dispute develops over a particular snag. You may be obliged to complete and have the issue decided by an “expert” at a later date. You should also make sure that the valuer, who is to carry out the final valuation for the bank, goes out to get that done and also that your insurance cover, as required by the bank, is in place. Your Solicitor will arrange to draw down your loan cheque so you can close your purchase.

## **HOUSES IN EXISTING HOUSING ESTATES**

If you have decided that you don’t want to worry about decorating just yet you may go down the second hand route. The above points regarding Contracts, Deposits and insurance all apply again but there are a few other noteworthy points. In an estate, yet again, have a good look around. Does the estate look well kept? Is it mostly owner occupied? Again, we will be aware of the management position when we get the Contracts. We will make enquiries to ascertain the potential Service Charge. Are there any extensions to the house, porches, sunrooms, utility rooms? These may or may not have required Planning Permission and this is an important factor regarding your Mortgage company. Again, we recommend arranging a

professional survey of the house, so that you can deal with any potential problems before you commit your money.

## CHAPTER 8 – MANAGEMENT COMPANIES

It is important to note that this Chapter applies only to relatively new housing estates, generally known as “managed estates”

### WHAT IS A MANAGEMENT COMPANY?

A Management Company is usually a company limited by guarantee and registered in the Companies Office, established by a property developer to own and be responsible for the management of the Common Areas such as car parks, gardens and communal stores.

### The Multi-Unit Developments Act 2011

Often known as the *MUD Act*, this Statute was enacted to combat a lot of the problems which had arisen where developments of Apartment blocks and Housing Estates were not being properly managed. It is not the purpose of this Guide to do a detailed analysis of the MUD Act, but it is important to be aware of its existence.

The Act provides that before a developer sells any units:

- An owners' Management Company must be set up, and
- The Common Areas of the development must be transferred to the owners' Management Company to manage

A multi-unit development is a development in which there are at least 5 residential units and the units share facilities, amenities and services. In practice, the majority of multi-unit developments are apartment blocks, but the Act also covers groups of houses that share common facilities and have an owners' Management Company. In addition, the Act provides for some rules in relation to developments with between 2 and 4 residential units and it applies to mixed commercial and residential developments to a certain extent.

The Management Company will also be responsible for ensuring that the Common Areas are insured, well lit, that the area is kept clean and well maintained. From a practical perspective the importance of the Management Company is that it is responsible for ongoing maintenance and it is the legal person to whom you pay your Service Charge.

From a legal perspective, its importance lies in the fact that it will become the freehold owner of the Estate Common Areas after the developer finishes his development.

This mechanism works very well provided all of the house owners take an interest in making sure that the Management Company performs its duties i.e. maintain proper insurance, retain maintenance men and cleaners in respect of Common Areas, lighting of Common Areas etc. The Management Company will usually retain Property Managers, known as Managing Agents, to take over these responsibilities.

In certain Developments where a significant number of the houses are purchased by investors for rental purposes, there is often very little reason for those investors to participate actively in the management of the Housing Development. In such circumstances particularly prior to the enactment of the MUD Act, very often the management of the estate left a lot to be desired and the Common Areas could generally fall into disrepair, which could negatively affect the value of your property. Indeed it was quite common for residents to neglect to ensure that the Management Company filed its Annual Returns and this can result in the Management Company being struck off the Register of Companies. Reinstatement can involve High Court Proceedings which are very expensive and effectively the cost of which must be borne by the House owners. The MUD Act places a statutory duty on the Directors of the Management Company to ensure that Annual Returns are filed and that the Directors properly report to their members.

## **WHO OWNS THE MANAGEMENT COMPANY?**

The Developer establishes the Management Company at the very start of the Development, before the sale of any of the houses. The Company will be incorporated using the Developers nominees. As each house is sold, each buyer is obliged under their Contract to become a member of the Management Company. For example, if there are 100 houses / apartments then when all the units are sold, there will be 100 members of the Management company in addition to the Developers nominees. At this stage, once the development is fully complete, the Developer will transfer all his ownership of the Development to the Management Company and the Developer's

nominees will resign their membership. The result is that all of the house / apartment owners will own the Management Company which is the freehold owner of the Common Areas and has responsibility for them.

