GLOBAL LEGAL INSIGHTS

Commercial Real Estate

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Securing the premises

Typically, parties negotiate through agents and will sign up to non-binding commercial heads of terms, facilitating a period of exclusive negotiation. This does not confer any legal rights or give rise to any remedies in the event that one party acts contrary to their stated position. In order to reach a legally binding position, the parties either enter into the lease or they enter into an "agreement for lease". Once an agreement for lease is in place, both parties are legally obliged to proceed. Usually, the agreement will allow for certain conditions to be satisfied such as a grant of planning permission, the carrying out of works or obtaining vacant possession.

Taxes and fees payable

Stamp duty is payable by the tenant at a rate of 1% on the annual rent and the premium (if any). An additional €12.50 is payable for the counterpart and €12.50 is payable if there is a rent review clause in the lease. Different rules apply for leases in excess of 35 years. The landlord may "opt to tax" and if they do so, VAT is charged on rents at a rate of 23%. Registration fees may be payable if the lease is a registrable interest at the Land Registry.

Fitting-out works

It is common for premises to be provided "to shell and core state" with the tenant carrying out approved fit-out works themselves. The tenant will often secure a rent-free period to allow for this, incentivising them to get on with completion of the works as quickly as they can, since the rent commencement date will be set. Landlords may require removal of the works on expiry or determination of the lease, which can be a material liability. Tenants who pay for their own fit-out works usually require that those works are ignored for the purposes of any rent review during the term.

Codes of practice

There are no codes which have any wide application in Ireland. Generally, the market will have a broad consensus on norms for leasing which change from time to time and which are affected by the bargaining strength of the parties and the nature of the particular transaction. For example, an internationally renowned brand name retailer will doubtless find it easier to obtain concessions than a local trader. Many such concessions are personal to the original tenant and contained in a side letter, such that Irish leases may appear more uniform than the underlying transactions actually are.

Key commercial terms

We will comment on the usual position for our jurisdiction below, recognising that exceptions and differing market positions will pertain from time to time:

Rent

Usually payable quarterly in advance. Must be paid without deduction, set-off or counterclaim. Usually, the tenant will be notified of precise payment mechanics and often, lending banks will have security over the rent accounts. Service charges, insurance rent payments and interest are usually formally reserved as rent to strengthen a landlord's hand in the event of non-payment. The rent amount may need to be calculated based on measurement, either agreed between the parties or determined by an expert.

Rent adjustments

Typically, any concessions are contained in side letters which are personal to tenants (though binding on successors in title to the landlords). Rent is typically reviewed to open market every five years. Following a change in law in February 2010, the Government banned "upwards only" reviews, though the market has found some ways around this, ending up at the same end result in many cases.

Other occupational costs

Usually, as occupiers, tenants are responsible for business rates. Irish leases are usually full-repairing and insuring ("FRI"), so the tenant is responsible for funding the cost of repair (if not responsible for repair themselves) and funding the cost of insurance. In a multi-tenanted building or shopping centre, a tenant will typically contribute to a service charge.

Period of occupation

The market up to the end of the 1990s was very rigid and most leases were for 25 years or for less than five years. However, lease terms are now more flexible. A change in VAT rules helped this and we often now see leases of 5, 10, 15, 20 and 25 years. The older 35-year terms are not seen any more. Tenants are also having a lot more success in looking for break options (often linked to the five-year rent review period).

Remaining in occupation

On expiry of a contractual term, a tenant who stays in occupation can usually be said to be "holding over" on a periodic tenancy. This can often persist for some time before the parties formalise a new lease or before the tenant decides to vacate. A business tenant who has been carrying on a business for five years or more at the premises (or has, together with the period of its immediate predecessor in title, built up those five years) should qualify for a right to renew the lease (subject to conditions). A similar right exists for a tenant who has built up a period of occupation of 20 years or more (a "long possession equity"). In the absence of agreement, a Court can be asked to determine the precise terms of the new lease. Tenants can "renounce" the right that would otherwise arise following occupation as a business user for five years, at any time through execution of a "deed of renunciation", having taken independent legal advice. However, it is not possible to renounce the right that arises where a tenant has been in occupation for 20 years or more. Landlords can legally refuse to renew on certain grounds. If the tenant has not been at fault (for example, the landlord simply wishes to redevelop) then compensation is payable to the tenant.

