



THE LEGAL PERSPECTIVE

# Investment guide Ireland

# Some peculiarities of the country

There are two separate systems of registration in Ireland:

- A. Registry of Deeds (known as “Unregistered” or “Registry of Deeds” titles); and
- B. Land Registry (known as “Registered” or “Land Registry” titles).

Both systems are administered by a state entity called Tailte Éireann (formerly the Property Registration Authority or “PRA”) and both are mutually exclusive.

## Main documents to be drawn up in the context of a transaction

### For an asset transaction the main documents to be drawn up are:

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**Head of Terms:** Typically non binding heads of terms are drawn up between the parties setting out the key commercial terms of the deal. The legal team are not usually involved in the negotiation and agreement of the heads of terms.

**Requisitions on Title:** The Law Society of Ireland’s conveyancing committee maintains a set of standard pre-contract due diligence queries, known as “requisitions on title”. Requisitions are replied to by the vendor’s solicitor pre-contract. Only in certain limited circumstances can any further requisitions be raised between exchange and completion.

**Contract for Sale:** A Contract for Sale is typically used to sell and purchase property. The Law Society’s template form of contract for sale, known as the “General Conditions of Sale, 2023 Edition”, is used in the vast majority of Irish real estate transaction.

**Deed of Transfer:** Upon completion of the sale the parties will execute a Deed of Transfer, this is the deed pursuant to which the title to the property is transferred from the vendor to the purchaser.

### For a Share Transaction the main documents to be considered from a real estate perspective are:

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**Share Purchaser Agreement:** A share purchase agreement is typically used to sell and purchase shares. If the company being acquired owns or leases property, then usually the purchaser will carry out due diligence in relation to the

assets in advance of the parties executing the Share Purchase Agreement and details of the property will be included in the Share Purchase Agreement. The purchaser will also generally seek certain warranties from the seller in relation to the property.

**Disclosure Letter:** The Disclosure letter should be read in conjunction with the Share Purchase Agreement. It provides specific disclosures from the seller regarding the target company and the warranties in the Share Purchase Agreement will be qualified by reference to the Disclosure Letter.

### For a lease the main documents to be drawn up are:

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**Head of Terms:** Typically non binding heads of terms are drawn up between the parties setting out the key commercial terms of the deal. The legal team are not usually involved in the negotiation and agreement of the heads of terms.

**Pre Lease Enquiries:** The tenant will raise a comprehensive set of pre- lease enquiries in advance of entering the lease. It is important that the landlord’s responses to these queries are carefully reviewed.

**Lease:** The Lease will set out the terms upon which the property is demised from the Landlord to the Tenant. This is usually a heavily negotiated document.

**Ancillary Documents:** Depending on the nature of the transaction there may be some ancillary documents to the lease. For example, sometimes a landlord might agree to grant the tenant a concession on the basis it is personal to the tenant in which case such a concession will generally be included in a side letter.

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# 1. Ownership of real estate

## 1.1 Freehold ownership

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The two broad categories of proprietary interests in land in Ireland (known as “estates”) are “freehold” and “leasehold”.

The owner of a freehold estate is generally free to use and enjoy its land as it chooses, subject to the law and to any relevant covenants or restrictions on title.

There are two sub-categories of freehold estate, being the “fee simple” (essentially an unrestricted freely alienable form of freehold) and the “fee farm grant” (essentially a hybrid form of freehold and quasi-leasehold estate which may contain covenants and in respect of which some form of periodic rent is reserved). It has not been possible to create new Fee Farm Grants since 1 December 2009, but existing fee farm grants remain common, particularly in urban environments.

A freehold estate is not time limited. The State is a freehold owner’s ultimate intestate successor.

## 1.2 Leasehold ownership

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The owner of a leasehold estate typically holds its property for a limited duration subject to an obligation to pay rent and compliance with covenants. Most leaseholds are created by way of leases, being written contracts between a lessor and lessee pursuant to which the lessee is granted exclusive possession. The terms of tenancies/leases can vary. In some cases, they can be for periods at are considered “freehold equivalents” (such as for 999 years), in which case they often constitute the basis for the main economic interest in the relevant land.

Leasehold interests are held subject to them reverting to a “reversionary owner” upon expiry or earlier determination. The owner of the reversion may be either the owner of a freehold interest or of a superior leasehold interest. For so long as the leasehold interest subsists, the relationship between the leasehold owner and the reversionary owner is governed by the terms of the lease agreement. The obligations on the lessee under the lease agreement may range from very basic to quite significant and may include an obligation to pay the reversionary owner a rent. Usually, where a lessee has been granted or has acquired a long leasehold interest, the rent will be nominal only.

Owners of freehold equivalent long leases are often able to avail of statutory rights to “buy out” the freehold title (sometimes calling buying the “ground-rent”). The relevant legislation and procedures are complex and would usually require the payment by the lessee of some form of compensation (albeit relatively minor in value).

## 1.3 Other interests in land

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An owner of land can usually also grant or reserve rights, known as easements, in respect of the use of land, such as right of way (to facilitate access) or wayleaves (to facilitate the laying and use of cables, pipes, wires or other conduits). Such rights run concurrently with the ownership rights to the property.

