

SAFE AND SECURE LENDING – THE NEW ZEALAND WAY

NEW ZEALAND'S LAND REGISTRATION SYSTEM

Land Ownership in New Zealand is based on the Torrens system of land registration.

The Torrens system of land registration provides a public register recording all material facts in relation to the title of a particular property. Once registration of transfer of ownership of a property into the owner's name is accepted, the state (government) guarantees what is called an "indefeasible" title. An indefeasible title means it cannot be annulled or rendered void.

A Central registry of land title holdings is maintained by the state. The register is deemed to accurately reflect what has been registered, such as a transfer of ownership. It is unnecessary to go beyond the register of ownership of titles to establish property ownership in New Zealand. The person whose name is recorded on the register holds guaranteed title to the property in all but the most exceptional circumstances. People who are deprived of land, or any interest or estate in land, by any error, omission or mis-description of any entry in the register are entitled to take legal proceedings against the government for the recovery of damages.

Likewise, registration of a mortgage confers indefeasibility of title on a mortgagee. In the same way as a person buying a property gets absolute certainty in knowing that they have a safe and secure title, once a mortgage is registered the mortgagee or lender can have certainty the mortgage is valid and binding on the mortgagor/borrower.

LAND OWNERSHIP IN NEW ZEALAND

New Zealand has 4 main forms of land ownership. These are:

1. Freehold;
2. Leasehold;
3. Unit Title; and
4. Cross-Lease

Freehold (Fee Simple) Title

Technically the term “freehold land” refers to land free of any encumbrances, such as mortgages. However, common usage over time now means that “fee simple” and “freehold” are terms which are used interchangeably.

Fee simple is considered to vest in the private citizen the greatest group of rights in the use, enjoyment and power to dispose of land allowed by law in New Zealand. In other words, it is the highest form of personal ownership of land allowed under New Zealand law.

Leasehold Land

Leasehold is where someone apart from the occupier owns the land. The owner of the land, the lessor, vests in the occupier, the lessee, certain occupation rights for a defined period of time. The rights created between the lessor and lessee are created by contract between the lessor and the lessee.

It is important, therefore, to recognise that if a dwelling or commercial building is located on a piece of leasehold land, the lessor owns the land but the lessee or occupier does **not** own the land. Typically, if a dwelling or commercial building is built on leasehold land, the lessee is required to pay the owner of the land a rental known as ground rental.

Typically, ground rental will be payable in advance, often twice a year. It is also common practice for ground rental to be reviewed on a regular basis.

Unit Title

Unit titles allow an individual to own a residential dwelling or commercial/industrial unit within a larger complex. It also provides a legal mechanism for multiple ownership of the common spaces such as: driveways, communal gardens and facilities, air conditioning systems and lifts.

A property that is unit titled can be bought and sold, leased or mortgaged, as the case may be, in the same way as a freehold or fee simple title.

Cross-Lease

A cross-lease property is typically seen where a unit or flat is joined together or built on a shared piece of land. The overall property on which the units or flats are built is owned by all the unit owners.

A property that is subject to a cross-lease title comprises 2 separate interests. Firstly, there is an estate of the undivided share in the fee simple of the head title of the land. The various owners of the units are owners (as tenants in common) in equal shares in the overall block of land on which the units are built. Secondly, however, a title is issued for an estate in leasehold, usually for a term of 999 years.

In other words, although a unit owner may have a leasehold interest in the units or flats that are built on the land, they are joint owners of the underlying land on which the units or flats are built.

The rights and obligations of all unit owners are set out in a lease that is registered against the title for the property.

We point out that cross-lease titles are very common in New Zealand and are not seen as an impediment to land ownership or to the borrowing of money.

SECURITY

There are 2 main forms of security that a lender will take in New Zealand comprising a Mortgage and General Security Agreement.