Disposing of the premises

A tenant and its lease are not affected by a landlord disposing of the landlord's interest in the property. If the tenant itself wishes to dispose of its interest, it can either look to assign

the lease or grant a sub-lease. In both cases, landlord consent will be required. A landlord may not unreasonably withhold consent to such an application. Often a landlord will look for a rent deposit or guarantor from the proposed assignee or sub-tenant where the landlord has concerns about their ability to meet obligations under the lease.

Alterations

A tenant will usually need landlord consent for all but the most minor, non-structural works. Further, tenants are usually under strict obligations in their lease to ensure full compliance with all applicable planning and fire safety codes. There is legislation under which a landlord may not unreasonably withhold consent to an application for alterations, but the remedy is cumbersome and most tenants will prefer to reach agreement with their landlords. Tenants may be entitled to compensation on expiry or determination of their lease, for works carried out. Accordingly, landlords may often agree to do the works themselves and increase the rent as a result, rather than have the tenant do the works and accrue a right to that compensation payment.

Repair of the premises

The cost of repair will typically be solely a tenant cost. The tenant will either be responsible for repair itself (usually where the tenant has taken a letting of an entire building) or the tenant will agree to pay a due proportion of service charges incurred by the landlord in repairing and maintaining (usually where the tenant has a lease of a unit, floor or part only of a larger building or centre). On expiry of the term, the tenant can be hit with a large bill in relation to dilapidations (on top of any obligation to remove fit-out works).

Investment

Practical points

Exclusivity

Typically, the most that a purchaser of commercial property will get is a signed but non-legally binding heads of terms. This is a commercial document and is seen as the precursor to the deal "going to legals". There may be an exclusivity provision in the heads of terms but it is not usually legally binding (and can be difficult to enforce even if it is intended to be binding). The express extent of legal obligations for failure to comply with an exclusivity agreement often goes to reimbursement of fees for the unsuccessful purchaser.

Restrictions on disposing of property: subject to proper due diligence, a purchaser will typically be able to rely upon the title (whether registered or unregistered) with any restrictions being clearly set out. Irish law provides that a *bona fide* purchaser for value without notice will take free of certain matters, where they should have been registered to put the purchaser on notice, but were not. Usually, restrictions are rare and a purchaser must instead ensure that existing security protecting a seller's lender, is released on completion of the purchase.

Impacts on timing

From agreement on heads of terms, the buyer is well advised to adopt a "*caveat emptor*" (buyer beware) position and will typically carry out legal due diligence using its lawyers as well as practical diligence required from a wider professional team such as architects, surveyors and fire safety consultants. If the buyer is using borrowings to fund the purchase then the funder will also have legal diligence to carry out and agreement on conditions, finance documents and satisfaction on the real property collateral, all of which can take time. Closing searches are carried out in public registers on the completion date and can sometimes give rise to delay whilst explanations are sought.

Key milestones in acquisition process

The parties will go from heads of terms to contract to completion. The heads of terms stage is typically not legally binding at all and the parties are dependent upon each other to act in good faith. On exchange of contracts, the parties are contractually bound to complete (subject to any agreed conditions). A buyer is usually required to pay a 10% deposit on exchange and that can be forfeited where the buyer does not complete and it is the buyer's own fault. On completion the balance of funds is paid by the buyer and the seller transfers the legal title to the asset to the borrower. Following completion the buyer (or perhaps its funder) will attend to registration.

Requirement for transfer of monies

10% deposit payable on exchange of contracts and the balance on completion. The deposit is typically held by the seller's solicitors as stakeholders under the contract. The balance is paid on completion and cleared funds are required.

Execution procedure

The purchaser and seller can sign the contract "under hand" without affixing seals or executing as a deed. The contract must be sufficiently clear as to the parcel of land, the price, the parties and other key terms. It will set the completion date. The conveyance of real property itself, on completion, requires execution of a deed, as a deed, by the parties. For foreign entities, there may be a requirement for a foreign legal opinion as to due capacity, powers and manner of execution.