## 1.4 Ownership by foreign investors

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Currently there is no general prohibition on foreign investors acquiring Irish real estate. Freehold and leasehold estates can be owned by local or international individuals or companies.

There may be some practical matters relating to registration that should be considered where a foreign purchaser acquires registered land. As part of an application for registration or to deal with the land in general, some or all of the following may be required to be provided:

- i). a certificate from a lawyer with knowledge of the laws of the jurisdiction in which the company is registered certifying that the relevant document was executed in accordance with the execution requirements of that jurisdiction (such certificate being in a prescribed form);
- ii). a copy of the company’s constitutional documents, translated (if required) and notarised as a true copy of the original;
- iii). a search of the companies registration office of the relevant jurisdiction, with the acts appearing thereon satisfactorily explained;
- iv). a certificate confirming that the company has not established a breach or operation in Ireland (if that is the case); and
- v). an address in Ireland for the service of notices.

A new EU Foreign Direct Investment Screening regime will come into effect in 2024. It will provide that any transfer of ownership of an asset considered to comprise critical infrastructure with a value above EUR2 million to a non-EEA or non-Swiss individual or the transfer of ownership of a company comprising a “change of control” of that company will need to be screened by the Department of Trade and Enterprise. The purpose of the screening process is to ascertain whether the particular transaction is a risk to national security or public order before approval. Critical infrastructure in a real estate context includes but is not limited to data centres, energy assets and pharmaceutical manufacturing plants.



# 2. Acquisition of ownership

## 2.1 Formal requirements

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Conveyancers typically follow a well-worn path when conveying title to land.

The phases of a conveyancing transaction include:

- i). Pre-contract;
- ii). Contract;
- iii). Post exchange of contract/pre completion;
- iv). Completion; and
- v). Post-completion.

Conveyancers also almost always use market standard template due diligence, contract and conveyancing developed by the Law Society of Ireland or imposed by the Land Registration Rules (being statutory rules governing dealings with registered land). Where they are not used, the title acquired by a purchaser may not qualify as a “good marketable” title, being the standard of title acceptable to prudent conveyancers. This can impact on the ability to sell or finance at a future date.

The Law Society of Ireland’s conveyancing committee maintains a set of standard pre-contract due diligence queries, known as “requisitions on title”, which are updated on a regular basis. Requisitions are replied to by the vendor’s solicitor pre-contract. Only in certain limited circumstances can any further requisitions be raised between exchange and completion, and in practice, commercial contracts sometimes prevent a purchaser raising post exchange requisitions entirely.

The Law Society’s template form of contract for sale, known as the “General Conditions of Sale, 2023 Edition”, is used in the vast majority of Irish real estate transaction. It contains 48 general conditions, which may be varied or deleted by way of special conditions, and in practice, the main focus of contractual negotiations is on these special conditions.

A property can be acquired by way of auction or by private treaty. The standard Law Society Contract for Sale can be adapted for use in either situation.

## 2.2 Registration

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There are two separate systems of registration in Ireland:

- A. Registry of Deeds (known as “Unregistered” or “Registry of Deeds” titles); and
- B. Land Registry (known as “Registered” or “Land Registry” titles).

Both systems are administered by a state entity called *Tailte Éireann* (formerly the Property Registration Authority or “PRA”) and both are mutually exclusive.

### 2.2.1 Registry of deeds

The Registry of Deeds deals only with the registration of the existence of documents affecting titles to land, so that priority can be demonstrated in the event of a dispute with a third party. Unlike the Land Registry, is not a register of ownership.

Registration of a deed in the Registry of Deeds is not legally required for the deed to be effective, but registration does give the grantee under the deed statutory priority against third parties in the event of a dispute, so registration is advisable.

Deeds lodged in the Registry of Deeds are not retained by *Tailte Éireann*. They are stamped with a serial number and returned to the lodging party who holds them with the other title deeds required to evidence title to a purchaser/mortgagee/grantee.

When acquiring unregistered lands, a purchaser will need to carry out searches of the Registry of Deeds, in order to ensure that there are no acts appearing that might affect its priority upon acquisition. The services of an expert of conveyancer are required in order to ensure a purchaser knows the correct search parameters, as too wide or too narrow a search can be insufficient. In a conveyance, a purchaser’s solicitor will be asked to provide explanations of searches on or in advance of closing.

Considerable difficulties and expense arise when original title deeds and documents have been lost, or contain errors. In recent years, title insurance has become a feature of the property market. Insurance providers can usually insure such risks, and where they do so, it may be possible to first register a title that would otherwise not be registerable.

Unregistered property purchased in the State after 1 June 2011 (subject to a small number of exceptions) is subject to compulsory “first registration” in the Land Registry, whereby title is converted from “unregistered” to “registered”. Therefore, the number of unregistered properties in Ireland is decreasing steadily, although a significant number of complex urban titles have yet to be converted.

### 2.2.2 Land registry

Land, where ownership is registered in the Land Registry, is known as “registered” land or “Land Registry title”. Almost all the land in Ireland is registered in the Land Registry (although the pockets of unregistered lands tend to be in the larger cities).

