



The International Comparative Legal Guide to:

Real Estate 2015

10th Edition

A practical cross-border insight into real estate law

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Ireland

Shane Fahy



Denise Dockery



McCann FitzGerald

1 Real Estate Law

1.1 Please briefly describe the main laws that govern real estate in Ireland. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1.

The principal legislation governing Irish real estate is as follows:

- Land and Conveyancing Law Reform Act 2013.
- Land and Conveyancing Law Reform Act 2009.
- Conveyancing Acts 1881-1911. These Acts have been mostly replaced by the Land and Conveyancing Law Reform Act 2009. However, certain provisions continue to apply.
- Registration of Title Act 1964. Significant amendments have been made to this Act by the Land and Conveyancing Law Reform Act 2009.
- Registration of Deeds and Title Act 2006.
- National Asset Management Agency Act 2009.
- Statute of Frauds (Ireland) Act 1695.
- Settled Land Acts 1882-1890. However, these Acts have mostly been replaced by the Land and Conveyancing Law Reform Act 2009.
- Vendor and Purchaser Act 1874.
- Partition Acts 1868 and 1876. The Land and Conveyancing Law Reform Act 2009 repealed and replaced certain provisions of the Partition Acts.
- Family Home Protection Act 1976.
- Family Law Acts 1981 and 1995.
- Family Law (Divorce Act) 1996.
- Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
- Finance (No.3) Act 2011.
- Stamp Duties Consolidation Act 1999.
- Succession Act 1965.
- The European Communities (Energy Performance of Buildings) Regulations 2006-2008.
- Value Added Tax Consolidation Act 2010.
- Multi-Unit Developments Act 2011.
- The Property Services (Regulation) Act 2011.
- Finance (Local Property Tax) Amendment Act 2013.
- Water Services Act 2013.
- Water Services (No.2) Act 2013.
- Pyrite Resolution Act 2013.
- Local Government Reform Act 2014.

1.2 What is the impact (if any) on real estate of local common law in Ireland?

Irish property law is based on both common law and statute law. As UK law is also based on common law, judgments made in the UK courts have persuasive authority in the Irish courts but are not binding.

1.3 Are international laws relevant to real estate in Ireland? Please ignore EU legislation enacted locally in EU countries.

There are no international laws of direct relevance to real estate in Ireland. However, decisions made in other common law jurisdictions would have persuasive authority in our judicial system.

2 Ownership

2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?

There are no legal restrictions on ownership of real estate for non-resident persons in Ireland.

3 Real Estate Rights

3.1 What are the types of rights over land recognised in Ireland? Are any of them purely contractual between the parties?

■ **Freehold**

A freehold estate is closest to absolute ownership and has the potential to last forever.

■ **Leasehold**

Leasehold estates are lesser estates than freehold estates and they occur where a tenant holds the property for a term of years, subject to rent and other covenants. Leasehold interests in Ireland are based in contract rather than in tenure.

■ **Option**

An option is a contract which entitles the holder to purchase property on particular terms at some future date.

■ Licence

Lesser rights of occupation or use may be granted by way of licence, e.g. the right to park cars. A licence is generally personal to the grantee and is not assignable, nor does it create any interest in the land itself.

■ Easement

An easement is an express or implied right created over land for the benefit of other land, such as a right of way or a right to lay pipes under land. Section 34 of the Land and Conveyancing Law Reform Act 2009 provides that subject to subsection 38, the acquisition of an easement or profit *a prèndre* by prescription at common law and under the doctrine of lost modern grant is abolished, and from 1 December 2009 acquisition by prescription has been in accordance with section 35 as amended by section 37 of the Civil Law (Miscellaneous Provisions) Act 2011.

■ Profit a Prèndre

This is a right to enter upon the land of another and remove some part of the natural produce, such as the right to take minerals, turf, fish or game. It also includes the right to graze animals.

■ Public Rights

To establish a public right of way it must have been open and exercised without interruption. Certain public rights, such as the right of the public to fish in the sea, are very similar to the rights recognised as easements or profits.

■ Right of Residence

This is a personal interest which cannot be transferred.

3.2 Are there any scenarios where the right to a real estate diverges from the right to a building constructed thereon?

In Ireland, the owner of the real estate is also typically the owner of any permanent building erected thereon. However, the owner of real estate may grant a licence to a contractor to construct a building on the land. Upon a sale, the proceeds are apportioned *pro rata* between the real estate owner and the contractor.

4 System of Registration

4.1 Is all land in Ireland required to be registered? What land (or rights) are unregistered?

The Property Registration Authority controls two separate systems for recording transactions, namely the registration of title system operated by the Land Registry since 1892 and the Registry of Deeds system operated by the Registry of Deeds since 1708. The Registry of Deeds provides for the registration of documents and is mainly concerned with urban property, whereas the Land Registry is responsible for the registration of ownership and deals with most of the non-urban land in Ireland.

Except as set out in question 4.3 below, there is no requirement that documents or titles be registered, but it is good conveyancing practice that deeds be registered in either the Registry of Deeds or the Land Registry in order to preserve the priority of the deed.

In the case of registered land, there are certain rights which must be registered in the Land Registry to gain protection, otherwise these rights will not be protected against a *bona fide* buyer for value without notice (e.g. rights of residence, restrictive covenants, leases for lives, leases exceeding 21 years). Section 35 of the Land and Conveyancing Law Reform Act 2009 provides that an easement

and profits *a prèndre* shall be acquired at law by prescription only on registration of a court order under section 35. Section 35(4) of the Land and Conveyancing Law Reform Act 2009 provides that the order shall then be registered in the Registry of Deeds or Land Registry as appropriate.

Section 37 Civil Law (Miscellaneous Provisions) Act 2011 amended the Land and Conveyancing Law Reform Act 2009 and the Registration of Title Act 1964 to enable the Property Registration Authority to register easements without a court order where there is no disagreement between the parties concerning entitlement to an easement or profit.