Other procedural requirements

Following a change of law in 2011 all properties in Ireland are now subject to compulsory registration where they are sold. Over 80% of all land is already held with registered title (the state-backed system of title guarantee) and now, any sale of lands held under unregistered title triggers an obligation on the purchaser to register. Lenders will need to register charges over the property within set time limits.

Taxes and fees payable

Stamp duty is payable at a rate of 2% on commercial property transactions. VAT is payable where certain conditions pertain and is charged at a rate of 13.5%. Specific VAT advice should be taken for property transactions generally, since latent VAT liabilities (for example, a clawback of VAT claimed on development costs) may be present and represent a cost for a buyer, tenant, landlord or seller.

Key commercial terms

Deposit

Usually 10% and usually refundable save in the case of buyer default.

Timing

Completion usually takes place 28 days (or less) from exchange. The timing required from heads of terms to exchange varies depending upon the risk profile of the buyer, the complexity of the asset and the nature of the deal.

Employees

Not always relevant to a real estate transaction, but if relevant it will usually be dealt with in the contract, where Transfer of Undertakings (Protection of Employment) (TUPE) is a concern. Depending on the type of transaction, an indemnity may be sought by either party against the other.

Warranties for construction of building

These may only be available for a set period of three, six or 12 years from the date of practical completion of the relevant works. They can be available on a purchase from the original developer/tenant, and industry standard now would be that a warranty may be assigned once without the consent of the warrantor. Buyers need to be careful to look for warranties on both the design and building elements.

Transfer of other tax or financial benefits

Capital allowances are of far less importance in the last couple of years. Usually a buyer will be very concerned to know that there is no latent VAT problem with the property. In the case of tenanted property, VAT complexities can arise and diligence is usually carried out to quite a high standard around VAT.

Development

Practical points

Land ownership and assembly

Whereas previously it was common for developers to structure developments for stamp duty tax planning reasons so that the seller would remain the legal owner and person registered as owner with the developer holding the beneficial interest, this is no longer the case as a result of changes that were introduced to the stamp duty regime. As a result, it would now be expected that a developer would own both the legal and beneficial interest in the land to be developed and is registered as owner or is in the process of being registered as owner in the Land Registry.

It is good practice to arrange for an architect/surveyor to prepare a "declaration of identity", which is a sworn document in which the boundaries of the land to be developed are identified based on descriptions contained in title documents and any discrepancies with the physical boundaries of the land are identified. Such a declaration of identity is most relevant in cases where a site consists of a number of separate properties or "parcels" that have been acquired separately from different sellers. The declaration will also generally confirm that the land is accessed directly from the public road and that it is connected directly to services that have been taken in charge by the local authority. If access from the public road to the land is over lands owned by a third party, and/or services that connect the land to services that have been taken in charge by the local authority pass through lands owned by a third party, the declaration of identity will confirm that, based on a review of the title documents for the land to be developed, the necessary easements exist in relation to such access and/or services. If the land to be developed is subject to easements or other rights, the architect/surveyor should be asked to address these in the declaration of identity so that their impact on the proposed development can be assessed.

The title documentation should be reviewed to ensure that there are no restrictive covenants that would prohibit or restrict the entire or any part of the proposed development.

Land transfer

As indicated above, it would be expected that a developer would own both the legal and beneficial interest in the land to be developed and is registered as owner or is in the process of being registered as owner in the Land Registry.

Taxes and fees payable

Taxes payable on the development include stamp duty and possibly VAT on the acquisition

by the developer of the land to be developed. The buyer of the developed land will pay stamp duty (currently 2% on non-residential property) and VAT on the construction cost. Direct taxes may also be payable by the developer on any profit realised. It is important to ensure that the tax structuring of the development is planned at the outset of the transaction. Fees payable will include legal and agents' fees as well as fees of the professional design team.

Key commercial terms

Price

The price will generally be fixed at the outset but on occasion there may be provision for a deferred payment to be made in certain circumstances, such as a favourable planning permission being granted that allows for greater density on the land to be developed.

Payment structure

The most usual structure would involve the acquisition cost of the land being paid at the time of acquisition from the seller and the developer then funding the cost of the development until it is completed, when it would expect to either sell the developed property and recover its costs and a developer's profit or retain the property and let it to third party occupiers.