When title to land is registered in the Land Registry, the deeds evidencing such title are maintained in the Land Registry, and a “folio” is opened, which is capable of inspection by the public (although the underlying title instruments of title referred to on the folios may usually only be inspected by or on behalf of the registered owner.

Folios record the class of title and ownership, the name and address of the registered owner, and the burdens affecting the title (such as charges or rights of way). The basic principle is that folios are “conclusive evidence” of the title of the registered owner to the land as appearing thereon and the title shown on the folio is guaranteed by the State. However, this does not mean that the folio is evidence of all titles that may affect the same land. For example, excluded from the register are various types of title burdens known as “section 72 burdens”, which are burdens incapable of registration. Such burdens must therefore also be investigated when seeking to acquire registered lands, including by way of physical inspection, the raising or requisitions on title and the obtaining of a standard form of statutory declaration of the seller on or in advance of completion.

In conjunction with folios, Tailte Éireann also maintains maps in electronic form known as “filed plans” that identify the boundaries of the relevant title. However, it is one of the drawbacks of the Land Registry system that the filed plans are not conclusive (unless neighbouring land-owners agree to make them so, which is rarely done). It is therefore often necessary to engage the services of a mapper, architect or surveyor to review the filed plan against the boundaries as they appear on the ground, particularly where a complex title or particularly valuable property is concerned.

## 2.3 Asset deals

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The most common form of property acquisition in Ireland is an asset purchase, where the buyer is able to pick and choose which land assets it acquires, and the legal formalities set out above must be followed in respect of each of the assets being acquired. This is in contrast to an acquisition of property by way of share purchase. The conveyancing process for asset purchases will involve:

### 2.3.1 Due Diligence

It is very important that a purchaser carry out due diligence on all aspects of the property prior to exchange of contracts, the point from which each party is bound to complete the transaction. Such due diligence should cover:

- all legal aspects including title to the property, whether it be registered or unregistered, and any rights or easements affecting it. Searches will be carried out with the Land Registry or Registry of Deeds, whichever is applicable (and certain other registries), and the copy title pack provided by the vendor’s solicitor, which is particularly important when the property is unregistered as explained above, will be reviewed;
- the title investigation will also include a review of the planning status of the property to ensure that all necessary permissions are in place and all necessary compliance documents are held (usually an architect or engineer needs to provide an opinion confirming compliance with planning permission);

- the title investigation will also include a review of the available building control legislation by reference to the acts appearing on a search of the planning register;
- depending on the nature of the property, a physical inspection may be undertaken to ascertain the state and condition of any buildings and to investigate the environmental condition and whether the land is contaminated with hazardous substances which need to be remediated; and
- a Building Energy Rating Certificate will have to be provided showing the energy performance of the property, which will become even more pertinent when the EU Energy Performance of Buildings Directive takes effect.

### 2.3.2 The Sale Contract

As set out above, the parties will enter into a contract for sale. The special conditions may contain a number of bespoke provisions that are relevant to the property and transaction and it is important to make sure that such matters are properly dealt with. This may include:

- if the property is let and is being purchased as an investment, the apportionment of rent and other outgoings as well as provisions detailing how the property is to be managed between exchange and completion;
- the tax treatment; and
- various warranties as to the state and condition of the property.

Most sellers will be required to provide a capital gains tax clearance certificate from the Revenue Commissioners (called a CG50) prior to completion. If this is not provided, a purchaser is obliged to withhold 15% of the purchase price and remit it to Revenue, although in practice, this very rarely happens.

### 2.3.3 Exchange of Contracts

Contracts will be exchanged between the lawyers for the buyer and the seller and, unless the contract specifies otherwise, risk passes to the buyer on exchange. This means that the buyer is obligated to complete the purchase even if the property is damaged by an insured risk and, as such, they should take out insurance for the property with effect from exchange. Where the exchange of contracts and completion are not simultaneous, usually a deposit sum of 10% of the total purchase price will usually be paid by the buyer to the seller’s solicitor on the exchange of the contract for sale, to be held until completion is confirmed. A contract is generally stampable at the full rate of stamp duty if over 25% of the purchase price/consideration passing is paid on exchange.

### 2.3.4 Post Exchange and Completion

Prior to completion, whether that be post exchange or simultaneous with exchange (which is becoming much more common), a buyer will:

- carry out a Land Registry or Registry of Deeds search, whichever is applicable, to ensure that no new acts appear that may affect the title; and
- review the original title, planning and accompanying documents that form the deeds pack to ensure all documents listed in the contract for sale are held.

On completion, a transfer deed or conveyance will be delivered and legal title to the property will pass to the purchaser (subject in the case of registered land to the obligation to perfect title via the registration process). Any stamp duty due must be paid within 44 days, and typically a stamp duty return is filed by the purchaser's solicitor.

## 2.4 Share deals

Another way to acquire real estate in Ireland is to purchase the legal entity which owns the property. This is often the case as part of a business acquisition, but it is also increasingly common when buying significant investment properties held in special purpose vehicles.

The buyer acquires the shares in the target company that owns the property and as such will acquire all of its assets, obligations and liabilities. In a share deal, all of the property owned by the target remains with the target, but the ownership of the target changes. There is therefore no conveyancing aspect and no application to the Land Registry will be necessary on completion.

The document under which the shares in a company are transferred is a share purchase agreement.