## **HOW IS THE MANAGEMENT COMPANY RUN?**

The Company is obliged to hold an Annual General Meeting and at that meeting the directors will be appointed by the members from the membership of the Company i.e. the house owners. In effect a voluntary committee is appointed to make sure that the Management Company performs its designated role.

This mechanism works very well provided all of the house owners take an interest in making sure that the Management Company performs its duties i.e. maintain proper insurance, retain maintenance men and cleaners in respect of common areas, lighting of the common areas etc.

Complying with the requirements of Company Law is a significant task over and above the other responsibilities we touched upon briefly earlier on. It should also be borne in mind that a Management Company is a limited liability Company and, as such, must comply with all the requirements of Company Law, which will include the filing of Annual Returns in the Companies Office and the requirements to maintain certain Statutory Registers such as Registers of Shareholders, Directors etc. In effect, there will be an ongoing cost in legal and accounting terms in having the Management Company. Despite the appearance of this being quite cumbersome, there is no reasonable alternative to this mechanism. For this reason the Management Company will require a Solicitor, an Accountant to produce audited accounts, a Company Secretarial advisor to ensure that all filings are made on time and correctly in the Companies Office and a "Managing Agent" to co-ordinate the various professional advisors and deal with the day to day administration and performance of the duties of the Company. The Management Company will usually retain Management Agents. The performance of the Management Company in maintaining the building will have a direct effect on the value of the houses.

## What is the difference between a Management Company and a Managing Agent?

A **Management Company** is effectively a legal entity (a Company) owned by the house owners for the purpose of owning the freehold interest in the Development and being legally responsible for its management. The Directors of the Management Company will be a number of house owners who are voted in by their neighbours to be responsible making sure the Management Company performs all its legal duties. These Directors are a voluntary committee and ordinarily would not have the time or expertise to manage the Development on a day-to-day basis.

Therefore the Directors of the Management Company require professional assistance to co-ordinate the legal and accounting obligations, to demand and account for the Service Charge, to set budgets, to employ cleaners and maintenance people on the behalf of the Management Company, to monitor standards, to provide assistance in case of emergency e.g. flooding, to insure the building at a competitive price. The list goes on and on. This type of professional assistance is provided by “**Managing Agents**” who will charge an annual fee for their services.

## Why do I have to pay a “Service Charge”?

It should be noted that each House owner effectively is obliged under their Lease to contribute a Service Charge to pay the Management Company for discharging its functions such as insuring the Common Areas, employment of grounds men to tend planted and green areas, repairing the service roads, paying the electricity and other service charges relating to common lighting, payment of legal and Accountants fees in respect of compliance with Company Law requirements and the preparation of Accounts and the filing of Annual Returns in the Companies Registration Office.

Difficulties can often arise when certain house owners refuse or neglect to pay their Management Charge. It may require the issuing of Legal Proceedings or a Court Order to make such House owners pay. Obviously, this can give rise to legal costs. As such, if there are a number of bad debtors in any particular Housing Development, this will lead to an increase in the Service Charge payable by the people

who pay regularly as they will, in effect, be obliged to make up the shortfall from the people who are slow to pay or neglect to pay. As such, it is important for the Management Company to keep a tight reign on late payers in such circumstances.

### **What protection do I have if the service charge is too high?**

The first piece of advice that we give is that you should never rely upon a telephone complaint to the Management Company or the Managing Agent as the sole means of airing your grievance. You must always put your complaint in writing and keep a written record of your complaint. We also advise that you should never hold back on paying the service charge or ground rent without taking full legal advice. If you do this, you may run the risk of Forfeiture proceedings being issued by the Management Company against you, and that could cause you considerable expense.

