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Real Estate

Ireland

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The Maples Group

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IRELAND

Law and Practice

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1. General

1.1 Main Sources of Law

The main source of real estate law is statute. The key legislative provisions are set out in the Land and Conveyancing Law Reform Act 2009 (the 2009 Act), the Registration of Title Act, 1964 (the 1964 Act), the Registration of Deeds and Title Act, 2006, the Landlord and Tenant Acts, 1967-2019 (LTA) and the Residential Tenancies Acts, 2004 to 2019 (the RTA).

The other main source of real estate law is case law, which is derived from the judgments of the Irish courts.

1.2 Main Market Trends and Deals

The level of investment in the Irish commercial real estate market reached a new record high of EUR7.2 billion in 2019. The completion of the sale of Green REIT PLC to Henderson Park Capital for EUR1.34 billion (the largest direct asset sale ever in the Irish market) and 18 other transactions with a value in excess of EUR100 million boosted investment figures significantly.

Activity in the private rented sector (PRS) continues to increase with more than EUR2 billion spent by institutional investors on existing and build-to-rent residential schemes throughout 2019. Significant deals in this area included Greystar's acquisition of Blocks B and E at the Dublin Landings development in Dublin Docklands for a reported EUR154.6 million and the sale of 166 apartments at Mount Argus, Harold's Cross, Dublin for EUR93 million by Marlet Property Group.

The hotel/licensed market has been robust this year. Notable transactions included the sales of the Conrad Hotel, Portmarnock Hotel and Golf Links, the Central Hotel and the Marker Hotel.

The flexible office sector also continues to grow in Dublin. 3% of take-up in the Dublin office market during 2019 was to flexible office providers, with ten transactions to serviced office providers reported during 2019. During 2019, 51% of total investment in the Irish market comprised offices.

1.3 Impact of Disruptive Technologies

The most significant obstruction to the use of blockchain technology, decentralised finance, proptech and other technologies in the legal sector in Ireland is the absence of regulation and the fact that these technologies have no fixed jurisdiction.

While blockchain and proptech should result in increased efficiencies in many areas of the Irish commercial real estate market and in the registration of title, it is unlikely to have a significant

impact in the Irish real estate market in the next 12 months, given the absence of regulation.

1.4 Proposals for Reform

There are no current proposals for reform which would significantly impact real estate investment, ownership or development in Ireland.

2. Sale and Purchase

2.1 Categories of Property Rights

The categories of property rights which can be acquired in Ireland are freehold title, which confers absolute ownership, or leasehold title, which confers ownership for the period of years granted by the relevant lease. A leasehold interest is based on a contractual relationship between the lessor and the lessee.

2.2 Laws Applicable to Transfer of Title

Historically, Irish law was based on legislation pre-dating the establishment of the Irish State. The 2009 Act replaced much of the old law and modernised this area of law and conveyancing practice.

The RTA governs the residential property sector. The 2009 Act governs the transfer of industrial, office, retail or hotels.

2.3 Effecting Lawful and Proper Transfer of Title

The Land Registry was established in 1892. When ownership of a property is registered in the Land Registry, the deeds are filed with the Land Registry and all relevant particulars concerning the property and its ownership are entered on folios which form the registers maintained by the Land Registry. In conjunction with folios, the Land Registry also maintains maps (referred to as filed plans). Both folios and filed plans are maintained in electronic form.

The Registry of Deeds was established in 1707 to provide a system of voluntary registration for deeds which affect property. The purpose was to give priority to registered deeds over unregistered but "registerable" deeds. There is no statutory obligation to register a deed in the Registry of Deeds but failure to do so may result in a loss of priority.

The use of title insurance in property transactions in Ireland is not widespread. Typically, title insurance is used where there are missing title deeds (which may include insuring against unknown covenants in missing documents) or where there are identified defects on title (such as restrictive covenants impacting on the development potential of a property).

2.4 Real Estate Due Diligence

A buyer's lawyer will investigate the seller's title to the property to ensure a buyer will acquire a good marketable title. The underlying principle is one of caveat emptor (buyer beware).

To ensure consistency in drafting and to avoid protracted negotiations, the Law Society of Ireland produces a template contract for sale for property transactions. This template document is an attempt to give a fair balance of rights between buyers and sellers.