Deal structures

Development can be carried out on a speculative basis or on the basis of pre-lets. In the current market, if the developer is obtaining finance from a third party, it is likely that their funder will insist that the entire development or a significant portion of it is pre-let prior to commencing development works. Such pre-lets contractually bind tenants to take a lease of the relevant portion of the development once complete, and seek to eliminate the risk that a completed development will remain unlet (partially or fully) for any material period of time, or that the rent receivable in respect of the completed development is materially less than anticipated and as a result it is difficult or impossible for the developer to repay finance that has been advanced to him and/or to service the loans that he has obtained in connection with the development.

Taxes and fees payable

Please see above.

Financing

Practical points

Level of loan

In this market, it is uncommon for an amount in excess of 75% of a commercial property's value to be advanced. Typically a lender will insist on a loan-to-value (LTV) ratio of approximately 65% but this is dependent on a number of factors including the value and quality of the property to be offered as security. Even where a loan is within the required LTV ratio, some lenders apply minimum loan thresholds. Updated valuations are generally required to be delivered to the lender on an annual basis.

Security

Save in very exceptional circumstances, a lender will always require a legal mortgage to be created in its favour over a property, which legal mortgage will generally incorporate specific security assignments of all material contracts such as leases and all rental income relating to the property. Depending on the property and the commercial terms, the creation of the security assignments over the leases may or may not be notified to tenants. With

investment properties on stand-alone transactions, lenders will generally require the borrower to procure that rent is mandated to a blocked account and will seek to create a fixed charge over that account. To the extent that rent is collected by a managing agent, the lender will generally require that managing agent to enter into a duty of care agreement with the lender. To the extent that the rent account is held with a bank other than the lender, the lender will generally require some form of direct or control agreement with that account bank to ensure the lender can exercise the controls or dominion necessary to create a fixed charge in Ireland. The lender may also seek security over other assets of the borrower, such as intoxicating liquor licences attached to the property and chattels on the property (such as furniture in a hotel). The security must be executed as a deed, and certain formalities observed in that regard, and is registrable in the relevant public registers (e.g. the Land Registry, Registry of Deeds, the Companies Registration Office (if created by a corporate) and the High Court (if it creates security over chattels owned by an individual)). Once registered and provided certain "hardening periods" relating to transactions occurring in the period leading up to a bankruptcy/insolvency event have passed without issue and subject to any relevant rules of priority and provided that the security was validly executed and the transaction was entered into for *bona fide* commercial reasons without fraudulently preferring the lender over other creditors, the lender's security over the property should be protected in the event of a bankruptcy/insolvency related event occurring in respect of the borrower. Where a legal mortgage is being created over a leasehold interest and the lease provides that landlord consent is required in respect of the creation of security over the lease, then such consent will be required by the lender in advance of the drawdown of funds by the borrower. Lenders will often require that the borrower is an SPV (special purpose vehicle) which has no other borrowing and over which another lender has not taken security. In the alternative, a lender may require a priorities agreement to be entered into by the borrower and each of its other lenders, which will govern the order in which proceeds of the sale of the property are to be applied to the repayment of indebtedness incurred by the borrower and the manner and circumstances in which a lender can enforce its security.

Lender due diligence

Prior to advancing funds to a borrower, a lender will require that its solicitor carry out a legal due diligence of the title to the property. Depending on the circumstances of the case, the lender's solicitor will either review and negotiate a certificate of title addressed to the lender that is prepared by the borrower's solicitor, or investigate and report on the title to the property on behalf of the lender as if the lender was purchasing the property. Reports such as building inspection and condition reports, reports by environmental consultants, reports by fire safety consultants and reports by planning consultants may also be commissioned by the borrower at the request of the lender as part of the lender due diligence. The legal title due diligence is intended to confirm that the title to the property is "good and marketable" and to highlight any defects in the title that may exist so that a lender can assess, with the assistance of its solicitors and other advisors, whether any defects are likely to materially affect the value of the property or its marketability in circumstances where the lender was enforcing its security and seeking to sell the property on the open market. Where a borrower holds an interest in the property pursuant to a leasehold title, the lender will need to understand if the lease can be forfeited by the landlord in circumstances where the borrower suffers a bankruptcy or insolvency event. Whereas it may be possible for the lender to make an application to court for relief against forfeiture, such relief (if available) is discretionary and lenders will seek to obtain step-in rights for the lender from the landlord that would allow them to avoid the lease being forfeited through curing the alleged tenant breach.