There are also a number of burdens which affect registered land without registration, such as public rights and occupational tenancies for terms not exceeding 21 years.

4.2 Is there a state guarantee of title? What does it guarantee?

Titles registered in the Land Registry are guaranteed by the State. The register in the Land Registry is conclusive as to title and buyers or chargees for value are protected against errors or mistakes made by authority officials.

In relation to the Registry of Deeds, the State does not guarantee either the title to the land dealt with by the registered documents, or the validity of the document itself.

4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

First registration in the Land Registry is compulsory in respect of the following:

- where land had been or is deemed to have been at any time sold to or vested in any person pursuant to the provisions of the Land Purchase Acts or the Labourers Acts;
- where land is acquired by a statutory authority after 1 January 1967;
- land in all counties in Ireland following a sale is now compulsorily registrable (which is an extension of the previous situation where only certain counties were affected); and
- freeholds purchased by way of Vesting Certificates, where the freehold is already registered in the Land Registry.

See question 4.7 below for the potential consequences of non-registration.

4.4 What rights in land are not required to be registered?

See question 4.1 above.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

There is no probationary period following first registration. An applicant may be registered in the Land Registry with one of the following classes of title:

- Absolute title: This is the best type of title and is the most common.

- Qualified title: If the applicant can only establish title for a limited period or where the title is subject to particular reservations, then the Registrar may register a qualified title.
- Possessory title: Where an applicant is in occupation of the land or in receipt of the rents and profits issuing out of the land, then he may be registered with possessory title.
- Good leasehold title: This would apply where the Land Registry has not investigated the title of the landlord. Where the landlord's title is registered then the tenant will be registered with absolute leasehold title.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

In the case of unregistered land, title usually passes when the purchase money is paid to the seller and the buyer takes delivery of the deed. In relation to registered land, legal title generally does not pass to the buyer until he is registered in the Land Registry as the new owner.

Interestingly, section 52 of the Land and Conveyancing Law Reform Act 2009 provides that the entire beneficial interest passes to the buyer on the making of an enforceable contract for the sale or other disposition of land.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Where interests are registered, priority will depend on the date of registration. A registered interest will have priority over an unregistered interest, even if the registered interest had been created after the earlier unregistered interest. Priority between unregistered interests will be determined by their date of creation. In order to benefit from the Doctrine of Priority:

- the buyer must be *bona fide*, since gross negligence or fraud will deprive the buyer of his priority;
- the buyer must pay consideration, since a voluntary conveyance will deprive the buyer of his priority;
- the buyer must have acquired a legal interest in order to gain priority over an equitable interest; and
- the buyer of a legal title will gain priority over an earlier equitable interest, only if the buyer of the legal interest purchased without notice of the equitable interest.

5 The Registry / Registries

5.1 How many land registries operate in Ireland? If more than one please specify their differing rules and requirements.

There is only one Registry of Deeds which is located in Dublin. There is also only one Land Registry, but there are a number of Land Registry offices throughout the country which deal with registrations in different counties.

5.2 Does the land registry issue a physical title document to the owners of registered real estate?

The Land Registry no longer issues a Land Certificate as these have been abolished. The Land Registry does record ownership and can issue any number of "Folios". Each has a specific number. The Folio will identify the name of the registered owner, detail the

quality of title held and list any registered encumbrances or burdens affecting the Folio.

The Registry of Deeds does not issue any documents of title, but simply records details of deeds submitted to it.

5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?

Yes, all transactions relating to registered real estate can be submitted, (as opposed to completed) electronically, to the Land Registry. Once the application has been submitted electronically, the Land Registry will issue a dealing number. However, the actual documents must be physically lodged in the Land Registry in order to effect the completion of the registration.

The documents that typically need to be provided to the Land Registry to effect registration of an ownership right are as follows: a Form 17 (which is the Land Registry application form); the deed; and the appropriate Land Registry fees (see www.pra.ie for a note of the Land Registry fees).

As the Irish Land Register is a document of public record any person can inspect the Folio and maps on payment of a prescribed fee. This information may also be accessed electronically if you have an account with the Land Registry.

5.4 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Compensation can be claimed from the Land Registry but not from the Registry of Deeds (see question 4.2 above).

5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

Any member of the public is entitled to search the Registry of Deeds records (except for the Registration Book) on payment of the prescribed fee.

In the Land Registry, members of the public can inspect the Index of Names, the Index of Lands and folios and file plans on payment of the prescribed fees. Pending dealings can only be inspected by the registered owner of the property or by someone authorised by him or by a prescribed category of persons.

A buyer through his/her solicitor raising pre-contract enquiries and requisitions on title can obtain all the information they might reasonably require regarding encumbrances and rights affecting real estate.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in Ireland? Please briefly describe their roles and/or duties.

a) Selling and purchasing agents (or realtors)

An estate agent or an auctioneer advises on the market value of the property and advertises the property for the seller.

b) Lawyers

A seller's lawyer is responsible for drafting contracts, dealing with pre-contract enquiries raised by the buyer's lawyers, replying to requisitions on title, redeeming mortgages/charges and distributing the balance of sale proceeds to the seller.

A buyer's lawyer investigates the title, explains the title and loan offer to the buyer, completes the mortgage documentation, raises requisitions on the title, drafts the purchase deed, requisitions the loan cheque, conducts closing searches, attends the closing appointment and stamps and registers the title. Lawyers have a duty of care towards their clients.

c) Notaries

Our common law system enables documentation to be sworn/affirmed in the presence of a Commissioner for Oaths, practising Solicitor or Peace Commissioner. Generally, notaries do not have any function in an Irish real estate transaction.

d) Others

Surveyors/Architects may be engaged before the buyer signs contracts to carry out a structural survey of the property. A seller/landlord will instruct a BER Assessor to prepare a BER certificate and advisory report in relation to a building being sold or let (see question 10.7 below).