Your Deed of Purchase will ordinarily provide for proper accountability of the Management Company, such as a requirement to provide Accounts or, in the case of large expenditure, to supply copies of estimates before arranging major expenditure. House owners must appreciate that the annual Service Charge must, by necessity, exceed the annual running costs in order to build up a **“Sinking Fund”**.

A Sinking Fund consists of surplus monies held by the Management Company for the purpose of meeting inevitable once off expenditure. For example, periodically the service road may need to be resurfaced or the grounds may need to be relandscaped. Failure to update and modernise the Common Areas leads to devalued property in the long run.

You can find more information on multi-unit developments, including management fees, on the website of the *Competition and Consumer Protection Commission*, [ccpc.ie](http://ccpc.ie).



## CHAPTER 9 – MORTGAGES

### INTRODUCTION

If you are buying a home, you will probably have to take out a mortgage, which is a long-term loan to finance a property purchase. If you cannot get a mortgage from a commercial lender (bank) you may be eligible for a loan from a local authority.

### WHO GIVES ADVICE ON MORTGAGE PRODUCTS?

It is important to stress at the outset that advice on Mortgage products is financial advice and we, as your solicitors, do not offer financial advice. What we do in this Guide is to explain the terms of the Mortgage from a legal point of view.

### MORTGAGE APPROVAL

Commercial lenders offer a range of mortgage rates and products. Before starting to look for a home, you should check with potential lenders to get a statement of how much they are prepared to lend you. This is called *Approval in Principle*. Getting Approval in Principle will indicate what price range you can consider when looking for somewhere to buy.

However, Approval in Principle doesn't mean that the lender has approved a Mortgage and agreed to lend you this amount. The official

Mortgage Approval is contained in a *Letter of Offer*, which the lender will only issue when it is fully satisfied with certain matters, including a valuation of the property you are buying.

### **Definition of a Mortgage**

A Mortgage is a Charge of money by security. A typical Mortgage for the purpose of buying property will charge the amount borrowed (capital) on the property (the security).

The Mortgage will also contain Terms and Conditions relating to interest charged on the capital and the mode for paying off the Mortgage. It will also incorporate a power by the Lender (the Mortgagee) to repossess the property and sell it if you (the Borrower) default in your repayments. It will also contain restrictions on the way the Borrower uses the property.

The Terms and Conditions relating to a Mortgage can and do vary considerably according to the rate of interest, the way in which the Mortgage is to be repaid and any collateral security. We look at some of the different types of Mortgage below.

### **Usual Important Terms and Conditions of the Mortgage**

The Mortgage Conditions contain many Terms, but apart from the requirement that the Mortgage should be paid off in a certain way, we believe that the following Terms are the most important to which we should draw your attention:-

- You should not let the property without the consent of the Lender (this term is often ignored but is a breach of the Mortgage conditions).
- You should not make any structural alteration to the property without the consent of the Lender

Technically, a breach of any of these terms could lead to the Lender taking a Possession action.

IN EVERY CASE WHEN YOU RECEIVE AN OFFER OF LOAN FROM A LENDER YOU SHOULD STUDY IT CAREFULLY AND SPEAK TO YOUR SOLICITOR TO ENSURE THAT YOU UNDERSTAND IT. IF THE LOAN IS NOT REPAYED THE LENDER HAS A RIGHT TO TAKE THE PROPERTY FROM YOU AND SELL IT. THIS RIGHT MAY ONLY BE EXERCISED IN CERTAIN CIRCUMSTANCES AND IF YOU AT ANY TIME IN THE FUTURE HAVE DIFFICULTY REPAYING THE LENDER YOU SHOULD IMMEDIATELY CONSULT YOUR SOLICITOR.

Your lender will require a Surveyor to Value the property. Please note our comments in Chapter 3 regarding the Report prepared on behalf of the Lender. You are not entitled to rely on it and, as such, you will need your own independent report prepared.