This contract for sale requires the seller to list the documentation and searches to be provided in relation to the property and incorporates the Law Society of Ireland General Conditions of Sale (the General Conditions). The General Conditions make a number of assumptions about the property and place certain disclosure obligations on a seller, which the seller can only exclude by inserting a bespoke special condition in the contract for sale. In this way, the buyer should be on notice of any deviations from the template document. In commercial property transactions, it is normal for the seller to seek to limit the warranties being provided in the General Conditions. Where the seller's knowledge of the property is limited, for example, in a sale by a receiver, liquidator or mortgagee, it is usual to exclude or limit many of the warranties.

The buyer's lawyer also carries out a number of searches against both the seller and the property. The seller must explain and/or discharge any adverse matters resulting from the searches which affect the seller and/or the property.

The buyer's lawyer will also review the VAT profile of the property, using a Law Society standard set of Pre-Contract VAT enquiries which are completed by the seller and then reviewed.

The General Conditions were updated in January 2019; the primary change to the General Conditions requires the buyer to investigate and satisfy itself as to the title pre-contract, which follows the approach taken in the market for commercial real estate transactions prior to 1 January 2019 (previously, in most commercial real estate transactions the General Conditions were modified by way of special condition to provide for this).

2.5 Typical Representations and Warranties

As outlined above, the principle of caveat emptor is diluted somewhat by the General Conditions, which place a number of warranties and disclosure requirements on the seller. For instance, the General Conditions include numerous warranties relating to matters such as notices, planning compliance, boundaries, easements and identity. These warranties can be excluded or amended by way of special condition by agreement between the parties. In addition to any specific disclosures, sell-

ers often limit the warranty provided in respect of planning and building control compliance by reference to documentation and opinions/certificates of compliance with planning and building regulations in the seller's possession and provided to the buyer. Where the property is being sold in an enforcement scenario (ie, by a receiver, a liquidator or by a mortgagee), it is usual that many of the warranties contained in the General Conditions are expressly excluded or varied/limited by reference to knowledge.

There are also implied covenants as to ownership contained in a purchase deed (which are detailed in the 2009 Act).

A seller can be liable for misrepresentation. General Condition 29 of the General Conditions provides that a buyer shall be entitled to compensation for any loss suffered by the buyer as a result of an error which includes any non-disclosure, misstatement, omission or misrepresentation made in a contract for sale. However, as outlined above, a seller may seek to exclude or vary this condition by inserting an appropriate special condition in the contract for sale, stating that the buyer shall not rely on any representations made by the seller.

In addition, it is an offence under the 2009 Act for a seller fraudulently to conceal or falsify material information relating to their title to the property.

2.6 Important Areas of Law for Investors

An investor should ensure that the title to the property is properly investigated and is good and marketable, that the property complies with the Planning and Development Acts 2000–2019 (the Planning Acts) and environmental laws, and that the property benefits from adequate easements for access and services. Investors will also need to ensure they understand the application of Irish tax law to the acquisition of the property.

2.7 Soil Pollution or Environmental Contamination

The buyer may have secondary liability for soil pollution or environmental contamination of a property even if that buyer did not cause the pollution or contamination. If the person or entity which caused the pollution or contamination cannot be identified, the current owner of the property could then become liable under the applicable environmental legislation for remediation.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

The Planning Acts govern planning and zoning matters in Ireland and regulate the zoning and permitted uses of areas through a variety of development, sustainability, landscape conservation and special amenity plans. The local planning author-

ity where a property is situated is responsible for enforcement of the Planning Acts.

Each local authority has a development plan which sets out the planning policy of the local authority for a six-year period.

A buyer's solicitor should carry out a planning search as part of the planning due diligence at the outset of a transaction and this search should specify the zoning applicable to the property.

The State Authorities (Public Private Partnership Arrangements) Act, 2002 (the 2002 Act) enables local authorities to enter into joint-venture Public Private Partnership (PPP) arrangements with the private sector. A PPP is an arrangement between the public and private sector for the provision of infrastructure or services.

Under this model, contractors in the private sector become long-term providers of a service, rather than merely building an asset upfront. This allows local authorities to plan resources and monitor services, rather than provide them directly.

2.9 Condemnation, Expropriation or Compulsory Purchase

Local authorities, the National Asset Management Agency (a body established by the Irish government in 2009 to function as a "bad bank" acquiring property loans from Irish Banks) (NAMA) and the Industrial Development Agency (Ireland's inward investment promotion agency) (IDA) all have the ability to purchase lands compulsorily in connection with their statutory functions.

