



Law Society of Ireland

## Guidelines for Solicitors re Limited Application of Law Society Approved 2010 Commercial Certificate of Title Documentation

From 1st December, 2010, certain ad hoc practices regarding commercial mortgages and commercial undertakings will be prohibited by law - by virtue of regulations set out in S.I. 366 of 2010. Any reference to "undertaking" in these guidelines should be read as "relevant undertaking" as defined in the regulations.

From that date –

1. Borrowers' solicitors will be **prohibited by law from giving undertakings** to lenders in commercial property transactions. The only exception to this is in relation to "de minimis" loan transactions where undertakings may be given provided the liability of the solicitor does not exceed a figure of €75,000. Therefore undertakings given by borrowers' solicitors to lenders in relation to commercial loan transactions in this category are not prohibited by the statutory instrument.
2. Solicitors will be **prohibited by law from acting for both borrower and lender in the same commercial property transaction**. There is no exception to this.
3. It is intended that in non de minimis loan transactions, where the liability of the solicitor is limited to the mandatory minimum level of professional indemnity insurance cover for solicitors in Ireland current at the time of giving the certificate of title, it will be acceptable for a solicitor to furnish a certificate of title (but not an undertaking). This is called the "hybrid scenario". In cases where liability is not so limited, there should be a full examination of title by the bank's solicitor and no certificate of title should be furnished.

The expected result of the statutory instrument is that lenders will appoint their own solicitors to act for them in relation to all commercial loan transactions other than de minimis loans. Bank of Ireland and AIB have already appointed their panels and it is anticipated that the other lenders will establish a panel of solicitors to act for them by 1st December 2010. In most cases, therefore, the borrower's solicitor will deal with the panel solicitor by way of a three-way closing for any commercial loan transaction.

To avoid a separate full investigation of title by the panel solicitor, the lending institution may elect to seek a certificate of title from the borrower's solicitor. The Law Society has drafted a certificate of title to cover this instance (called for convenience the "hybrid scenario") but it **strongly recommends** its use only where the borrower's solicitor's liability does not exceed the mandatory minimum level of cover of professional indemnity insurance for solicitors in Ireland current at the time of giving the certificate of title.

The Law Society's Commercial Undertakings Task Force has drafted precedent documentation to assist practitioners in complying with the above statutory instrument. The precedents are largely based on the existing forms for residential mortgage lending and, therefore, the general format should be familiar to most practitioners. These precedents are Law Society precedents and they are recommended by the Society on the basis that, in the view of the Society:

- they comply with the provisions of the above statutory instrument, and
- they are designed to facilitate the certification of title in certain commercial loan transactions appropriate to the size of the loan, the nature of the property, and the straightforward nature of the title to the property offered as security.

The Law Society approved precedent documentation is drafted on the basis that there is no solicitor / client relationship between the borrower's solicitor and the lender. The Law Society **strongly recommends** to solicitors that in appropriate cases they use only the Law Society approved precedent documents and that they do not use any additional or alternative documents provided by the lenders.

The Society is also of the view that where the lender engages its own panel solicitor to carry out a full investigation of title it is not appropriate to request the borrower's solicitor to provide a certificate of title to the lending institution in addition to acting for the borrower in the investigation of the title.

The Society will provide the lenders with the precedents to facilitate their printing and inclusion by the lenders in their documentation packs for borrowers' solicitors.

The Law Society will not review any alternative precedents provided by or on behalf of lenders or indicate a view either to lenders or to members of the Society as to whether any such amended format complies with the statutory instrument.

### "De minimis" loans scenario:

- From 1st December 2010 borrowers' solicitors will be prohibited by law from giving undertakings to lenders in commercial property transactions. Solicitors will also be prohibited from acting for both borrower and lender in the same commercial property transaction.