Depending on the nature of the transaction an environmental expert may also be engaged to provide an environmental report in respect of the property.

6.2 How and on what basis are these persons remunerated?

- Auctioneers – normally charge a percentage of the sale price and a percentage of the annual rent on a lease. The Property Services (Regulation) Act 2011 seeks to regulate property services provided by auctioneers, estate agents and management agents. The agent must issue a letter of engagement which among other things must set out the amount or the rate of any commission or any other fee payable by the client under the agreement.
- Lawyers – fees can vary from 0.5-1% of the sale/purchase price plus VAT at the applicable rate (currently 23%) and outlays. Lawyers can also charge an hourly rate. Irish lawyers are obliged to set out the basis of their charges under section 68 of the Solicitors Amendment Act 1994. The Legal Services Regulation Bill 2011, once enacted, will among other things seek to regulate the provision of legal services, establish a legal services regulatory authority, a disciplinary tribunal and reform the law relating to the charging of costs by legal practitioners and the system for assessing costs relating to the provision of legal services.
- Commissioner for Oaths/Practising Solicitor – €10 per affidavit, affirmation, declaration and €2 per exhibit not exceeding €30 for all exhibits and €10 on execution of a bond.
- Surveyors – no standard/fixed price. Fees normally commensurate with the value of the property/work involved.
- Environmental expert – no standard/fixed price. Fees normally commensurate with the value of the property/work involved.

6.3 Has the real estate market in Ireland seen an increase in the availability of real estate finance during recent years? What trends (if any) are emerging as to different categories of finance providers beyond traditional lending banks?

Following the 2008 crisis and its aftermath, real estate finance was relatively scarce for a number of years. Given the need to repair

balance sheets, Ireland's domestic banks were perceived as having little interest in increasing exposure to real estate as an asset class. The last 12 months have seen a noticeable increase in traditional funding of real estate by those indigenous banks as their balance sheet health improved. This coincided with increased confidence in the real estate sector, a noticeable recovery in capital values and rental returns, a dramatic increase in transaction activity and the return of traditional real estate transactions. As of late December, 2014 is set to be the busiest year on record for Irish real estate transactions, even when compared to the 2002 to 2007 period.

The last couple of years have seen foreign banks and other types of lender becoming involved as senior and mezzanine lenders for specific transactions. Banks have been lending at lower loan to value ratios, leaving a perceived area of opportunity for mezzanine lending, which has notably increased from usual levels. Ireland has also seen foreign lenders involved in funding loan portfolio acquisitions either on completion or shortly following completion, which is a relatively new phenomenon.

6.4 How strong is development activity in Ireland? What were the most significant development transactions in Ireland in the past year?

Ireland's general economic outlook has improved, following a successful return to the bond markets, a lowering of yields applying, falling unemployment and strong GDP growth. This has seen a move away by the State from harsh cuts to a more benign budget. However, State spending on capital projects with a real estate element has not increased significantly. Private development of real estate is increasing, perhaps on the back of the sharp recovery in capital values coupled with a perceived shortage of supply for certain types of development, notably prime office space in Dublin. A return of both speculative and pre-let developments is noticeable given the almost complete cessation of development activity over the previous few years. Certain commentators such as the Industrial Development Authority (the State entity charged with attracting foreign direct investment) are sounding a warning that certain multinational companies will simply not be able to locate here because of an imminent lack of appropriate office supply. Accordingly, certain types of development are expected to continue to increase in the short to medium term.

6.5 Have you observed a shift in the approach of investors towards residential as an asset class and, in particular, towards what were historically viewed as its specialist subsectors such as affordable housing, student accommodation and retirement living?

The Irish residential market suffered one of the most severe price corrections seen anywhere in the world over the last 50 years, during the period 2008 to 2011. Only now in 2014 has the market witnessed substantial and sustained growth. Certain sectors are in fact giving concern to commentators and stakeholders as representing a potential bubble (in particular houses in south county Dublin where prices have been rising by as much as 3% per month).

For a number of years, there was a perceived overhang of residential units, but in fact, detailed analysis of those Central Statistics Office figures reveal that many supposedly empty houses were holiday homes, second homes or homes built in undesirable locations. Accordingly, the development sector is now looking to meet a perceived shortage of supply in some areas and we are seeing a multi-speed residential market with some areas likely to remain over-supplied and others facing a chronic shortage – particularly of family homes. Apartment prices have noticeably recovered in 2014 where previously they had been hardest hit.

All of this recovery has resulted in a recommencement of residential development from a standing start, but demand appears to be pent-up and buyer frustration is palpable. Completions and planned developments are at record lows. Mortgage drawdowns during 2014 remained at 1974 levels (when the population was very much lower). The Central Bank has now also proposed limits on lending such that deposits must be 20% or more and borrowings cannot be more than 3.5 times salary. These moves have slowed activity and perversely, as pointed out by the Department of Finance, may result in a further constriction of supply and an increase in pricing as a result.

Investors had again started to look at residential as an asset class carrying appropriate reward but the overall picture is complex and it is difficult to predict where residential will be in the medium term. Certain international investors have acquired multiple unit developments or are constructing same, and with a longer term hold strategy, which is a new feature in the market. The areas of affordable housing, student accommodation and retirement living are relatively new in the market and have arguably not yet taken off in the same way as might be expected in more stable markets. Whilst nursing homes have been constructed and operated, it has not been seen as a major area of real estate activity for the last number of years by the real estate market commentators and players.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

A buyer/seller must have the legal capacity to execute a contract for the sale/purchase of real estate, i.e. they must be over 18 and of sound disposing mind. To ensure the enforceability of a contract it must be evidenced by some note or memorandum in writing (section 51(2) of the Land and Conveyancing Law Reform Act 2009 reinforces section 2 of the Statute of Frauds (Ireland) Act 1695) in this regard. The contract must recite the description of the property, consideration and the parties to the agreement and must be signed by the party against which it is being enforced or an agent on their behalf. Section 51(3) of the Land and Conveyancing Law Reform Act 2009 is interesting in that unless there is an express provision in the contract to the contrary, payment of a deposit in money or money's worth is not necessary for an enforceable contract.