Local authorities can compulsorily acquire lands in the following circumstances:

- where property is derelict and poses a danger in the community;
- for the purpose of developing infrastructure; and
- for conservation/preservation purposes.

NAMA has extensive statutory powers to acquire land compulsorily where it is necessary to allow NAMA to fulfil its statutory function and derive the best value from the property assets secured to it.

The IDA also has the ability to acquire property compulsorily for the purpose of industrial development. A key function of the IDA's role is acquiring land for development purposes and, as a result, the IDA's power to acquire land compulsorily is quite broad. The Industrial Development Act, 1986, as amended by the Industrial Development (Amendment) Act 2018 (the IDA Act) provides that the powers under the IDA Act may be

exercised in respect of land not immediately required if, in the opinion of IDA, the land will or is likely to be required for the purpose of industrial development in the future and whether or not, at the time of the exercise of the powers concerned, an industrial undertaking is identified for such a purpose.

2.10 Taxes Applicable to a Transaction

Any transfer of Irish real estate and certain other property, including shares, is liable to stamp duty payable to the Revenue Commissioners. Stamp duty is charged on the consideration payable for the property, or the market value in certain instances. Usually, the buyer is liable for payment of stamp duty, although in certain transactions, such as voluntary transfers, both parties can be liable.

Where an instrument is liable to stamp duty, a stamp duty return must be filed online via the Revenue Commissioner's e-stamping system within 44 days. Failure to file and pay within this period will result in late filing and interest charges.

The rate of stamp duty payable on the transfer of non-residential (commercial) property was increased from 6% to 7.5% in the 2020 Budget.

Stamp duty on the transfer of Irish shares is generally charged at 1% of their value. Transfers of shares or interests of corporate entities (which includes Irish and non-Irish incorporated companies) and partnerships can be subject to 7.5% duty where the entity derives over 50% of its value from Irish land which is intended for development, held as trading stock, or held with the sole or main object of realising a gain on disposal. This provision is subject to a number of conditions, including that the transfer is one which transfers control of the land. Transfers of minority holdings may not be impacted.

The rate of stamp duty on transfers of residential property is 1% on consideration up to EUR1,000,000 and 2% on consideration over this threshold.

Where non-residential property is transferred and is subsequently utilised for the construction of residential accommodation, a stamp duty refund is available which effectively reduces the rate from 7.5% to 2%. This scheme is subject to a number of conditions.

2.11 Legal Restrictions on Foreign Investors

There are no restrictions on foreign investors acquiring real estate in Ireland. All investors, including foreign investors, will have to comply with anti-money laundering legislation by providing certain information and documentation to verify their identity and the source of funds.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions have traditionally been financed by banks, but recently there has been an increase in the number of non-bank lenders in the Irish market advancing both senior and mezzanine debt to fund the acquisition and development of commercial property.

The choice between bank financing or financing by alternative lenders is influenced by the commercial terms on offer. Alternative lenders are not subject to the regulatory restraints imposed on banks, and, as a result have a different appetite for risk. There is a trend towards alternative lenders providing development finance at much higher loan-to-value ratios than banks. Such financing is usually made available at a higher margin with prepayment, arrangement and exit fee mechanisms, as well as equity interests in the transactions.

3.2 Typical Security Created by Commercial Investors

A lender will provide finance that is secured over the relevant property and that security will be registered as first-ranking in the appropriate property register, thereby securing priority of the security for the benefit of the lender. Where a lender is providing finance for development purposes, it would be normal for the lender to receive collateral warranties from the members of the professional team, such as architects, designers and engineers, as well as step-in rights.

3.3 Restrictions on Granting Security over Real Estate to Foreign Lenders

There are no restrictions on the granting of security over real estate to foreign lenders or on repayments to foreign lenders; lending to an Irish company is not a regulated financial services activity and, pursuant to the Companies Act 2014 (the Companies Act), the directors of an Irish company have the authority to exercise the company's power to borrow and to mortgage or charge its property, subject to Irish law and its constitutional documents.

On the basis that the Foreign Investment Risk Review Modernisation Act of 2018 (FIRRMA) is specific to real estate located in the United States or in close proximity to a United States military installation or property of the United States Government that is sensitive for reasons relating to national security, no implications for Irish real estate finance transactions are envisaged.