## **TYPES OF MORTGAGE**

### **(a) Ordinary Repayment (Annuity) Mortgage**

This is the simplest type of Mortgage, as the term suggests. Each Mortgage payment pays the interest and part of the capital. The payments are usually (subject to changes in interest rates) the same each month. The longer the Mortgage goes on, the more of the monthly payment goes towards paying capital rather than interest.

### **(b) Endowment Mortgage**

These mortgages are no longer common in Ireland. During the term of the Mortgage, the Borrower pays interest to the Lender every month. He does not pay of anything towards the capital. Instead of repaying the capital, the borrower takes out an “Endowment Policy” which is effectively like a saving plan whose performance is linked to the stock market. If the stock market does well then it is an efficient way of borrowing. However, if it does badly then the borrower can be left with a financial problem. When the endowment policy matures the proceeds of the policy are applied towards payment of the capital off the Mortgage. There tends to be significant negative financial implications for cashing in the policy early and this should be avoided. One advantage of an Endowment Policy is that you can use it as security for a mortgage on a different house. Therefore it does offer a certain amount of mobility as a financial product.

### **(c) Pension Linked Mortgages**

These operate in a manner similar to Endowment Mortgages except that, instead of an Endowment Policy being used to pay off the mortgage, the borrower uses the proceeds of his Pension Policy to repay the capital element. They tend to be used for investment properties. The nature of these types of policies are more specialised than an endowment type policy, and advice should be sought before considering them. Having regard to the tax advantages of Pensions, this can be a very tax efficient way of borrowing money. It tends to suit higher earners who are middle aged so that they will be of sufficient age to drawdown their pension lump sum when the capital sum falls due for payment e.g. in 20 years time when they are 65 years old.

#### **(d) Interest-Only Mortgage**

Interest-only mortgages in Ireland are predominantly aimed at Buy-to-Let Borrowers and those in the property investment area and not those looking to buy their own home.

These operate on the basis that the borrower only pays interest for the first couple of years of the Mortgage but in later years the borrower will be obliged to make accelerated capital repayments. For example a borrower might borrow €200,000 over 25 years with the first 5 years interest only. If the borrower had borrowed the money over 25 years on an Ordinary Repayment basis his payments might, for example, have been €1,000 per month for the 25 years. If the borrower opts for a 5 year interest only period, the interest only repayment will be, for example, €500 per month. After the 5 years however the interest and accelerated capital

repayments kick in and the monthly repayments may now be, for example, €1250 per month. (The figures used in this example are only to illustrate the point and are not accurate.)

In certain cases, the Lender may lend money on the basis of interest only payments for the entire term of the mortgage provided that they are satisfied that the borrower will have some means of paying off the capital at that stage e.g. an inheritance or perhaps the sale of the property itself.

## **INTEREST RATES**

To begin with, it is worth explaining the Standard Variable Rate. Each Lender has its own Standard Variable Rate, which is the normal interest rate that it would charge to its own mortgage customers. This rate fluctuates, up and down, and is usually dependent on the interest rate the European Central Bank charges your bank when they borrow money from it. In turn, the Bank will lend to you at a higher rate i.e. the banks margin or profit. You can have a mortgage which combines one of the types mentioned in (a) (b) (c) or (d) above with either the Standard Variable Rate or one of the “Rates” mentioned in (i) – (iii) below. If you chose one of the Schemes mentioned below instead of the Standard Variable Rate, you should bear in mind the redemption penalty which will apply to fixed rate Schemes and may apply to other schemes.

### **(i) Fixed Rate Schemes**

A fixed rate scheme is one where, for an agreed period (typically 1,2,3 and 5 years), the interest rate set will be fixed regardless of the movements in the Standard Variable Rate or European Central Bank rates. This type of scheme is ideal for people who want to budget their finances for a fixed period, or for those who envisage interest rates going up in the future. For reasons too complicated to go into here, Fixed Interest Rates are priced by banks having regard to the yield on EuroBonds and it is generally accepted that the banks charge a higher margin, ie they make more profit on Fixed Rate Schemes, than they do on Variable Rates. This does not necessarily mean that Fixed Interest Rates, are more expensive in the long run for the borrower as this is ultimately decided by changing European Central Bank Rates and the yields on Eurobonds. It is practically impossible to second-guess these rates; the only thing sure is that the banks will always make money from you.

