

News from the Leeds Office: Islamic Mortgages

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Background

The UK property market is seeing the emergence and development of a new mortgage product known as Islamic Mortgages. These mortgages are becoming increasingly popular not only with Muslims but also other denominations who follow the principle that it is not suitable for the 'Abrahamic' faiths to pay usury. Usury is the payment and receipt of interest. In Islam interest is known as *riba* and as such, conventional mortgage products are not suitable for a practising Muslim.

Originally the mainstream banks in the United Kingdom were not involved in this field. Banks that had links with the Gulf States and Asia led the market. However in recent years some mainstream lenders have developed a range of Islamic banking products including Islamic Mortgages. It is expected that many more mainstream lenders will provide Islamic mortgages in 2007 and the coming years.

Islamic Financing – The Legal Principles

Ijarah Wal Iqtina - Lease to own financing

The word *Ijarah* means lease. In this type of contract, the lender provides the funds and purchases the property while simultaneously agreeing to rent the property to the customer. The lender gives a unilateral undertaking to the customer that at the end of the lease period, ownership of the asset would be transferred to the lessee if the full purchase price has been paid. The rentals as well as the purchase price are fixed in such a manner that the bank gets back its principal sum along with profit over the period of lease.

Murabaha – cost plus financing

Murabaha means sale on mutually agreed profit. The lender will buy the property from the seller at an agreed purchase price, however it is then sold to the customer at a higher price. This is then paid back monthly over a period of time and the bank makes their profit from this. This is due to the fact the bank has declared its cost and profit at the outset of the transaction.

Diminishing *Musharakah* – joint venture or partnership financing

Musharakah is where a relationship is established under a contract by the mutual consent of the parties for the sharing of profits and losses in the joint business. The customer puts up part of the equity and the lender pays the balance. With this type of lending also known as HPPS (home purchase plans) the lender then purchases the property, becoming the legal owner but shares the beneficial ownership with the customer. It is agreed that the customer will buy the entire property on a specified date and in the interim, the proportion of the customer's ownership increases while the lender's decreases. At the end of the contract, the customer owns the whole property and legal ownership is transferred to them.

Practical Appliance of the Legal Principles

The most common vehicle used by the Lender is that of the Diminishing *Musharakah*. The property is bought jointly by the bank and the customer, but is held on trust by the Trust Company created by the bank or lending society for both parties in shares equal to their contribution to the purchase price. There is a 'promise to sell' their interest

from the bank, once the client has paid them for their share. The property is then leased to the client for a fixed term and the customer pays rent. The rent is offset against the use of the lender's share of the property and to acquire an additional share for the client. At the end of the agreed term and when all payments have been made, the property is transferred to the client. The client can purchase their interest in the property by exercising the 'promise to sell' at anytime during the term of the finance.

Hybrid Scheme

Some lenders combine both the *Ijarah* and Diminishing *Musharakah* scheme. The property is bought jointly, with the title deeds in the lender's name. The customer buys back the lender's share over a number of years. During this period the customer is also charged rent for living in the property on the percentage of share the lender holds. As payments are made, the customer's share increases, while the lender's decreases. The customer would sign two contracts, the *Ijarah* and Diminishing *Musharakah* to cover this.

The Future

The main disadvantage until 2003 was that stamp duty was paid twice under this system. This has now been abolished and with lenders like HSBC providing Islamic complaint insurance in conjunction with their mortgages, the market for this type of mortgage is becoming increasingly popular. However there are still some obstacles. For example, state assistance is not available for Islamic mortgages. It is expected that as the pricing becomes more competitive, these mortgages should also be considered as an option in the general market for mortgages.

New Work Permits Regime

Deirdre O'Halloran,
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Employment Law Unit

New legislation in the area of work permits is of interest to all employers. The Employment Permits Act 2006 came into effect from the 1st of January 2007. The Act was introduced in order to codify the granting of employment permits for non-European Economic Areas (EEA) nationals. The Act aims to make the application process for work permits more transparent and the Department of Enterprise Trade and Employment has issued revised procedures for employees and employers applying for work permits. The Act also seeks to strengthen and safeguard the rights of migrant workers.