Mortgage

A mortgage is the security that a borrower provides to a lender for a debt. For example, if a borrower wanted to borrow \$500,000.00 from ABC Finance Ltd, the borrower would be required to grant a mortgage over his property to ABC Finance Ltd. The mortgage is like a lien or charge which is registered on the title and granted to secure an obligation such as a loan. A mortgage is put up as security or collateral.

Typically, a lender will only lend up to a certain percentage of a valuation of a property, known as the loan to valuation ratio (LVR). Depending on the value of the property, the creditworthiness of the borrower, the purpose of the loan and various other factors, a conservative lender may lend between 66% and 70% of the LVR of the property.

However, if a borrower owns more than one property, the lender may take a mortgage over more than one property to secure the loan depending on the LVR of all the borrower's properties. This means, for example, a borrower who has a low LVR in relation to one property, could borrow 100% of the purchase price of a second property and grant the lender a mortgage over both properties whilst ensuring the LVR of both properties is in say the 66% to 70% range taking account of the value of both properties and the amount of money being borrowed.

General Security Agreement (Debenture)

A General Security Agreement ("GSA") is another form of security that a borrower can grant a lender. It is typically seen when a company is borrowing money. A GSA is a form of security that is granted by a borrower over the assets of the borrower company.

A GSA is a very powerful tool. It allows a lender to appoint a Receiver or an Administrator if the company debtor fails to pay the debt. It means that the lender can step in and appoint someone to run the company. Receivers' powers are considerable. Some of the fundamental points to remember about the power of a Receiver include:

- a) A receivership is instant. Typically if a borrower defaults, there may only be a day between serving notices and demanding repayment of the debt and the appointment of a Receiver. There are no complex court battles or lawyer's fees. It is paperwork only. The Receiver, chosen by the lender, can seize and sell the assets of the borrower company to pay the debts.
- b) The Receiver can act as the company's agent if the GSA provides for it. This means that the Receiver can run the company to achieve the best result for the lender. This may, for example include completing a building contract rather than just selling a partly completed building site or continuing to run a business.
- c) A Receivers' duty is primarily to the lender, the secured creditor. He is required to take all the assets of the company, sell them and pay the lender as the secured creditor. He has a general duty to ensure that any sale of company assets is for a reasonable value but primarily the receivers job is on making sure the lender's debt is repaid.

It should also be noted that individuals can grant GSAs over themselves. This has many advantages in that if your borrower has a number of shares or investments you can get recourse to those assets from the individual through the GSA in the same way as you can get access to company's assets.

GSAs are registered on a computer based website and registered on the Personal Property Securities Register ("PPSR"). Details of securities registered on the PPSR can be searched through an internet search at minimal cost.

Typically, a prudent lender will take a mortgage security in the first instance. However, depending on the nature of the loan application and assets of the borrower, it would not be unusual for a lender to take a GSA over the assets of the company or an individual by way of collateral security.

A Lender may also require a borrower or grantor of a security to give a negative pledge. If an individual owns shares, for example, the borrower may be required to not only give the Lender a GSA but give a promise not to sell the particular shares.

Personal Guarantee

A personal guarantee is where a company borrows money and its shareholders and directors personally guarantee to the lender that the company will repay the money borrowed.

If, the company is unable to repay the money that is being borrowed, the responsibility and liability for repaying the money falls on the guarantor's shoulders.

It is standard practice in New Zealand for most lenders to insist on personal guarantees being given when a company is a borrower.

Furthermore, if a lender is concerned about an individual borrower's ability to repay, it is not uncommon for a borrower, whether that be a company or an individual, to have someone totally independent give a guarantee in support of the loan.

In other words, a personal guarantee is an agreement that makes someone else liable for another party's debts or obligations. It signifies that a lender can claim the guarantors assets in the event that a borrower defaults in its repayment obligations to a lender. It is the equivalent of a signed blank cheque but without a date.

Valuations

It is standard practise in New Zealand to require borrowers to have a valuation prepared for the property over which the mortgage is taken. Valuers must belong to a professional organisation. They carry professional indemnity insurance.