Chapters 3 and 4 of the Land and Conveyancing Law Reform Act 2009 introduced new formalities in relation to the execution, operation, witnessing and contents of deeds.

Another formality that will need to be adhered to is the Conveyancing Conflict of Interest Regulation which will prohibit solicitors acting for both vendor and purchaser in conveyancing transactions (including voluntary transactions), with certain very limited and defined exceptions, with effect from 1 January 2013.

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

In Ireland the maxim of "*Caveat Emptor*" exists. However, the Standard Law Society General Conditions of Sale 2009 Edition place a number of duties on sellers. General Condition 15 states that a seller shall disclose before the date of sale all easements, rights, reservations, privileges, covenants and restrictions which are known by the seller to affect the property.

General Condition 35 places an onus on sellers to disclose notices which have been served prior to the date of sale.

7.3 Can the seller be liable to the buyer for misrepresentation?

Yes, a seller can be liable for misrepresentation. General Condition 33 of the contract for sale states that a buyer shall be entitled to compensation for any loss suffered by the buyer in respect of the sale as a result of an error which includes any omission, non-disclosure, misstatement or misrepresentation made in the contract. However, a seller may attempt to exclude/vary this condition by inserting a special condition in the contract for sale stating that the buyer shall not rely on any representations made.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

Under General Condition 36 of the contract for sale, a seller warrants that there has been no development since 1 October 1964 or that there have been developments after that date but all planning permissions and bye-laws relevant to the property have been complied with. Under General Condition 36(d) the seller warrants there has been substantial compliance with the Building Regulations under the Building Control Act 1990. The planning warranty reduces the planning due diligence to be undertaken by the buyer. In the event the seller is not in a position to warrant planning they will seek to amend/delete General Condition 36 and this will put a buyer on notice that there is a planning issue. Warranties are not a substitute for the buyer carrying out their own thorough due diligence.

7.5 Does the seller warrant its ownership in any way? Please give details.

There are implied covenants as to ownership contained in a purchase deed. A buyer's lawyer is obliged to investigate title to ensure a buyer and/or their lending institution will acquire a good marketable title. In a lot of cases a real estate lender will rely on the borrower's lawyer's certificate of title.

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

The buyer is also responsible for discharging the following costs:

- Stamp duty.
- Surveyor/Architects' fees.
- Solicitors' legal fees.
- VAT (if applicable).
- Registration fees.
- Commissioner for Oaths' fees.
- Search fees.
- Local Property Tax.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

The principal Acts, Regulations and Central Bank Codes of Conduct

concerning the financing of real estate are:

- (a) Consumer Credit Act 1995.
- (b) European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.
- (c) Conveyancing Acts 1881-1911, the Land and Conveyancing Law Reform Acts 2009 and 2013.
- (d) Bills of Sale (Ireland) Act 1879.
- (e) Asset Covered Securities Act 2001.
- (f) Agricultural Credit Act 1978.
- (g) Credit Union Act 1997.
- (h) Credit Union and Co-operation with Overseas Regulators Act 2012.
- (i) Central Bank Acts 1942, 1971, 1988, Central Bank Reform Act 2010 and the further Financial Services of Ireland Acts 2003 and 2004.
- (j) Central Bank (Supervision and Enforcement) Act 2013.
- (k) Central Bank Act 2014.
- (l) Companies Acts 1963-2014.
- (m) Criminal Justice (Money Laundering) Act 2010.
- (n) Credit Institutions (Stabilisation) Act 2010.
- (o) Central Bank Consumer Protection Code 2012.
- (p) Code of Conduct on Mortgage Arrears 2013.
- (q) The Central Bank and Credit Institutions (Resolution) Act 2011.
- (r) Mortgage Credit Directive (Directive on credit agreements for consumers relating to residential immovable property).
- (s) Draft Consumer Protection on the Sale of Loan Books Bill.

There are extensive differences between financing real estate as a corporate entity and as an individual, most notably from a practical and legal perspective.

Real estate lenders have little regard as to the residential status of an individual, as long as the real estate is situated in Ireland.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

A real estate lender will protect itself by only giving finance that is secured by a Mortgage or Charge, registered first in priority against the property in the Registry of Deeds or Land Registry, as applicable (see section 4 above).

Section 89(1) of the Land and Conveyancing Law Reform Act 2009 provides that a legal mortgage of land may only be created by a charge pursuant to a deed. Since 1 March 2012, a new one-page form of charge must be used for taking security over registered land (with very limited exceptions) in the Property Registration Authority.

8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

The common proceedings for realisation of mortgaged properties are a court order for possession followed by a sale or the appointment of a receiver.