## **(ii) Discounted Variable Rate Schemes**

The interest rate charged is reduced by applying a discount to the Standard Interest Rate by a specific percentage for an agreed period, usually being a year. This means that should Standard Variable Rates go up or down, the interest rate charged will move accordingly, but still with the discount applied. This scheme is suited to Homebuyers who envisage interest rates to be stable, or decreasing. Lenders often offer these Schemes to new customers to entice them into doing business with them by giving a discounted rate for the first 12 months. Borrowers should ensure that the

lender offers continued good value after the discounted period expires.

### **(iii) Tracker Rates**

This applies to a mortgage rate that tracks the Eurobor rate by a predefined fixed percentage. You will note from earlier comments that the Eurobor Rate is effectively the interest charged to the bank when they borrow large amounts of money from the European Central Bank to lend onwards to their customers. So for instance, the interest rate applying to the mortgage might be Eurobor + 1.5%. So if the Eurobor rate is 2% then the total interest rate applying to the mortgage will be 3.5%. Equally, if the Eurobor rate rises or falls then the overall rate will adjust accordingly. Basically the Lender's margin or profit of 1.5% will be fixed for the term of the mortgage or such lesser period as may be contained in the loan offer. The rate paid by the customer will only change if the Eurobor Rate changes.

None of the lenders in the Irish market offer tracker rates any more.

## **REDEMPTION PENALTIES**

The Loan Offer letter should always be checked with care to ascertain if there is a clause whereby a penalty will apply if one partially or fully redeems (pays back) the Mortgage early or if one elects to swap from one interest rate type to another. In Ireland penalties usually only apply in respect of the part or full redemption of a Fixed Rate Mortgage or changing out of a Fixed Rate Mortgage Type to a Variable Interest Rate Type.



A Redemption Penalty will usually take the form of a number of extra month's interest (usually 6 months) being payable on the above-mentioned events. Basically, the purpose of the penalty is to compensate the bank for the lost profit it would have made on the Mortgage if you had continued with the Fixed Rate

### **WHICH MORTGAGE TYPE SHOULD I HAVE?**

As already stated, we do not offer this type of advice since we are not qualified financial advisers. The answer usually depends on many factors such as your financial strength, your attitude to risk, whether you are self-employed or not and your short, medium and long terms plans.

### **WHAT HAPPENS IF I FALL BEHIND IN MY REPAYMENTS?**

The short answer is that you should 'come clean' with the Lender straight away. They will be more sympathetic to somebody who comes to them with their problems straight away. They will usually give you plenty of helpful advice. Failure to pay the Mortgage instalments without coming to an arrangement with the Lender will inevitably lead to Possession Proceedings in the Circuit Court with a greatly increased debt by virtue of Legal Costs and added penalties and interest being added to the Mortgage.

## CHAPTER 10 – PLANNING PERMISSION

Any property built since 1964 must comply with Planning laws This arises under the Planning Act 1964. Certain smaller additions such as domestic garages or rear extensions may be exempt, but this is not always the case. Furthermore, any property built since 1992 must comply with stringent Building Regulations as to the material used in construction and the manner of construction of the property.

The Local Authority (generally the County Council) is in charge of administering Planning law in Ireland. The Local Authority is also responsible for prosecuting persons who do not comply with the Planning laws. They do not, however, certify that a property either complies or does not comply with Planning Permission.

Prior to a property being erected, Planning Permission is sought. If successful Planning Permission is granted. If unsuccessful, the Planning Permission is refused. It is then up to the Developer or builder to construct the property in accordance with the Conditions of the Planning Permission and/or Building Regulations. If the Developer fails to build the property in accordance with the Planning Permission and/or Building Regulations, the Local Authority can take enforcement proceedings in the Courts to make sure that the property is either demolished and re-built or that the required amendments to the building are made.