### 2.4.1 Due Diligence

Because of the greater risk assumed by a buyer of shares, the scope of due diligence required on a share purchaser will generally be greater than on an asset purchase. The due diligence will include not only the matters set out in above for an asset purchase but also diligence in relation to the target company as an entity.

### 2.4.2 Share Purchase Agreement

The share purchase agreement is the principal contractual document through which the company is acquired. It documents the agreement between the parties to sell and purchase the entire issued share capital of the target company at a specified price and sets out other terms

governing the acquisition such as warranties. Warranties are contractual promises made by the seller which the buyer can rely on and (subject to a maximum and minimum threshold) sue against if they turn out not to be accurate. The level of warranty cover achieved will be dependent on the nature of the transaction and the level of due diligence information available, and the quality of the cover secured will in turn have a direct impact on the amount of diligence work that is done.

In addition to the share purchase agreement, there are a number of ancillary documents that typically accompany the share purchase agreement, namely the disclosure letter and the tax covenant (also known as the tax deed).

Other agreements which often precede or accompany a share purchase agreement include:

- an exclusivity agreement (or lock-out agreement), which prevents the seller from actively seeking or negotiating with other prospective buyers for a specified period, thereby giving the buyer a period of exclusivity in which to negotiate the share purchase agreement;
- a confidentiality agreement, which imposes a duty of confidentiality on the buyer in respect of confidential information concerning the target company and its subsidiaries pending the formal conclusion of a share purchase agreement;
- a contribution agreement, which is a seller document used in a transaction involving multiple sellers. Its main purpose is to apportion liability between the sellers as regards their contractual liability under the share purchase agreement; and
- formal transfer documents, such as a stock transfer form, which is required to transfer the legal title to shares to a buyer.

### 2.4.3 Timings and Approvals

A proposed share purchase may require various consents or approvals, and this could affect the transaction timetable. The main types of approval that may be necessary include:

- board approval;
- shareholder approval; and
- approval of regulatory authorities (such as the Competition Authority) or other third parties.

The nature and extent of approvals required will have an important bearing on the timing of the transaction, as will the level of due diligence required.



## 2.4.4 Completion

Following completion of a share purchase, the buyer will become the new owner of the target company and there will usually be various post-completion matters to attend to, including:

- a possible announcement of the transaction;
- making certain filings with the Companies Registration Office (for example, to notify any changes in the directors of the target company and its subsidiaries);
- paying any stamp duty due on the transfer of the acquired shares; and
- certain administrative matters, such as insurance, payroll, VAT and pensions.

On completion, the seller will send the title deeds and documents to the purchaser and also signed certificates of title if these are being provided by the seller.

## 2.5 Public auctions

Properties are sold at auction for various reasons, including:

- for a quick sale;
- the property may have been repossessed by a receiver;
- the property may need significant redevelopment or refurbishment; or
- the property may have proved difficult to sell on the open market.

Unlike a standard transaction, the auction contract is binding as soon as the price is agreed and the hammer falls. The buyer must pay 10% of the agreed sale price immediately, with the balance due on completion.

The seller's legal advisors must prepare a legal pack for the lot. The legal pack must be prepared prior to the auction so that buyers and their legal advisors can download the information and make an informed decision on whether to bid for the property.



# 3. Other rights to property

## 3.1 Easements

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An easement is a right benefiting a piece of land (dominant land) that is enjoyed over another piece of land owned by someone else (servient land). Easements may be permanent or granted for a specified period of time. Usually, an easement allows the owner of the dominant land to do something or exercise specified rights over the servient land, such as a right of access or to use conduits or other service media.

An easement must contain four fundamental characteristics:

1. There must be dominant land and servient tenement;
2. The easement must accommodate the dominant tenement;
3. The dominant and servient tenements must be owned or occupied by different persons;
4. The right claimed must be capable of forming the subject matter of a grant.

## 3.2 Mortgages and charges

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Since 2009, title to a freehold interest in property may only be secured by way of a charge.

Charges are often referred to in practices as “mortgages”, and that description is used interchangeably in this document (as it is in the market). However, it is noted that “mortgage” is no longer a technically correct description.

There is no conclusive way to determine the priority ranking of security in Ireland. Charges may be expressed to be “first ranking”, and they usually are, but there is a factual component to this which the use of these words does not override.

There are some general principles which apply to the consideration of priorities of charges over land and the analysis differs depending on whether the land is registered or unregistered, as set out below:

**Registered land:** when dealing with registered land, in general, the register maintained in the Land Registry governs priorities, which are determined by the date of registration (which takes effect from the date of the application for registration).

Certain burdens set out in Section 72 of Registration of Title Act, 1964 affect registered land without registration (such as the rights of every person in actual occupation or in receipt of rents, save where on reasonable enquiry of such person, the rights are not disclosed (Section 72(j)). Whether or not Section 72 burdens arise is a matter of fact, and if they do exist at the time a charge is created, they will rank in priority to the charge.

By and large, the types of rights protected by Section 72 are not rights that would usually give cause for concern. As a matter of practice, on a sale or on the creation of a mortgage, a Lender would typically make enquiries and seek a statutory declaration confirming the non-existence of such rights (given their existence is not revealed by searches). A charge of registered land must be by way of a form prescribed in by the Land Registration Rules. The most common form in commercial transactions, is the Form 52. A Form 52 is a one-page document that is executed by the borrower in favour of the lender and registered in the Land Registry.