Prior to 1 December 2009, section 62(7) of the Registration of Title Act 1964 set out the procedure for repossession of registered land. Section 62(7) provided that when repayment of the principal money

secured by the instrument of charge became due, the registered owner of the charge or his personal representative could apply to the court in a summary manner for possession of the land. However, the Land and Conveyancing Law Reform Act 2009 repealed this provision without making any transitional measures for mortgages completed prior to 1 December 2009. The lack of transitional measures resulted in a number of high profile cases for example *Start Mortgages v Gunn* [2011] IEHC 275 which held that an order for possession could not be obtained by the summary procedure under the Registration of Title Act 1964. Other cases to seek clarification on the legal issue were *EBS Limited v Gillespie* [2012] IEHC, *Brian McEnery v Tim Sheehan* [2011 No.3505 P] and *GE Capital Woodchester Home Loans Ltd v John Reade and Dymphna Reade* [2012] IEHC 363. Action to ameliorate the legislative conundrum was eventually introduced with the passing of the Land and Conveyancing Law Reform Act 2013. The Act confirms that certain provisions of the Conveyancing Acts and Registration of Title Act 1964 will continue to apply to mortgages which predate the enactment of the Land and Conveyancing Law Reform Act 2009 thus allowing a mortgagee the power of sale, power to appoint a receiver and power to overreach subsequent charges. Repossession proceedings for principal private residences can also be adjourned pending proposals for a Personal Insolvency Arrangement (introduced by the Personal Insolvency Act 2012).

There are no other options for a mortgagee to realise a mortgaged property without court proceedings or the co-operation of the mortgagor. However, section 98 of the Land and Conveyancing Law Reform Act 2009 enables a mortgagee, where they have reasonable grounds for believing a mortgagor has abandoned the mortgaged property and urgent steps are needed to prevent deterioration, to apply to the District Court or any court for an order authorising the mortgagee to take possession of the property.

8.4 What minimum formalities are required for real estate lending?

Depending on the circumstances in each financial transaction, the real estate lender will issue a letter of loan offer subject to specific conditions. In commercial transactions this is often called a Facility Letter or Term Sheet. If accepted by the borrower, a specific legal document, mortgage, charge, or, in the case of a company, a debenture will be drawn up and executed by both parties. Sections 64 and 65 of the Land and Conveyancing Law Reform Act 2009 are of importance as they outline the formalities which must be observed in relation to the execution of all deeds. For the most part, real estate lenders will either satisfy themselves that there is good marketable title or they will rely on the borrower's lawyer's certificate of title.

8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The real estate lender will require/demand that the mortgage/charge take priority over any other creditors, with the exception of statutory creditors. As such the mortgage/charge will usually be registered when the borrower is registering its title to the asset. The real estate lender may also require a guarantor to guarantee the loan.

A real estate lender must also register a charge over the assets of a company in the Companies Office. Failure to register the charge within 21 days will render the charge void.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The transfer tax is called Stamp Duty and is payable by the buyer to the Revenue Commissioners.

For residential property, a rate of 1% applies on consideration up to €1,000,000. If the consideration exceeds €1,000,000 then a rate of 2% applies on the consideration.

For non-residential property, a rate of 2% applies.

The Revenue website www.revenue.ie contains detailed and helpful information relating to various taxes and duties.

9.2 When is the transfer tax paid?

Stamp duty is payable on an instrument within twenty eight days of first signing. Penalties and interest will apply to all unpaid stamp duty and the current late penalty regulations will apply under the new e-stamping system.

9.3 Are transfers of real estate by individuals subject to income tax?

Where the disposal of a particular property by an individual is not done as part of a trade, then that disposal will not be liable to income tax, but Capital Gains Tax (CGT) may be payable on any gain element.

9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

The standard rate of VAT on real estate is 13.5%. Where VAT applies on the transfer, the party transferring the real estate is to charge as appropriate the buyer (or lessee) the VAT and furnish it to the Revenue Commissioners. There are many variations and exemptions under the VAT system, including the Capital Goods Scheme by which a trader's VAT deduction in respect of a property is tied into the use to which that property is put over its VAT-able life.

9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

CGT, as defined in question 9.3 above, arises on the disposal of a wide range of assets, including real estate. The gain is calculated by deducting from the consideration received for the asset, the cost of acquisition and any expenditure incurred on its enhancement or disposal. The rate of CGT is 33% for gains on disposals from 5 December 2012. Budget 2015 did not change the rate of CGT. The 7-year relief from CGT in respect of land and building purchases between 7 December 2011 and 31 December 2014 was not extended.

If the seller is a company carrying on a trade in real estate, the gain can be subject to corporation tax instead of capital gains tax. There is an obligation on a buyer to withhold tax at 15% from the consideration paid for Irish land or shares deriving their value or the greater part of their value from Irish land where the consideration exceeds €500,000 unless the seller can produce a tax clearance certificate.

Real Estate Investment Trusts (REITs) were introduced in Budget 2013. REITs are listed companies used to hold rental property, which provide a return for investors similar to that of direct investment in property. Qualifying income and gains of a REIT will be exempt from corporation tax at the level of the REIT company. REITs will be required to distribute profits annually for taxation at investor levels.

9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

Yes, transferring the ownership of a company by shares only attracts a Stamp Duty rate of 1%.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

The main laws that regulate leases of business premises are as follows:

- Landlord & Tenant Law Amendment Act 1860 ("Deasy's" Act).
- Landlord & Tenant Amendment Act 1980 (as amended).
- Landlord & Tenant (Ground Rents) Act 1967.
- Landlord & Tenant (Ground Rents) Act 1978.
- Civil Law (Miscellaneous Provisions) Act 2008.
- Chapter 4 of the Land and Conveyancing Law Reform Act 2009 (Leases and surrender of leases).
- Property Services (Regulation) Act 2011.
- While not yet enacted, regard could also be given to the draft scheme of the Landlord and Tenant Law Reform Bill 2011.

10.2 What types of business lease exist?

There are generally two types of business lease:

- Short-term temporary convenience business lease for a term of up to four years and nine months (see question 10.3 below).
- Full Repairing and Insuring (FRI) leases for terms of up to 35 years.

Section 88 of the Property Services (Regulation) Act 2011 is of note, as it requires tenants under a relevant commercial lease to provide the Property Services Regulatory Authority (PRSA) with particulars of the relevant commercial lease.