From the 1st of February 2007, a new regime is in place in relation to the employment of individuals from outside the EEA area and for individuals from the new EU accession states of Romania and Bulgaria. This will have a direct impact on the employment of foreign nationals within the state.

At least 50% of the employer's workforce must be from within the EEA before a New Work Permit will issue by the Department.

The type of work permit required for an individual will largely depend on their qualifications and training. Work permits will only be issued to individuals who have secured a job offer with an employer prior to applying for a work permit.

Work Permits

Under the revised Work Permits regime, permits will only be issued where a genuine vacancy occurs and the employer is unable to fill the position with Irish or European nationals. The employer will have to produce sufficient evidence that the job vacancy has been advertised with FAS, the European Employment Services and in the local and national media. The Department will apply a rigorous labour market test to these applications.

Apart from exceptional cases, work permits will normally only be issued for positions

which have an annual salary of between €30,000 and €60,000.

The Department has also issued a revised list of job categories which are not eligible for work permits. These include the following:

- All clerical and administrative positions
- General Operatives
- Labourers
- Production and Operation Staff
- Sales Staff
- Transport Staff including drivers
- Childcare Workers
- Catering and Tourism Staff (with the exception of chefs)
- Craft workers (this category includes electricians, carpenters, mechanics etc).

Green Card System

The Work Authorisation scheme has been discontinued and has been replaced through legislation by a Green Card system. This system has been introduced for occupations where there is currently a high level of skills shortage. Green Cards will be available for an extensive list of occupations with annual salaries in excess of €60,000.

Green Cards will also be issued for a specified list of occupations which have an annual salary of between €30,000 and €60,000 such as:

- Information technology
- Health care
- Construction professionals
- Engineers
- Financial professionals
- Research positions.

Green Cards will only be issued to individuals who have received a job offer from an employer who is registered and trading in the State. Unlike the work permit requirements, there is no requirement to establish a labour market test when applying for a Green Card and therefore no obligation to advertise the position with FAS.

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Family Law and Divorce Points

Did you know?

1. The mother of a child is automatically a Guardian of that child. Unmarried fathers of children do not automatically have legal rights in respect of their children. Even if the father's name is on the Birth Certificate it does not give rise to Guardianship Rights. The mother can consent to the father being a Guardian by simply signing a Declaration or the father can apply to Court if the mother will not consent.
2. A couple who co-habit and are not married do not have the benefit of the Family Home Protection Act, 1976. The benefit for married couples is where the house is in the name of one spouse only, then that spouse cannot sell the family home without the consent of the other spouse.
3. A couple who are not married cannot seek maintenance from each other when their relationship ends. Maintenance however can be sought in respect of their children.

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New Work Permits Regime (Cont'd)

Green Cards will be issued to the employee rather than the employer and will issue for an initial period of 2 years. The employee will be entitled to change employer after 12 months and will also be eligible to apply for permanent or long-term residence after this period. The spouses and families of the employee will be entitled to join them immediately.

Intra-Company Transfers

The Intra-Company Transfer concept has been re-introduced in the new legislation in order to encourage direct foreign investment in the Irish marketplace. This scheme will allow multi-national companies to transfer key personnel to their Irish branches from abroad. Intra-Company transfers will only apply to the following 3 categories of employees:

1. Trans-national senior management;
2. Key personnel who hold specialist knowledge; and
3. Personnel undergoing a detailed training programme.

Intra-Company Transfers will be available to employees who earn an annual salary in excess of €40,000, who can establish that they fall into one of the 3 specified categories and have been employed by a foreign branch of the company for a

minimum of twelve months.

There must be a direct link between the two companies involved in the transfer of employees. The Irish entity must be properly registered in the jurisdiction and actually trading in Ireland.

No labour test needs to be established when applying for an Intra Company Transfer Permit. The permit will be issued for an initial period of two years and may be extended for a further period of up to 3 years thereafter. The permit will only entitle the employee to work for the host organisation.

Normally, a Company will only be entitled to employ up to 5% of their total Irish workforce on an Intra-Company Transfer Permit. This limit may be extended in certain limited circumstances such as start-up companies.

