

Family Law Guidelines

How do we handle Family Law Property Proceedings

Background

We recognise the difficulties for anyone, especially our customers, when they are involved in family law proceedings where there are joint debts and a jointly owned matrimonial home or financial obligations. In particular, these difficulties relate to:

- obtaining a bank's consent to the transfer of jointly owned property with a related mortgage to one of the parties; and
- the bank's position if a settlement or court order re-allocates a joint debt of the parties to just one of them.

To assist with family law proceedings and pursuant to clause 38 of the Code of Banking Practice we have published guidelines setting out the manner in which we will:

- (a) deal with applications for transfers of mortgage and consents to transfer of title pursuant to a family Court determination or approval; and
- (b) otherwise enforce debts affected by a family law property settlement.

Purpose of these guidelines

These guidelines will assist you (our customer), your legal practitioners and representatives involved with family law property proceedings (including agreements for division of matrimonial property) and the division of your joint property that is subject to a mortgage to us and your other joint and several liabilities owed to us.

Liabilities

Where customers hold joint loan accounts, invariably the account holders will have a joint and several liability to the bank. This means that the bank is entitled to ask for the debt to be repaid by the parties jointly and by each of them severally (individually). An agreement between the parties for one of them to take responsibility for a joint and several debt will not change the right of the bank to require either or both parties to pay the debt. The bank has to agree to the re-allocation of liability before it is bound. For example if one spouse has a credit card debt and the other spouse agrees to assume responsibility for the debt, the bank's right against the credit card holder is not affected by the agreement unless the bank agrees to recognise the change of responsibility.

A person's liability to a bank can be either as a borrower or as a guarantor of another person's borrowing money from the bank. In these guidelines, a reference to a liability to a bank includes both borrowing and guarantee liabilities.

Guidelines

- 1) Unless we are a party to a court order or to a privately negotiated agreement between parties to a marriage, we are not automatically required to consent to arrangements such as the transfer of property over which we have a mortgage or the re-allocation of debt between the parties.
- 2) While we will try to accommodate any new arrangements, we may need to conduct investigations into the parties' financial position so as to satisfy ourselves about the ability of the transferee of property or the party who has assumed liability for joint debts owed to us to fulfil the financial commitment to us by himself or herself without undue financial hardship.
- 3) In the majority of cases a bank would be reluctant to release joint debtors from their joint obligation to the bank where the debt is an unsecured liability.
- 4) We might either agree to the transfer of the property subject to the mortgage and release the other party from further liability or retain our rights under the personal covenants in the mortgage against that other party.
- 5) Where a transfer of property subject to a mortgage is contemplated, applicants should keep in mind the following points:
 - a) Allow sufficient time for us to make an assessment of the proposal; it is advisable to get in touch with us as soon as the likelihood of a settlement or court order altering the interests of the parties in mortgaged property arises;
 - b) Don't enter into the agreement or seek the court order until you know that we will agree to the transfer.
 - c) We need to make a fresh financial assessment of the party who is to assume responsibility for the mortgage debt as if it is a new loan application;
 - d) Where the court intends making an order requiring one of the parties (A) to pay a lump sum or an amount by instalments in settlement of the other party's (B's) interest in property, if A is to borrow that amount, we will take that amount into account when assessing A's ability to service the existing loan facility. Depending on A's financial circumstances, we might not be satisfied that the existing facility together with the new obligation to B can be serviced by A without undue financial hardship.
 - e) Full financial particulars including the terms of the proposed agreement need to be provided to us;

- f) If there are continuing credit facilities on a joint (or several) account that are secured by a mortgage, we may have to stop further drawings on the account until the matter is resolved or unless both parties expressly agree to further drawings;
 - g) We are not able to divulge information about one of the parties to the other party or to their practitioners or representatives without that party's consent;
 - h) If there are other co-owners their consent will be required to any dealing with the property;
 - i) If other persons have guaranteed the parties' obligations to us, the consent of those guarantors might be needed before any re-arrangement of the facility;
 - j) There may be bank and other fees and costs payable for obtaining our consent to a dealing and in connection with the dealing itself;
 - k) Each application for our consent will be assessed on a case-by-case basis.
- 6) When there is a proposal that one party is to be responsible to repay the bank for jointly owed unsecured debt an application to the bank for consent to recognise the change in liability should be made. The points a) to k) above should be observed.
- 7) You will need to contact us to ascertain its likely attitude to releasing one of the parties as soon as possible after it becomes apparent that an agreement or court order is likely to provide for a re-allocation of liabilities.
- 8) If the court grants one party the sole right to reside in a property to the exclusion of the other party you should let us know. Our rights against the other party under the mortgage over the property would be preserved unless we agree to release the other party from the mortgage.
- 9) If we decline a transfer or to release a party from further liability it will be entitled to enforce that liability, if that becomes necessary.

Important Information: These guidelines are intended to be for general information and guidance. They are not intended to be legal or financial advice. They are not a substitute for legal or financial advice. If you are contemplating or are involved in family law proceedings or a family law agreement you should seek specialist legal and financial advice