Although enforcement proceedings are quite rare, a Planning defect on a property is a significant Title issue which can affect the value of

the property and its marketability. Therefore when a Lender grants a Mortgage to be secured on a property, they will require proof that the property complies in all respects with Planning Permission and/or Building Regulations. The evidence they rely on is a Certificate from an Architect or Engineer confirming that he has inspected the property and that it substantially complies with the Planning Permission granted and/or Building Regulations.

## **PLANNING DEFECTS**

In the event there is a Planning defect, this must be notified to the Lender by your solicitor and the Lender will then take a decision whether they wish to proceed to lend money on the security of the property, despite the fact that it is in effect a defective security. Obviously if the breach of Planning law is significant the Bank will not proceed with lending the money. If the breach is of minor importance, the Bank may be prepared to overlook any difficulty usually on the basis that the borrower will regularize any difficulty by making a Retention Planning Application. Very often the Lender will hold back a portion of the loan funds pending the borrower obtaining the Retention Permission and furnishing an Architect's Certificate certifying that all Planning difficulties have been resolved.

## **ARCHITECTS CERTIFICATES**

As such, you will be relying on your Solicitor's professional abilities and judgement to ensure that the Architect's Certificates furnished by the Seller are comprehensive and do not seek to water down the required confirmations that there are no Planning difficulties. In the

event that the Architect was incorrect in his assessment, then you would be entitled to issue Proceedings against that Architect where you suffered financial loss on foot of his negligently given opinion. You may also have rights under the purchase Contract to sue the Seller for misrepresenting the position, but this will depend on the wording of the Contract Conditions.

Even if you were not getting a Mortgage to purchase a property, the old adage of “*the day you buy is the day you sell*” applies. In effect, if you are a “cash” purchaser, you may be prepared to buy a property regardless of the Planning defect because you may form the view that enforcement proceedings are unlikely and therefore the matter is not all that serious. You should note however that when you subsequently go to sell the property it is more than likely that the person buying from you would require a Mortgage and the same problem would be encountered again by any potential purchaser. Always avoid buying a problem because it will invariably always return to haunt you.

## **RETENTION PLANNING APPLICATIONS**

Sometimes, if no Planning Permission exists for a property or part of a property or some other defect exists it may be remedied by making a Retention Planning Application. If a Retention Planning Application is required to remedy a planning difficulty, then this will delay the purchase for at least 4 to 5 months realistically. In the event that the Planning Authority refuse the Retention Application then it is clear that

a serious problem exists and specific advice would have to be taken at that stage as to whether it would be wise to proceed with the purchase.

# CHAPTER 11 – COSTS AND ACCOUNT

## Professional Charges and Expenses

At the earliest possible stage of the conveyancing transaction, we will forward to you a written Estimate of Costs showing what the legal charges are likely to be if your transaction is successfully completed. A Solicitor is required, under Section 150 of the *Legal Services Regulation Act 2015* to issue a Notice of Costs to you as soon as reasonably possible.

This Estimate is divided into two parts. First there are the fees due to the Solicitor and these will be agreed at the earliest possible stage. Secondly there are sums of money spent on your behalf. These are normally called "Outlays". If you are obtaining a loan from a building society or other financial institution they will insist that all Outlays, such as Stamp Duty, are held by us on your behalf prior to releasing the loan cheque. It is the policy of this firm to seek payment of both fees and outlay prior to completion.

## OUTLAYS

The main items of "Outlay" are as follows:-

1. **Stamp duty.**

Stamp Duty is a tax payable on documents relating to land and premises and is payable by a purchaser on a scale which increases according to the value of the property purchased. Duty is charged as a percentage of the total sum paid.

Over the years the Stamp Duty rates for residential property have changed frequently. At this time, Stamp Duty on residential property is 1% where the purchase price does not exceed €1,000,000 and 2% on any excess over €1,000,000. It is important to note that Stamp Duty on non-residential property is 7.5%.