**Unregistered land:** when dealing with unregistered land, the area of priorities is more complex and priorities are determined by the date of registration of the documents in the Registry of Deeds and the doctrine of notice (which may imply notice of a prior interest which takes priority – an interest arising in this manner would not be revealed by searches).

Not all forms of mortgages and charges are registrable and therefore it is not possible to carry out a definitive search which reveals the existence of all prior charges. An example of a charge which is not registrable is a statutory charge for unpaid commercial rates. In practice, on the sale of a property, detailed enquiries are made of a seller who is asked to confirm that no such charges or other interests which may have priority affect the property, in addition to which a purchaser would carry out searches in the appropriate registry.

## 3.3 Judgment mortgages

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Judgment mortgages are a form of mortgage used to enforce court judgement. They take effect subject to any rights or incumbrances (including charges) which are in existence at the time the judgment mortgage is created, whether or not the charge in question is registered. Accordingly, if a judgment mortgage is created after a mortgage granted by a lender, the judgment mortgage will rank behind the lender’s mortgage, regardless of whether or not the lender’s mortgage was registered in the Land Registry or the Registry of Deeds.

If the borrower defaults on its loan obligations, the lender (or owner of the charge of the borrower’s title) may exercise its rights in contract (under the terms of the mortgage/charge) or pursuant to statute to either appoint a receiver or sell the property. Whether or not a power of sale has arisen may be complex to determine and should be carefully considered on a case-by-case basis.



### 3.4 Floating charge

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A corporate borrower only can also create a floating charge. This is a charge over all of the trading assets, including property and rental income, of a borrower. Floating charges cover a general class of assets and are not property specific. They would not typically be used where the borrower has other properties or it borrows from other lenders with their own existing security. Floating charges may be found in transactions where a portfolio is owned by a single entity or where the borrower is a special purpose vehicle, in which case lenders would take a floating charge and a legal mortgage.

### 3.5 Other burdens affecting property

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There are a number of other burdens that can affect title to a property and it is important that purchasers' solicitors carefully consider them when investigating title. Common burdens include:

- i). a rent-charge;
- ii). a lien on the land for unpaid purchase money;
- iii). an occupational lease which exceeds 21 years;

Some categories of title burdens can affect a property without registration, as listed in Section 72 (1) of the Registration of Title Act 1964 (as noted above).

### 3.6 Options

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Options are temporary rights. The most common form of option is a call option which allows a potential purchaser to call for the landowner to sell the land. A call option is like a pre-emption right but the fundamental difference is that a call option places control in the hands of the purchaser as the landowner must sell the land if the option is exercised.





## 4. Planning and zoning

In Ireland, planning permission is major consideration in the process of development and commercial occupation. Planning control is a devolved matter such that different planning laws and policies, while similar in every county, are applied and enforced at local authority level. Planning policy is often highly political and is therefore subject to frequent policy and legislative changes as government seeks to use the system to deliver and respond to prevailing economic circumstances e.g. housing supply. Planning permission is required for all development unless exempted development provisions apply. Therefore planning control is a requirement for development but provides opportunities to create real value where unlocked.

The emphasis is on decision making at a local government level as local authorities must have regard to national planning policy in their decision making. Each local authority area is required to adopt and keep up to date a statutory development plan and local area plans that sets the planning policy for the locality and directs the location and extent of land use and zoning for development. A right of appeal exists for an applicant who is aggrieved by a decision of the local planning authority, this appeal would be made to the national planning body, An Bord Pleanála. The legality (but not the planning merits) of planning decisions can be challenged in the High Court.

Planning permission may be subject to detailed conditions and also the provision of funding of contribution payments to facilitate public infrastructure. Local authorities may also recover a development charge as a condition of the carrying out of consented development. The amount of the charge is set locally and is used for the provision of local infrastructure and is levied pursuant to the provisions of Section 48 of the

Planning and Development Act 2000 as amended.

Other functions of local authorities include the promotion of social, economic and environmental well being in its area which may include compulsory land acquisition for regeneration and the protection of amenity, historical and ecological features by means of enforcement.

The Government may designate certain areas of land as Strategic Development Zones ("SDZ") where their development is considered to be of strategic national economic and social importance. The SDZ designation enables the fast-track delivery of new residential and non-residential development planning permissions. There is no appeal to An Bord Pleanála for a grant or refusal of permission in an SDZ. Applications for permission for certain large scale infrastructure developments must be made directly to An Bord Pleanála.

If acquiring an interest in constructed property it is important to obtain satisfactory evidence of compliance with planning permission and building regulations. Unlike other jurisdictions, there is no planning register which can be checked in isolation to verify that a building has been constructed in accordance with the relevant planning permission or building control regulations.

The Building Control Authority regulates the design and construction of buildings, their material, their services, fittings, energy efficiency and matters of health, safety and welfare of building occupants in accordance with the provisions of the Building Control Acts. Once a property has been completed the developer must obtain a Certificate of Compliance on Completion in order to verify that the works comply with building regulations. This certificate must be registered in the national Building Control Management System.