10.3 What are the typical provisions for leases of business premises in Ireland regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

a) Length of term

In the last few years it has become much more common to grant short-term leases of up to 10 years. In certain cases, longer leases may be granted for up to 25 years but these will mostly contain a tenant's option to break after 5 or 10 years.

b) Rent increases

Normally every five years and as a result of section 132(3) of the Land and Conveyancing Law Reform Act 2009 on

an upwards and downwards open market basis. Disputes as to the rent review are normally referred to an independent surveyor acting as an Arbitrator or Expert. Section 132(4) provides that subsection 132(3) shall apply notwithstanding anything to the contrary contained in the lease or any agreement for the lease and only in respect of land demised by the lease in which business is permitted to be carried on under the terms of the lease.

The National Asset Management Agency (NAMA) has issued guidelines regarding reductions in rent on upward only commercial leases where they have acquired the loan on the property. NAMA will consider reducing rents for a certain period where a tenant can demonstrate trading difficulties which threatens the viability of their business.

c) **Tenant's right to sell or sub-lease**

Restrictions are normally placed on a tenant's right to assign or sub-lease without the landlord's prior written consent. Under section 66 of the Landlord and Tenant (Amendment) Act 1980, notwithstanding the terms of the lease, a landlord cannot unreasonably withhold consent. If a tenant is of the view that consent is being unreasonably withheld he/she may obtain a Court Order confirming the landlord is acting unreasonably.

d) **Insurance**

The landlord usually insures the property and recoups the cost from the tenant. The landlord's insurance will usually include insurance against loss of rent and consequently rent is suspended if the property becomes unusable due to an insured risk.

Tenants procure their own public liability, employer's liability and contents insurance.

e) (i) **Change of control of the tenant**

There are not normally any restrictions on the change of control of the tenant.

(ii) **Transfer of lease as a result of a corporate restructuring (e.g. merger)**

A landlord will normally allow an assignment of the lease to another group company but may require a Guarantee from the holding company. It will also normally allow an assignment on a restructuring.

f) **Repairs**

Most business leases are on a full repairing basis. If the tenant leases the entire building then it is liable directly for repairs. If the lease is for part of a building then the tenant reimburses the landlord a proportionate part of the cost of repairing the building through the service charge. However, short term leases have become more common and these may relieve the tenant of liability for structural repairs.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

- Value Added Tax (VAT), if the landlord opts to tax the rent at a rate of 23% on all rental payments.
- Income Tax/Corporation tax will be payable by the landlord on rental income. Where the rent is payable to a non-resident of Ireland, there can be an obligation to withhold income tax from the payment.
- Stamp duty. Currently 1% of the annual rent (for leases not exceeding 35 years), with an additional stamp duty charge of €12.50 payable if the lease contains a rent review clause and an additional stamp duty charge of €12.50 on the counterpart Lease. The tenant is liable for stamp duty.

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

A business lease may be terminated by:

- The effluxion of the term of the lease.
- Breach of a covenant in the lease.
- Surrender.
- A break clause.

Tenants gain rights to a statutory renewal of the tenancy if they can claim:

- A business equity, i.e. where a tenant has been in occupation and carried on business for five years. Landlords may require a tenant prior to signing a new lease to sign a renunciation of tenancy renewal rights.
- A long possession equity.
- An improvements equity.

In exercising a break option a tenant will usually be obliged to pay a penalty to the landlord. A landlord may claim damages if the tenant breaches a covenant under the lease.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?

Generally, a tenant ceases to be liable under the lease after it has been assigned with the landlord's consent. Technically, a tenant may remain liable but this has not been upheld by the courts.

The purchaser usually indemnifies the vendor against all liabilities as a result of future non-payment of rent and non-compliance with the covenants and conditions contained in the lease.

Both the landlord and tenant can be liable in respect of pre-sale non-compliance.

10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).

In the UK, the concept of the Green Lease has arisen due to rigorous building regulations imposed on developers to construct green buildings, the pressures on property owners to improve building energy performance, occupiers having their own social responsibility and company directors having a duty to take into account the impact the company's operations are having on the community and the environment under section 172 of the UK Companies Act 2006. Unlike our neighbours in the UK, there are currently no specific "green obligations" imposed in leases in Ireland. However, the European Communities (Energy Performance of Buildings) Regulations 2006-2008 (see question 11.10 below), since 1 January 2009, introduced the requirement that all classes of buildings being sold or leased must have a Building Energy Rating ("BER") Certificate. The aim of the rating is to inform prospective

buyers and tenants about the energy performance of the building. It also seeks to encourage developers, sellers and landlords to upgrade the energy performance of their buildings. The BER certificate is accompanied by an advisory report which sets out recommendations for cost effectively improving the energy performance of the building.

11 Public Law Permits and Obligations

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land? Please briefly describe them and include environmental laws.

Zoning Use & Occupation:

The Planning and Development Acts 2000 to 2010 govern planning and zoning matters. The Acts regulate the zoning of areas through development plans, special amenity area plans, local area plans and other regional plans. More specifically, development is controlled through the planning application process where licences or permission for development are either granted/refused by the local authority or on appeal by *An Bord Pleanála* (the Planning Appeals Board).

Planning and Development (Taking in charge of Estates) Bill 2012.

Planning and Development (Amendment) Act 2010.

Planning and Development (Strategic Infrastructure) Act 2006.

The Housing Act 1966-1992.

Housing Services (Miscellaneous Provisions) Act 2014.

Environmental Laws:

Environment (Miscellaneous Provisions) Act 2011.

The Environmental Protection Agency Acts 1992 to 2007 (“the EPA Acts”).

The Waste Management Acts 1996 to 2011 (“the Waste Act”).

European Communities (Environmental Impact Assessment) Regulations, 1989 to 2006.

Water Services Act 2007 (“the Water Services Act”). See also the Water Services (Amendment) Act 2012.

Air Pollution Act 1987 (“the Air Pollution Act”).

Building Control Acts 1990-2014.