- There is one exception to the above prohibition on giving undertakings whereby a borrower's solicitor may give the lender an undertaking (and a certificate of title) where the borrower's solicitor's liability does not exceed the amount of €75,000 and also provided that there is no solicitor / client relationship between the solicitor and the lender.
- It should be noted that there is no obligation on borrowers' solicitors or on lenders to participate in the giving or acceptance of undertakings or certificates of title in these de minimis loans, and it is open to both parties to agree to an alternative procedure for loans in this category i.e. on the basis that the lender appoints its own solicitor to act for it in the matter and that an undertaking and/or a certificate of title will not be sought from the borrower's solicitor.
- The Law Society has approved a form of undertaking and a form of certificate of title for use in de minimis loans which precedent documentation, if un-amended, in the view of the Society, would comply with the provisions of the statutory instrument.
- These documents are deemed to be suitable for use in simple loan transactions where the loan is small, the nature of the security to be mortgaged is un-complicated and the title to the property is straightforward. If a solicitor finds that complications arise, it is likely that the documentation would not be suited to the transaction in question, and the lender should be asked to appoint its own solicitor to act on its behalf.
- The undertaking and the certificate of title relate only to the title of the property and to the execution and registration of the mortgage deed.
- It should be noted that the commercial loan in the de minimis scenario may not always be paid to or through the borrower's solicitor e.g. overdraft facility, stocking facility, etc. For this reason, the undertaking should not be sent to the lender (even if being sent without a request to issue the loan funds) until such time as the borrower has signed all the mortgage documentation and necessary declarations and put the solicitor in funds to complete the stamping of the borrower's title (if necessary) and registration of the lender's mortgage.
- If a lender is not prepared to proceed with the loan on foot of the Law Society approved forms of undertaking (which applies in the de minimis scenario only) and certificate of title, the borrower's solicitor should request the lender to appoint its own solicitor to act on its behalf.

#### **"Hybrid" loans scenario:**

- From 1st December 2010 borrowers' solicitors are prohibited by law (S.I. 366 of 2010) from giving undertakings to lenders in any commercial property loan transaction (subject to the €75,000 de minimis scenario above).
- From 1st December 2010 borrower's solicitors are prohibited by law (S.I. 366 of 2010) from also acting for the lender in relation to the commercial property transaction the subject matter of the loan.
- It is conceivable that a borrower's solicitor would be requested after 1 December 2010 to provide a lender with a certificate as to the borrower's title to the property being mortgaged, including in a three-way closing case i.e. where the lender has appointed its own solicitor to act for it in relation to the perfection of the bank's security i.e. a "hybrid" situation lying between the de minimis scenario and the scenario where the bank appoints its own solicitor to do a full investigation of title and act for it in the perfection of its security.
- While the giving of undertakings by borrowers' solicitors to lenders in commercial property transactions will be prohibited from 1st December 2010 by the above statutory instrument, the giving of a certificate of title is not so prohibited.
- It should be noted that there is no obligation on borrowers' solicitors or on lenders or their solicitors to participate in the giving or acceptance of certificates of title in these hybrid cases, and it is open to both parties to agree to an alternative procedure for such loans i.e. on the basis that the lender appoints its own solicitor to act for it in the matter and that a certificate of title will not be sought from the borrower's solicitor.
- The Law Society **strongly recommends** that solicitors should only give hybrid commercial certificates of title in commercial loan transactions where the solicitor's liability on foot of the certificate of title does not exceed the mandatory minimum level of cover of professional indemnity insurance for solicitors in Ireland current at the time of giving the certificate of title.
- The Society has approved a form of "hybrid" certificate of title which, if un-amended, in the view of the Society, would comply with the provisions of the statutory instrument.
- The certificate of title relates only to the title of the property. It does not extend to perfection of the lender's mortgage or to any other security for the loan, such matters to be attended to by the lender or the lender's own solicitor appointed to act on its behalf.