3.4 Taxes or Fees Relating to the Granting and Enforcement of Security

A fee of EUR40 is payable in respect of the registration of security with the Companies Registration Office (the CRO). It is a statutory requirement for security created by an Irish company to be registered with the CRO within 21 days. Failure to comply with this timeframe for registration may only be remedied by a costly court application.

The creation of security does not attract tax, although a written notification must be made to the Revenue Commissioners by both the charge-holder and any subsequent transferee of that charge where a company creates a fixed charge over its book debts.

Where repayments under a security document or loan agreement include interest payments and that interest has an Irish source, a 20% withholding tax must be applied to the payments in Ireland. There are a wide range of exemptions available to companies who make payments of Irish-source interest to foreign lenders. Foreign lenders which are "qualifying lenders" should be entitled to receive Irish-source interest payments free from the withholding tax; qualifying lenders include certain foreign banks, companies resident for tax purposes in the EU or some jurisdictions that have agreed a double tax treaty with Ireland and certain treaty lenders.

The sale of Irish real estate, or of unquoted shares in companies deriving the greater part of their value from Irish real estate, will be subject to Irish capital gains tax. The gain is calculated on the proceeds of sale minus acquisition and enhancement costs, and minus the incidental costs of acquisition and the incidental costs of disposal.

Irish capital gains tax is subject to a withholding procedure applicable to the seller's capital gains tax liability. The procedure requires the buyer to withhold 15% of the consideration and pay this amount to the Revenue Commissioners unless the seller provides a clearance certificate from the Revenue Commissioners. A capital gains clearance certificate is automatically available on application to the Revenue Commissioners if the seller is resident in Ireland for tax purposes. A non-resident seller will need to agree and discharge its capital gains tax liability in order to obtain a clearance certificate. This withholding procedure only applies to a buyer where the consideration payable to the seller exceeds the relevant threshold at the date of the transfer agreement (currently EUR500,000 or EUR1,000,000 if the asset disposed of is a house or an apartment).

The current rate of capital gains tax is 33%.

A registration fee of EUR175 is payable to register security in the Land Registry and a fee of EUR50 is payable to register security in the Registry of Deeds.

3.5 Legal Requirements Before an Entity Can Give Valid Security

The Companies Act prohibits the provision of financial assistance by an Irish company in the form of a guarantee, security or otherwise to a person that is purchasing, or subscribing for shares in the company or its holding company. There is a validation procedure (referred to as the summary approval procedure) by which financial assistance may be approved in advance. This requires a majority of the directors of the company to make a declaration that, amongst other things, in their opinion the company will remain solvent for 12 months following the giving of the financial assistance. The shareholders must then, within 30 days of the declaration, resolve to approve the financial assistance. Both the declaration and resolution must be filed with the CRO within the prescribed time periods.

The Companies Act also contains a prohibition on Irish companies providing guarantees or security in relation to the debts or obligations of its directors (or directors of its holding company) or persons connected to such directors (including family members and spouses). There is an exemption from this prohibition if the debts or obligations are relating to another group company.

There is a general requirement that Irish companies derive benefit from transactions into which they enter. It is usually possible to demonstrate benefit if the Irish company is borrowing for its business activities and/or providing a guarantee or security in relation to the debts or obligations of another group company.

3.6 Formalities When a Borrower Is in Default

A receiver is typically appointed by a secured creditor under contractual powers granted by the debtor under the terms of the security document. The receiver's function is to take possession of the secured assets (including any real estate) and to discharge any unpaid indebtedness from the realisation proceeds.

The Companies Act provides that a receiver of the property of a company has the power to do all things necessary or convenient to be done for, or in connection with, or as incidental to, the attainment of the objectives for which the receiver was appointed and the Companies Act then specifies powers which that receiver may exercise (in addition to the powers conferred on him or her by the order or instrument pursuant to which he or she was appointed or by any other law).

The usual procedure for the appointment of a receiver is as follows:

- the security-holder notifies the borrower that an event of default has occurred under the facility and demands repayment in full of the facility by issuing a letter of demand and serving it on the borrower;
- the borrower must be given an opportunity to repay the debt, but the time period should be no more than is necessary to effect the mechanics of payment, ie, instruct funds to be transferred (in practice, one business day is standard); and
- after close of business on the day on which the demand is made, the security-holder will, pursuant to the powers granted under the security document, appoint a receiver over the assets of the borrower by executing a deed of appointment of receiver. The appointment becomes effective once accepted in writing by the receiver.