Building Regulations 1997-2014.

Building Control Regulations 1997-2014.

Wildlife (Amendment) Act 2010.

Petroleum (Exploration and Extraction) Safety Act 2010.

See also Energy Security and Climate Change Bill 2012.

Water Services Act 2013 and Water Services (No.2) Act 2013.

Climate Action and Low Carbon Development Bill 2013.

11.2 Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.

Local Authorities can acquire lands for road/rail by compulsory acquisition. The compulsory acquisition order is normally published in a newspaper in the vicinity of the affected land. The Local Authority then serves a notice to treat on the landowner which is effectively the compensation payable to the landowner. The compensation is negotiated by the local authority valuers and the land owners’ valuers. If an agreement cannot be reached, an independent valuer will determine the compensation payable. Section 158 of

the National Management Agency Act 2009 (NAMA Act): enables NAMA to compulsorily acquire land if, in its opinion, it is necessary to do so to enable it to perform its functions; enables a building constructed or charged to be used or enjoyed for the purpose it was developed; and enables NAMA to vest good and marketable title in a purchaser, where a debtor is in material default of its obligations to NAMA which is likely to cause substantial loss to NAMA, where the land in question was intended to form part of the security but was omitted in error or where an owner intends to use the land to impede a disposition. NAMA may only compulsorily acquire land where it has made a first reasonable attempt to acquire the land by agreement. If NAMA proposes to compulsorily acquire land they must apply to court under section 159 of the NAMA Act for an acquisition order. Section 166 of the NAMA Act determines compensation payable and in default of agreement it will be fixed in accordance with the Acquisition of Land (Assessment of Compensation) Act 1919.

Interestingly, the Industrial Development Agency (IDA) recently invoked its compulsory purchase powers under section 16 of the Industrial Development Agency Act 1986 to acquire a historic family home located near the M4. Section 16 enables the IDA to acquire lands either compulsorily or by agreement where it considers industrial development is or is likely to occur. The IDA’s compulsory purchase powers are more vigorous than that of Local Authorities. The applicant judicially reviewed the decision of the IDA to the High Court but the decision was upheld. The case has been appealed to the Supreme Court.

11.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Land/building use and/or occupation: The local authority is the responsible body for controlling land/building use and occupation. *An Bord Pleanála* is the responsible body for hearing appeals against decisions of the local authority. *An Bord Pleanála* is also authorised under the Planning and Development (Strategic Infrastructure) Act 2006 to use a streamlined procedure for certain applications (both State and private) for strategic infrastructural projects as defined in the Act.

Environmental regulation: The Environmental Protection Agency (EPA), its office of Environmental Enforcement and the local authorities are responsible for environmental regulation.

Buyers may obtain reliable information on these matters by consulting legal, planning and environmental experts, legislation, the appropriate local authority and EPA websites.

11.4 What main permits or licences are required for building works and/or the use of real estate?

A grant of planning permission, along with necessary licences or permits are required before any development can be commenced. Planning permission is required for any post-1964 development. Failure to obtain planning permission is an offence.

As detailed above, certain licences may be required to carry out certain activities. These include licences issued under the EPA Act, the Water Services Act 2007, Water Services (Amendment) Act 2012, the Air Pollution Act and the Waste Management Act.

The Building Control Acts 1990 and 2007 must be complied with for all building works carried out since 1 June 1992. The Building Control Regulations 2014 apply to new extensions, buildings, change of use of buildings and material alterations. The Regulations regulate Commencement Notices and 7-day notices, Fire Safety Certificates, Fire Safety Regularisation Certificates and Disability

Access Certificates. It is an offence not to submit a Commencement Notice and failure to submit a Commencement Notice cannot be regularised at a later date.

The Safety Health & Welfare at Work Act 2005, the Safety Health & Welfare at Work (Construction) Regulations 2006 and the Safety Health & Welfare at Work (Construction) (Amendment) Regulations 2008, the Safety Health & Welfare at Work (Construction) (Amendment) Regulations 2010, Building Regulations (Part H Amendment) Regulations 2010 and Building Regulations (Part M Amendment) Regulations 2010 must be complied with for all building works.

11.5 Are building/use permits and licences commonly obtained in Ireland? Can implied permission be obtained in any way (e.g. by long use)?

Planning permission is generally required for any development. However, a number of exemptions exist. In addition, where a local authority fails to make a decision on a planning application within a specific time limit, default planning permission is deemed to have been granted. (See section 23 Planning and Development (Amendment) Act 2010.)

Where development occurs without planning permission having been obtained, a party can make an application for retention permission save for developments within the scope of the environmental impact assessment regime. If unauthorised development has taken place and the Planning Authority has not issued enforcement proceedings within seven years, it is prevented from doing so at a later date; exceptions to this are contained in sections 47 and 48 Planning and Development (Amendment) Act 2010 in respect of developments involving quarries and peat extraction.

11.6 What is the appropriate cost of building/use permits and the time involved in obtaining them?

Each local authority sets a fee for making an application for planning permission or making an observation on an application. Application fees are also payable under the EPA Act, the Water Services Act 2007, Water Services (Amendment) Act 2012, the Air Pollution Act and the Waste Management Act and are determined by the relevant body.

A planning authority must make a decision within eight weeks of the planning application being received. It may require further information in which case it must make a decision within four weeks of receipt of the information. The eight-week time limit can also be extended in certain circumstances. An 18-week time limit is applicable for appeals to *An Bord Pleanála*. However, this is an aspirational non-binding time limit and is often extended.

11.7 Are there any regulations on the protection of historic monuments in Ireland? If any, when and how are they likely to affect the transfer of rights in real estate?