### **Common to both the “de minimis” scenario and the “hybrid” scenario:**

The Law Society approved documentation takes account of the following:

- As most commercial loan transactions will now require input from a solicitor for the borrower’s lending institution, it is expected that the said solicitor will split the loan cheque so as to ensure any existing charge is redeemed. Given that the redemption of the mortgage may be effected in different ways, it is a matter for the parties to make appropriate arrangements. However, as it is likely that the formal discharge of the existing mortgage will still issue to the vendor’s solicitor it is in order for the vendor’s solicitor to provide an undertaking to the solicitor for the new lender to forward a discharge (or confirmation of eDischarge) when to hand. The borrower’s solicitor cannot give this undertaking. Such an undertaking will not be in breach of the regulations as it is being given by the vendor’s solicitor to the solicitor for the borrower’s lending institution who will in any event have arranged for the payment of the existing mortgage. Where re-financing with the same lending institution, the panel solicitor for the lender will be attending to the registration of the vacate and an undertaking is not required from the borrower’s solicitor (and in any case cannot be given). Where re-financing with a new lender, it will be necessary for the two lenders to liaise in order to agree on how production of the vacate is to be managed between them: the borrower’s solicitor cannot give an undertaking for production of a vacate.
- The Law Society approved precedent documentation is drafted on the basis that there is no solicitor/client relationship between the borrower’s solicitor and the lender. The undertaking (which applies in the “de minimis” scenario only) and the two certificates of title all state that the basis for giving the relevant document is that the solicitor does not and has not acted for or as agent/quasi agent of the lender in the commercial property transaction the subject of the loan and the subject of the document given. In order to ensure that S.I. 366 of 2010 is not breached, the borrower’s solicitor should avoid doing anything or taking on any additional responsibility for doing any matter for the lender that would tend to suggest that the solicitor is also acting for the lender.
- The borrower’s solicitor should not deal with any other security for the loan such as guarantees, life policy assignments, etc, which are all matters to be dealt with by the lender directly with the borrower.
- The conditions of the commercial mortgage loan will not always require that a first legal charge be obtained by a lender, and the documentation has been drafted to allow the solicitor to select the appropriate option. Solicitors should note that this is different to the undertaking/certificate of title for residential mortgage lending.
- The Society does not recommend that solicitors would advise their clients as a matter of course to have the lender’s mortgage registered in advance of the lender advancing the loan funds because:
  - a. The client is placing a burden on the title at a time when s/he has not received any benefit in the form of loan funds for doing so.
  - b. If for any reason the loan approval is withdrawn by the lender prior to drawdown, but after the lender’s mortgage has been registered, the client’s title will be encumbered until the lender vacates the mortgage. The Society is not aware of any arrangement with lenders whereby they will issue releases/discharges in cases where no funds have been advanced.
- The Society recommends that solicitors download the Law Society approved documentation from the members’ area of the Law Society website on each occasion that they are required, if it has not been provided by the lender in the solicitor’s pack. This ensures that solicitors use the latest version of the documentation every time.
- Solicitors should use only the Law Society approved documents, and, other than filling in details in the sections of the documents left blank for this purpose, should not agree to use them in any amended format. The Law Society will not review any other proposed form of wording of these documents and will not indicate a view as to whether or not any such amended format complies with the statutory instrument.

## Summary

There are three tiers in relation to commercial transactions from 1 December 2010:

1 So-called “de minimis” transactions (where borrower’s solicitor’s liability does not exceed €75,000)	
<ul style="list-style-type: none"> <li>commercial undertaking permitted</li> <li>applies only where borrower’s solicitor’s liability will not exceed €75,000</li> <li>borrower’s solicitor prohibited by law from acting for lender</li> </ul>	<ul style="list-style-type: none"> <li>certificate of title not prohibited</li> <li>use only Law Society approved Undertaking and Certificate of Title documents (drafted on basis that there is no solicitor/client relationship between borrower’s solicitor and lender)</li> <li>operates in similar way to current residential system i.e. borrower’s solicitor registers title and/or mortgage</li> <li>no panel solicitor acting for lender</li> </ul>
2 So-called “hybrid” transactions (where borrower’s solicitor’s liability will be between €75,000 and, currently, €1.5m)	
<ul style="list-style-type: none"> <li>borrower’s solicitor prohibited by law from giving undertaking to lender</li> <li>borrower’s solicitor prohibited by law from acting for lender</li> </ul>	<ul style="list-style-type: none"> <li>certificate of title not prohibited</li> <li>use only where borrower’s solicitor’s liability will not exceed current level of compulsory minimum PII cover (currently €1.5m)</li> <li>use only Law Society approved Certificate of Title document (drafted on basis that there is no solicitor/client relationship between borrower’s solicitor and lender)</li> <li>lender/lender’s panel solicitor looks after registration of title and/or mortgage and all other security.</li> </ul>
3 All other transactions where borrower’s solicitor’s liability will exceed current level of compulsory minimum PII cover (currently €1.5m)	
<ul style="list-style-type: none"> <li>borrower’s solicitor prohibited by law from giving undertaking to lender</li> <li>borrower’s solicitor prohibited by law from acting for lender</li> </ul>	<ul style="list-style-type: none"> <li>full investigation of title by lender/lender’s panel solicitor</li> <li>no certificate of title to be given by borrower’s solicitor</li> <li>lender/lender’s panel solicitor looks after registration of title and/or mortgage and all other security</li> </ul>

**Always double-check the wording of the statutory instrument** to see whether it affects a particular transaction. Go through the wording of the definitions step-by-step. Extracts are provided here:-

- “Commercial Property Transaction” (... any transaction other than a Residential Property Transaction ...)
- “Residential Property” (...intended to be used as a private dwelling, including ... occupied or intended to be occupied as a private dwelling on an occasional basis, whether as a holiday home or otherwise; ...)
- “Residential Property Transactions” (...any transaction ... in connection with Residential Property for non-business purposes ... excludes any transaction whereby it is intended to use the Residential Property exclusively to earn rental income;)

### Remember:

**It is vital in all cases to take into consideration the purpose of the loan as well as the nature of the property being offered as security.**

A residential property used exclusively to earn rental income is subject to the regulations - this includes what are commonly referred to as “**buy-to-let**” residential properties and “**residential investment properties**”. Lenders should not issue residential mortgage lending packs to solicitors in such cases. Borrowers’ solicitors should not give undertakings to lenders in these cases.

A loan transaction in relation to a **private dwelling** (including what is often referred to as a “principal private dwelling”) is not normally subject to the commercial undertakings regulations but can be if, for example, the private dwelling forms part of the security for a commercial loan - no undertaking should be given by borrowers’ solicitors to lenders in the latter case.

A loan transaction in relation to a **holiday home** is not normally subject to the commercial undertakings regulations but can be if, for example, the holiday home forms part of the security for a commercial loan - no undertaking should be given by borrowers’ solicitors to lenders in the latter case.

“**Relevant undertakings**” means an undertaking to:-

- discharge or procure the discharge of a mortgage or other security over, or a loan advanced on the security of, any land or buildings the subject of a Commercial Property transaction; or
- furnish or procure the furnishing of a Certificate of Title relating to any land or buildings the subject of a Commercial Property Transaction to the relevant Financial Institution or to any of its Representatives; or
- furnish or to procure the furnishing of title deeds to any land or buildings the subject of a Commercial Property Transaction; or
- pay or procure the payment of any stamp duty accruing due in connection with any land or buildings the subject of a Commercial Property Transaction; or
- register or procure the registration of title to any land or buildings the subject of a Commercial Property Transaction; or
- register or procure the registration of a mortgage or other security over any land or buildings the subject of a Commercial Property Transaction,

but does not include an Accountable Trust Receipt

## Commercial Undertakings Task Force