# 5. Leases

## 5.1 Type of leases

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As in most jurisdictions, there is a distinction between commercial and residential leases in Ireland. Residential leases are more tightly regulated for obvious reasons but given the nature of the work we do in Ireland, this summary focuses primarily on commercial leases.

## 5.2 Duration

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In Ireland, there is no minimum or maximum term for a commercial lease. Very long leases or freehold equivalent leases (eg for terms of 999 years) are relatively common and normally granted for one-off payment rather than at a market rent. For market rent lease, terms are usually much shorter.

Under the Landlord and Tenant (Amendment) Act 1980 (the 1980 Act), as amended, a commercial tenant is entitled to a new lease, in certain circumstances, at the end of its existing five-year continuous occupation of the premises for business purposes. In practice, the landlord will usually ask that the tenant renounce this renewal right by entering into a deed of renunciation.

## 5.3 Rent

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Rent is usually calculated on the basis of a figure per sq. ft. and payable quarterly in advance. Value added tax (VAT) is often payable on commercial leases in addition to the rent but a landlord (or freehold owner) must generally exercise an option to tax in order to charge VAT. Most commercial properties are VAT opted and the majority of tenants are able to recover the VAT expended. It is advisable for both landlord and tenants to obtain specialist VAT advice when entering into an occupational lease.

## 5.4 Rent review

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The purpose of the rent review clause in a lease from a landlord's perspective is to protect the value of the landlord's investment by ensuring that the rent payable by the tenant throughout the term of the lease keeps pace with inflation and with the rent being paid on the open market for equivalent premises. Hence the reviewed rent will be a reflection of the changing value of the demised premises during the term of the lease.

There are a number of ways of reviewing rent, however the most common is a review to the open market rent. Rent review by reference to changes in the Consumer Price Index (or other government/official indices) can be seen occasionally. It is common for rent reviews to take place every five years during a lease term.

Certain legislation provides that all rent review clauses contained in leases granted post-28 February 2010 are deemed to be "upwards and downwards" rent review provisions. In other words, there is a prohibition on upwards-only rent review provisions in Ireland for leases entered into after this date.

## 5.5 Operating expenses

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In a commercial lease the tenant is usually expected to pay all expenses including utilities, rates and outgoings relating to the property.

Where part of a building (or estate) is let, a tenant is also expected to pay its share (often a fair proportion based upon a square footage calculation) of the service charge incurred by the landlord in maintaining the common parts and providing any services to the tenant(s). This is usually payable quarterly in advance based upon an estimated service charge, which will be reconciled following the end of the service charge year. Service charge caps (often index linked) are commonly seen, particularly in the retail sector, but landlords will wish to avoid any such caps where possible.

It is the normal for landlords to insure commercial property in order to both ensure that insurance is in place and to take advantage of economies of scale. A fair proportion of the cost of the insurance will be recoverable from the tenant under a standard commercial lease. Unlike rent and service charge, insurance rent is usually payable annually in advance.

## 5.6 Maintenance, repair and renovation at the end of a lease

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Where a tenant is demised the whole of a property they are usually responsible for maintaining the property and keeping it in good and substantial repair and condition. Considerable negotiation is often undertaken on the lease over repairing responsibilities as this can understandably cost the tenant a considerable amount of money during the term. Where a tenant is demised part of a property the landlord normally (via a covenant to do so) maintains responsibility for structural parts with recovery of the costs expended being made via the service charge payable by the tenant.

The repairing obligations in the lease can be limited by reference to a schedule of condition (i.e. a set of photographs/narrative) detailing the condition of the property at the date of the lease. A tenant would usually only need to give the property back in no better condition than as detailed in the schedule of condition.



The majority of leases will require a tenant to decorate (internally every three to five years and externally every five years and also, in both cases, in the last year of the term) and to fully reinstate the property (i.e. remove any alterations or fixtures and fittings) at the end of the term.

It is common for there to be a dispute surrounding the condition the property should be given back in at the end of a lease, especially if a tenant has occupied the property for quite a while. A schedule of dilapidations is often prepared and negotiated heavily between each party's surveyors before a settlement sum or list of defects to remedy is agreed.

## 5.7 Assignments/transfers

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Most commercial leases have detailed provisions regarding assignment. The landlord will want control over its direct tenant to ensure that the tenant is a strong covenant i.e. able and willing to pay the rent and other sums due both on time and in full and that they are able to comply with the other tenant covenants in the lease.

Despite this, commercial leases often permit assignments of the whole (rarely part) subject to landlord's consent (not to be unreasonably withheld or delayed) and subject to a number of conditions such as:

- the proposed assignee providing sufficient financial information and, possibly, being able to pass a financial test; and
- the proposed assignee providing sufficient security (for example, a guarantor or rent deposit).

Alienation provisions under leases are governed by statute in Ireland. Under s. 66(1) of the 1980 Act, any covenant prohibiting or restricting the alienation, either generally or in any particular manner, of a lease shall have effect as if it were a covenant prohibiting or restricting such alienation without the licence or consent of the landlord. Under s. 66(2), where a lease contains a covenant prohibiting or restricting alienation, either generally or in any particular manner, without the licence or consent of the landlord, the covenant shall, notwithstanding any express provision to the contrary,

be subject to a proviso that the licence/consent shall not be unreasonably withheld (although this will not preclude the landlord from insisting its expenses in giving consent are paid for by the tenant). The vast majority of office leases will have provisions to this effect drafted in any case.