The National Monuments Bill 2010 seeks to consolidate and update the existing National Monuments Acts 1930-2004. It proposes the introduction of a single register of monuments and monuments will be given a "special" or "general" protection designation. It also proposes the creation of a statutory framework for the reporting of finds, regulating archaeological works relating to all types of development in both the public and private sectors and introduces a more efficient licensing system for regulating archaeological excavations.

Local Authorities have records of protected structures. These include structures of architectural, historical, archaeological, artistic, cultural, social, scientific or technical importance. Under the Planning and Development Acts 2000-2002, works which might normally be considered exempted development under section 4(i) to (h) of the Act (thus not requiring planning permission) may not be exempt if the property is a protected structure or proposed protected structure. Section 57 of the Act enables an owner or occupier of a protected structure to request a planning authority to issue a declaration determining if the proposed works would be considered exempt from the requirement to obtain planning permission.

A planning search will normally reveal if a structure is protected or of historical significance. If the structure is protected this will limit if not prevent the developmental opportunities in respect of this structure.

11.8 How can e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in Ireland?

Ireland has no statutory regime for dealing with contaminated land and has no dedicated register of contaminated land. However, the Environmental Protection Agency is obliged to draft a National Hazardous Waste Management Plan. The current plan covers the period 2008-2012 and identifies sites at which waste disposal of hazardous waste has been carried out, assesses the risk of environmental pollution at these sites, recommends measures to prevent/limit environmental pollution and identifies measures to remediate these sites.

Another potential legislative resource a potential buyer could utilise to obtain information on contamination is the Waste Management (Certification of Historic Unlicensed Waste Disposal and Recovery Activities) Regulations 2008. It required Local Authorities to identify and register all closed landfills within their functional areas by 30 June 2009.

A potential buyer may also be able to rely on the Water Services (Amendment) Act 2012. It provides for a system of registration and inspection of domestic waste water treatment systems. Owners of waste water treatment systems will be required to register their system and re-register every five years. The register will be available for public inspection and it will be an offence not to register. Where properties connected to waste water treatment systems are sold the seller will be required to produce a valid registration certificate.

11.9 In what circumstances (if any) is environmental clean up ever mandatory?

Environmental clean up is mandatory where a party breaches the provisions of the EPA Acts and the Water Services Act. Sections 55-58 of the Waste Management Act 1996 are particularly relevant in this regard. The legislation provides that a party will be liable for the costs of a clean up and in addition any costs incurred by the EPA or local authority in investigating an incident. The responsible party will be liable for costs of enforcement proceedings.

11.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in Ireland.

The European Communities (Energy Performance of Buildings) Regulations 2006-2008 give effect to certain provisions of Directive 2002/91/EC on the energy performance of buildings. From 1 January 2009 all classes of buildings being sold or leased must

have a Building Energy Rating (“BER”) Certificate, prepared by a certified Building (BER) Energy Rating Assessor. The Regulations provide for exemptions for certain categories of buildings.

12 Climate Change

12.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).

Ireland has adopted two National Climate Strategies (CCS) in order to meet its commitments under the Kyoto Protocol to reduce its Greenhouse Gas Emissions (GHG). These strategies seek to reduce emissions by such measures as:

- Generating electricity from renewable resources.
- Modal shift to public transport.
- Revising building regulations in order to obtain a 40% improvement on thermal performance standards, introducing grants for greener homes and Building Energy Rating Certificates.
- Supporting afforestation.
- Introducing energy efficiency targets in the public sector.
- Reducing emissions in the commercial and industrial sectors.
- Increasing tax incentives.

A number of policies and strategies have been devised to reduce climate change and highlight sustainable development such as: the Carbon Budgets 2008, 2009, 2010 and 2011; the National Spatial Strategy 2002-2020; and the Bio Energy Action Plan 2007, to name but a few.

The Energy (Biofuel Obligation and Miscellaneous Provisions) Act 2010 obliges States in accordance with the Renewable Energy Directive that at least 10% of energy used in transport in each Member State will by 2020 be from a renewable source.

The Electricity Regulation (Amendment) (Carbon Revenue Levy) Act 2010 imposes a carbon levy on so much of revenues received by certain electricity generators as is attributable to the emissions from a generating installation operated by that particular electricity generator.

The European Communities (Greenhouse Gas Emissions Trading) Amendment Regulations 2010 provide for the revised operation of the EU-wide Emissions Trading Scheme (ETS) from 2013 onwards. While the European Communities (Greenhouse Gas Emissions Trading) (Aviation) Regulations 2010 establish a procedural framework for aircraft operators in Ireland to participate in the EU ETS. The Environmental Protection Agency is the designated body to impose, monitor, report and verify the obligations of aircraft operators.

12.2 Are there any national greenhouse gas emissions reduction targets?

Yes, under the Kyoto Protocol the EU agreed to reduce GHG (greenhouse gas) emissions to 8% below 1990 levels. Ireland committed to limit the growth in annual GHG (greenhouse gas) emissions to 13% above 1990 levels by the period 2008 to 2012 and to at least 20% of 1990 levels by 2020 as part of its contribution to the overall EU target.

12.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

The Building Regulations of 2010 have targeted a 60% improvement in the energy performance of dwellings (relative to 2002 standards) with the aim to have all new dwellings carbon neutral by 2013 and all other buildings carbon neutral by 2016. The SEAI, with the introduction of the Greener Homes Scheme in 2006, will provide €47m over five years for grant assistance to homeowners who intend to purchase a new renewable heating system for either new or existing homes. See also questions 10.7 and 11.10 above.

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Denise is a solicitor in our Real Estate Group and has several years' of multi-faceted commercial real estate practice. Denise's extensive real estate and loan portfolio sale experience has enabled her to devise bespoke solutions to novel real estate issues, leveraging her legal/commercial acumen in the various high profile transactions she has been involved in. Denise has been a joint contributor to the Irish Chapter of The International Comparative Legal Guide to Real Estate for 2008-2014 (Global Legal Group Ltd, London).

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