### **Mixed use property**

Mixed use property is property with a residential and non-residential part, for example, a shop with an apartment upstairs. Another example of mixed-use property is where the boundary of the property (curtilage) exceeds 1 acre. Curtilage includes gardens, paths, driveways, yards, garages or sheds used in conjunction with a house. When the property is mixed use, you must apportion the consideration for the property between the residential and non-residential parts. It is extremely important that you bear this in mind when calculating Stamp Duty.

You should always consult your solicitor or Tax Advisor to get an accurate assessment of the likely liability. We are happy to advise you on your stamp duty liability.

## **2. Search Fees.**

These are fees paid to Law Agents to check in the various Registries (Searches) that the person selling the house to you is not bankrupt, has no judgments registered against him/her and that there are no Charges against the property and that he or she is registered as owner of the property. Where you are getting a Loan the Bank will also insist on similar Searches being carried out against you (the Borrower) at your cost!

## **3. Registration Fees.**

These are paid to the appropriate Registry each time a transaction is registered. For example a Land Registry transaction for the purchase of an average house could cost a minimum of €600.00. It should be remembered that these fees are increased by the Land Registry from time to time.

### **WHAT IF THE TRANSACTION DOES NOT PROCEED?**

If the transaction does not proceed to completion a Bill is normally issued for the work done. At Morgan McManus, the charge for a transaction that does not proceed will be the amount which bears the same proportion of work done to that which would have been done if the matter completed.

### **AT WHAT STAGE/S DO I PAY FOR THE HOUSE?**



If you are buying only, we usually ask you for your first payment of money in the form of the deposit when we are about to proceed with the signing of the Contract (see “*Summary of the Conveyancing Procedure*” earlier). The final payment due from you is just before completion of the purchase.

### **How payment is made?**

If you are paying a deposit before exchange of Contracts, we can proceed immediately to an exchange of contracts if you pay by Bank electronic transfer. If you pay by personal cheque, we will need to clear it before we exchange Contracts. A definition of these modes of payment is provided in the paragraph after next.

If you are paying the balance before completion, it is important to note that we are obliged to send money to the Seller's solicitors and therefore are obliged to have cleared funds in our Client Account in order to comply with the Solicitors Accounts Rules. If you pay by building society cheque or personal cheque, we are obliged to clear the cheque before completion. It is preferable to use the Bank electronic transfer system both for you to send funds to our Client Account and in turn for us to send the funds to the Seller's solicitor's Bank Account.

If you want to send an electronic transfer, we will provide you with our client account details.

### **The Invoice and Accounts**

In every Conveyancing transaction, all the money passes through the Solicitor, with the exception of any Booking Deposit paid to the Auctioneer.

In any Conveyancing transaction, we send the Accounts to our clients between binding of Contracts and Completion. The Invoice and Account which we draw up contain a full breakdown of the professional fees, VAT, Stamp duty, the price of the property, Land Registry fees and any other expenses and money already paid. It will usually require a specific figure to be paid by you. We always insist on these monies being paid prior to Completion as, if we are not in a position to discharge expenses such as Stamp Duty, then we are not legally entitled to draw down your loan cheque. In addition if there is a delay in stamping your Deed of Purchase with the Revenue Commissioners you incur interest and penalties in addition to the underlying stamp duty liability. It is in everyone's interest to have all fees and outlays paid to us prior to completion.

## CONCLUSION

We do hope that this Guide has been of assistance to you in understanding the steps involved in the legal processes in purchasing a dwelling house.

We hope that you will instruct us in your house purchase.

**Brian Morgan**  
**Morgan McManus Solicitors**

**The Diamond,**  
**Clones, Co. Monaghan**

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This booklet is intended to give an overview of the law only and is not intended as full legal advice. You should always take full legal advice before you take any decisions that may impact on matters referred to in this booklet.

A photograph of a woman with blonde hair and a young child with blonde hair, both smiling and looking at a laptop screen. The woman is wearing a white cable-knit sweater. The background is a bright, out-of-focus indoor setting.

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McMANUS**  

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