## 5.8 Sub-leases

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Leases normally permit the tenant to underlet the whole of the property with the landlord's prior consent, which is not to be unreasonably withheld. It is less common (but not unusual) for leases to allow under lettings of part. As set out above, s. 66 of the 1980 Act landlord's consent must not be unreasonably withheld.

S. 78 of the 1980 Act provides that if a head lease is terminated before its normal expiration, any sub-lease survives and the head landlord becomes the landlord of the sub-lease, which now becomes a lease. The sub-tenant, now tenant, is obliged to pay the higher of the sub-lease rent or "such portion of the rent reserved by the terminated lease or contract as is fairly attributable to the premises."

## 5.9 Termination

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Provided the lease is not afforded security of tenure under the 1980 Act, the lease will end on the contractual expiry date stated in the lease.

It is not uncommon to see leases with break clauses allowing one or both of the parties to terminate the lease, before its expiry, on or after a specific date. It is common for break clauses to provide that six months' written notice must be provided, all basic rent must be paid up to the termination date and that the property must be given back free of third-party occupation.

## 5.10 Sale of leased property

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A sale of property that is leased does not affect the lease in any way. The benefits and liabilities of the lease are inherited by the new owner as the legal successor to the title to the property.



# 6. Tax

In this section we will summarize the main tax related aspects of real estate investment in Ireland.

## 6.1 Value added tax

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Value Added Tax (**VAT**) will usually be chargeable on the acquisition of commercial real estate. In relation to new buildings, i.e. one which has been developed in the previous 20 years or redeveloped in the previous 5, the VAT rate charged will be 13.5%. The sale of old properties is exempt from VAT.

The sale of old properties are generally exempt from VAT. In order to avoid a claw back of VAT that the seller may have previously recovered, both parties may jointly opt to have the sale subject to VAT. The sale will be subject to VAT where there is a contract, in connection with the sale, for the property to be developed.

The Capital Goods Scheme (**CGS**) applies where a party has been charged VAT on the acquisition or development of a property and they are engaged in business. CGS is a mechanism for regulating the amount of VAT reclaimed over the VAT-life of a capital good, i.e. a developed property. Where there is a change in the proportion of use for taxable purposes for any year in comparison with the use during the initial 12 months (initial interval), an adjustment of a proportion of the VAT reclaimed will be required.

In relation to the disposal of a property, VAT is paid to Revenue on a bi-monthly VAT return during which the sale closes. For the letting of a property, VAT is paid to Revenue on a bi-monthly VAT return in which an invoice is issued. Where the CGS adjustment applies, VAT is paid to Revenue on a bi-monthly VAT return each year following the financial year end.

## 6.2 Stamp duty

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The stamp duty rate on a transfer of non-residential property (on or after 9 October 2019) is 7.5%. The stamp duty rates on a transfer of residential property are 1% on the first EUR1 million and 2% on the balance of any amount up to EUR1.5 million and 6% on the balance of any amount over EUR1.5 million. A stamp duty rates of 15% can apply to the bulk acquisition of 10 or more residential properties in certain circumstances.

The indirect acquisition of real estate in Ireland through the acquisition of shares in an Irish special purpose vehicle company may, in certain cases, be subject to stamp duty at the rate of 7.5% where the shares derive their value wholly or partly from the underlying real estate, which is normally paid by the buyer.

The Stamp Duty Refund Scheme provides for a refund mechanism where residential dwellings units are built on non-residential land. It operates to reduce the stamp duty rate for qualifying residential developments to 2% where higher stamp duty had been paid on the acquisition of the land.

The scheme was due to expire for new construction commencing after 31 December 2022, but has now been extended by three years to 31 December 2025.

## 6.3 Corporation/Income tax

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Rental income is taxed at the rate of 25% where held by a company which is resident in the jurisdiction or a non resident company carrying on a trade here through a branch or agency subject to deductions which may be available for certain costs incurred in connection with the rental business.

## 6.4 Capital gains tax

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The disposal of the real estate may give rise to capital gains tax for the vendor, currently at the rate of 33%, regardless of where the vendor is resident.

The disposal of shares in a company which derives its value or the greater part of its value from Irish real estate may also give rise to capital gains tax for the vendor, currently at the rate of 33%, regardless of where the vendor is resident.

## 6.5 Local property tax

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The Local Property Tax (LPT), which came into effect from 1 July 2013, is a yearly tax payable on the market value of residential property. The LPT is administered by the Revenue Commissioners. It is a self-assessed tax and the property owner must determine the market value of the property. The LPT charge is based on the valuation of the property as at 1 November 2021. The valuation on this date determines the LPT charge for each year up to 2025.

Certain types of property are exempt from the LPT, including properties unoccupied for extended periods due to illness of the owner, properties purchased, adapted or built for use by incapacitated persons, and properties that are fully subject to local taxation of commercial property, and certain properties used by charitable bodies. There are qualifying conditions necessary to avail of each of these exemptions.