Enforcement

In the absence of the borrower agreeing to co-operate in a consensual sale of the property, a lender will typically seek to enforce its security in a default situation by appointment of a receiver who acts as an agent of the borrower whilst taking his instructions from the lender who appointed him. The receiver on appointment takes charge of the property. Lenders rarely seek to enter into physical occupation of a property in an enforcement situation because once a lender takes possession of the property it could be deemed to assume responsibility as the owner or occupier of the property and therefore incur liabilities that an owner would otherwise incur. Receivers appointed pursuant to a mortgage/charge created by deed have certain limited statutory powers (there is no statutory power of sale) that may be supplemented by the terms of the mortgage executed by the borrower. It is common now for extensive receiver powers to be included in mortgages, however, many existing mortgages contain very limited contractual receiver powers or may contain no such contractual powers at all. Therefore it is important to carefully examine the terms of each mortgage to consider the powers it contains and the circumstances in which they become exercisable. If no contractual power of sale is included in a security document, it is possible to make an application to the courts for a court order for the sale of the property through the court. This can be a time-consuming and costly process. The receiver and the lender have certain fiduciary duties to the borrower that must be observed when enforcing and selling a property.

Key commercial terms

Length of loan

As with other terms agreed between the lender and the borrower, the length of the loan will be a matter of agreement between the parties. Some loans are advanced on the basis that they are not term loans but are repayable on demand by the lender. Generally, the term of most loans in the market tends to be between three and five years.

Interest rate and payment dates

Again, the interest rate payable on the loan and whether interest is payable quarterly or otherwise, will be a matter of agreement between the parties but in general, it will be an agreed number of basis points above the passing European Interbank Offered Rate (EURIBOR).

Repayment

The repayment terms agreed between a lender and a borrower will vary in respect of each transaction. A number of alternative repayment terms exist, including the repayment of capital and interest throughout the term of the loan (amortising loan) and the payment of interest only during the term of the loan, with the repayment of principal amount borrowed at the end of the term of the loan (interest-only loan with a bullet repayment). The loan terms agreed between the lender and borrower will generally provide that if certain events of default occur, the lender will have the right to demand full repayment of the loan together with accrued but unpaid interest and associated penalty costs. The default position on investment properties is for all rental income, net of agreed deductions, to be applied in repayment on a quarterly basis. The loan terms may provide for a short grace period to allow the borrower to remedy any breach that has led to an event of default occurring. Equity cures are also becoming more prevalent in the market.

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Richard is a partner in the firm's Commercial Real Estate Group and has extensive experience in the purchase, financing, letting and disposal of all types of commercial real estate in Ireland.

Richard has acted for the National Asset Management Agency (NAMA) and other international clients on the buy and sell sides of a significant number of the most substantial and high-profile loan portfolio sales relating to loans secured by Irish real estate assets.

He has also acted for the Irish and international brokers and corporate finance houses appointed as sponsors and book runners by Hibernia Reit plc and IRES Reit plc in relation to their recent respective placing and open offer of shares worth in aggregate c. €515m.

He advises financial institutions and purchasers of loan sale portfolios from a real estate perspective in relation to the review, restructuring and refinancing of existing property finance transactions, and on the enforcement options and strategies open to them should they wish to realise their security over Irish real estate.

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Shane is Head of the firm's Commercial Real Estate Group and has wide experience of all aspects of commercial real estate including acquisition, development, landlord and tenant advice and re-structuring. He has worked on a number of projects which involve site assembly for specific uses, marrying technical title investigation with a practical approach involving engineers, architects and other professionals.

Having previously worked with a top-tier London firm, Shane has a very strong reputation with international intermediaries and clients. He continues to advise on a number of high-profile foreign investments and domestic enforcements, and works with foreign counsel on restructuring, purchasing and sales.

Shane has lectured at the Law Society of Ireland on various aspects of property law including landlord and tenant law, and the specialist co-ownership area arising out of his extensive property syndication work in Ireland and abroad.

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