Spousal and Dependant Permits

Under this new scheme the spouses and dependants of Work Permit holders will be allowed to apply for Work Permits. This will allow the spouses and dependants of the Work Permit holders to obtain work permits for an unrestricted category of occupations and without the necessity of having to satisfy the labour market test.

10 Good Reasons Why You Should Make A Will

Raphoe Collins,
Associate,
Private Client

1. You are recently married and wish to provide for your children.
2. You live with your partner but are not married and have children.
3. You have recently become a homeowner.
4. You have set up your own business.
5. You are getting divorced or separated.
6. A will is the only way to ensure that your assets are distributed with the minimum of fuss.
7. You wish to leave some money or assets to your relatives, someone with a disability or requiring special care or to a charity that you wish to support.
8. You decide who is the person(s) you would like to carry out your wishes in the administration of your estate.
9. You can reduce the tax liability on your estate. This will allow you to leave more of your estate to the people mentioned in your will.
10. If you have made a will, when was the last time you reviewed it? Has there been any change in your personal situation that you may have forgotten to include in your will?

The Importance of a Shareholders' Agreement

Helen Higgins Whelan,
Senior Associate and Department
Head, Corporate Law Unit

A Shareholders' Agreement is essentially a contract between some or all of the shareholders in a company and often, the company itself. The basic purpose is to govern the relationship between shareholders and the company as to the management and operation of the company.

If you are making an investment in a private company, particularly where you will not have a controlling interest, you should consider entering into a Shareholders' Agreement. An indication of the seriousness with which the other parties treat your investment will be their response to your request for such an agreement.

There are many issues which may become contentious between shareholders at some stage during the life of the company. If these points are addressed by the shareholders at an early stage and reduced to a written agreement between the parties, acrimony, disputes and even legal proceedings can be avoided in the future. Shareholders' Agreements also deal with situations where something untoward happens to one shareholder, such as death or incapacity, or simply exiting the business.

As companies are legal entities in their own right, and continue to exist whether the shareholders are around or not, they need to be protected from events affecting shareholders. The company may have employees, hold land or other valuable property rights such as patents. It will need to continue in business for its value and the value of any investment which you may have made to be realised.

A Shareholders' Agreement may be used to give rights and impose obligations on shareholders such as

binding a person in his capacity as a director or as a creditor or agent. However one needs to be very careful in imposing obligations on a director who is not a shareholder as a director has an overriding duty to act in the best interests of the company and he cannot fetter his duties in this regard.

The contents of any shareholders' agreement will of course ultimately be dictated by the specific facts of each situation and the relative negotiating strengths of the various parties. However most shareholders' agreements will deal with the following areas:

- Composition of the Board of Directors
- Proceedings of the Board of Directors
- Dividends
- Protection of minority shareholders
- Intellectual Property
- Issue of New Shares/Transfer of Shares
- Non Competition Provisions
- Remedies to resolve disputes
- Considerations relating to departing Employee Shareholders.

A shareholders' agreement can only be varied by agreement of the parties.

One reason for using a Shareholders' Agreement is that it is a private document between the parties which can be made subject to express confidentiality restrictions. The Articles of Association, which form part of the constitution of a company, also regulate the relationship between shareholders but they are a public document available for inspection in the Companies Registration Office. This means the Articles are often an unsuitable or inappropriate for dealing with sensitive internal management matters.

4. To apply for a Divorce the parties:

- Must have lived apart from one another for a period of at least four years during the previous five years;
- Must have no possibility of reconciliation;
- Must be aware that the Court may impose such provisions as the circumstances require for the spouses and dependents of the family.

5. There are six grounds for a Judicial Separation pursuant to the 1989 Judicial Separation and Family Law Reform Act, 1989:-

- 1) Adultery has been committed by one or other spouse;
- 2) One spouse has behaved in such a manner that the other spouse could not reasonably expect to live with that spouse e.g. on the basis that one spouse has been mentally or physically abused;
- 3) One spouse deserts the family for at least one year prior to the date of the issue of proceedings;
- 4) The spouses have lived apart for at least a year and the separation is on consent;
- 5) Where the spouses have lived apart for at least three years prior to the Proceedings;
- 6) That the marriage has irretrievably broken down and that there has been no normal marital relationship between the spouses for at least one year prior to the date of the Proceedings.

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