# 7. Real estate finance

Real estate finance involves the financing or refinancing of income-generating property by a borrower. The amount borrowed from the lender will be, among other things (as set out below), secured against the property as security for repayment of the debt.

The comments below relate to the financing or refinancing of an investment property which produces income. For development finance, the key principles below remain but there will be additional considerations for a lender (e.g. reviewing development documents and obtaining step in rights to enable the lender to complete the development if the borrower defaults).

The availability and terms of finance could be a key factor in the investment decision. A lender will be particularly interested in:

1. rental income that will be used to pay interest and other sums due on the loan; and
2. value of the property compared to the loan amount, as selling the property is likely to be how the principal will be repaid.

## 7.1 Interest rate risks

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Interest rates are frequently agreed by reference to a margin above a floating central base rate such as EURIBOR. There is a risk of increase to the interest rates. It is possible to counteract the risk by agreeing fixed interest periods with the lender but these are often time limited and more expensive.

It is common for borrowers to enter into hedging arrangements to protect against interest rate fluctuations – in some cases, the lender will require that a certain amount of the principal loan is hedged.

There are variations but, under a simple interest rate swap, the borrower pays a hedging fee to enable it to:

1. pay a fixed rate of interest to a hedging counterparty (which may be the lender or a third party); and
2. receive a floating rate of interest which is equal to the interest rate due under its loan.

The borrower will use the money received from the hedge to pay interest to its lender. By entering into hedging documents, the borrower reduces the risk of it being unable to pay interest on the loan because of an increase in the rate.

## 7.2 Assets held as security

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A lender will require a legal mortgage over the property as its main piece of security to protect the money advanced under its loan. This allows the lender to take control of the property where the borrower is in default and to use the rental income generated to pay the interest on the loan and/or sell the property to repay the principal loan amount owed.

As the land is (or will become) registered at the Land Registry, there are usually no physical assets held as security but the lender relies on registration in the public records.

## 7.3 Further collateral agreements

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In addition to the legal mortgage, the lender will often require additional collateral documents to be entered into by way of security. Depending on the circumstances, the following collateral agreements may be used:

**Floating Charge:** This relates to corporate borrowers only and is more typical where either the borrower is a special purpose vehicle (SPV) or there is a refinance of a portfolio of properties held by a single entity. This provides the lender with security across the whole of the borrower's business and undertaking.

**Share pledge:** If the borrower is corporate and is an SPV or is the top company in a group of companies, the lender may take security over the shares in the borrower to allow for a potential share exit rather than having to deal with the underlying property.

**Guarantee:** If the borrower is an SPV or is of weak financial covenant strength, the lender may ask for a parent company or third party guarantee. This could be capped or limited in time.

**Intercreditor Deed:** This applies where there are two lenders that are each creditors of the same borrower. One creditor can agree to subordinate its security interest to that of another by an intercreditor deed. The agreement will regulate the subordination of the debt as well as the security and will cover matters such as rights of enforcement.

**Assignment of Rental Income:** The borrower will be required to assign the benefit of the rental income to the lender. There will be controls over which account rental income is paid into and how much can be withdrawn by the borrower.

**Management Agreement/Duty of Care Deed:** As the property is income producing, the lender may require the formal appointment of a managing agent together with a duty of care deed to the lender. This ensures rental income is paid into the correct account and also gives the lender additional comfort that the property will remain income producing and well maintained.

**Charge over accounts:** The lender will take security over any rental income accounts or other accounts e.g. escrow sums or other assets of the borrower.

**Hedging:** As above, hedging is likely to be required in relation to some or all of the interest due and this would typically be an interest swap agreement. The lender will take security over the borrower's rights under the interest swap arrangement.

## 7.4 Filings and/or Registration of security

In accordance with section 409 of the Companies Act 2014 (as amended) (the "2014 Act"), for an Irish incorporated company, details of security taken should be registered at the Companies Registration Office within 21 days of its creation in order to preserve enforceability. The fee for the registration of security at the Companies Registration Office is EUR40.

Where a parcel of real estate which is registered in the Land Registry is charged, the charge can also be registered at the Land Registry. There is a fee payable but it does not generally exceed EUR175.

A charge in relation to real estate registered in the Registry of Deeds can be registered at the Registry of Deeds. There is a fee payable but it does not generally exceed EUR50.

## 7.5 Taxation on the creation of security

There is no stamp duty or other tax payable on the creation of a security interest. Nor are there any mandatory notary/authentication fees (documents are generally only notarized in connection with the authentication procedures for foreign jurisdictions).

Enforcement of the security does not create a taxable event in itself although tax issues may arise in the context of the enforcement process, particularly on the sale of real estate assets.

Where the lender is acquiring a fixed charge on book debts, the lender is required to submit a section 1001 notice on the Revenue Commissioner within 21 days of the creation. Where this has not taken place, the Revenue Commissioners can require a holder of a fixed charge over book debt to pay amounts received to the Revenue to discharge outstanding VAT or employer contribution liabilities. This claim can be limited where a section 1001 notice is served on the Revenue Commissioner within 21 days of the creation.



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This guide was written and updated predominantly by our Real Estate team.

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