It is also possible to apply to the High Court to have a receiver appointed over assets, if (for example) a trigger event set out in the security document for the appointment of a receiver has not yet occurred, but the secured assets are in jeopardy.

Before certain security interests created by a company will be valid, effective and have priority over subsequent security interests, they must be registered in the CRO within strict time periods or the charge may be rendered void as against the liquidator and any creditor of the company and priority will be lost. Where a certificate of charge has been issued by the Registrar, it is conclusive evidence that the charge has been registered. The priority of charges runs from the date of filing and not from the date of creation of the charge.

The rules on the priority of charges take effect subject to the rules on priority contained in any other enactment governing the priority of such charges. Consequently, the priority of charges created by companies over real estate will be determined in accordance with the order in which they are registered in the Irish Land Registry or the Irish Registry of Deeds, as the case may be.

3.7 Subordinating Existing Debt to Newly Created Debt

As set out in **3.6 Formalities When a Borrower Is in Default**, a real estate lender must register the charge/mortgage with the CRO in order to perfect security. Once the security is perfected, newly created debt cannot obtain priority over existing debt, other than by agreement.

The priority of debt can also be structured through the following:

- contractual subordination;
- structural subordination; or

- inter-creditor arrangements.

3.8 Lenders' Liability Under Environmental Laws

Lenders may be reluctant to enforce security in circumstances where the borrower has environmental liabilities due to the application of the principle of strict liability under Irish environmental legislation.

3.9 Effects of Borrower Becoming Insolvent

Under Irish law, both the creation of security and the making of payments by a company within six months prior to it being placed in an insolvent liquidation will be liable to be set aside as an unfair preference if the company intended to prefer the creditor benefiting from the transaction over its other creditors. In the case of a connected person, the period is extended to two years and the transaction is deemed, unless the contrary is shown, to have been done with a view to giving that person a preference over the other creditors, and to be an unfair preference and invalid accordingly.

Where a company is being wound up, a floating charge on the undertaking or property of the company created within 12 months before the date of commencement of the winding up (or two years if the floating charge is created in favour of a connected person) shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid. This provision does not apply to (a) money actually advanced or paid, or the actual price or value of goods or services sold or supplied, to the company at the time of or subsequent to the creation of, and in consideration for, the charge, nor (b) interest on that amount at the appropriate rate.

3.10 Consequences of LIBOR Index Expiry

The key consequences for borrowers are:

- uncertainty regarding forward-facing term rates, which present practical and operational difficulties and impact on the borrower's ability to manage cash flow;
- existing fall-back rates which are triggered if LIBOR is unavailable are likely to reflect a higher cost of funding and therefore increase the interest payable on a loan. Existing credit agreements envisage any period during which LIBOR might be unavailable as being brief, such that any increased interest costs would be manageable. The risk to a borrower of LIBOR expiring is increased where the loan has a significant period left to run.

The key mechanism for managing the risk of the anticipated expiry of LIBOR on an existing facility is to renegotiate the provisions around LIBOR and the application of a replacement benchmark rate when LIBOR is unavailable. Whilst uncertainty remains as to what will replace LIBOR in the event that it

expires, the optimum approach in relation to new facilities is to refer to one of the new rates which have been proposed as alternatives to LIBOR by the Financial Stability Board and to include additional flexibility to make the process of amending documents if necessary as easy as possible in the future. From a borrower's perspective, it would be prudent to ensure that the costs of any such amendments are not borne solely by the borrower.

4. Planning and Zoning

4.1 Legislative and Government Controls Applicable to Strategic Planning and Zoning

The Planning Acts apply to strategic planning and zoning and regulate the zoning and permitted use of areas.

The relevant local authority is the entity responsible for controlling land use and occupation. An independent third-party appeals board, An Bord Pleanála (the Bord), is responsible for the determination of planning appeals.

4.2 Legislative and Government Controls Applicable to Design, Appearance and Method of Construction

The design and construction of buildings is regulated by the Building Control Acts 1990–2014, the Building Regulations 1997–2014 and the Building Control Regulations 1997–2018 (together Building Regulations). The Building Regulations provide for proper building standards, fire safety, workmanship, conservation of energy and access for people with disabilities.

4.3 Regulatory Authorities

The relevant local authority is the entity responsible for controlling land, building use and occupation.

The Bord is responsible for the determination of planning appeals. Anyone applying for planning permission, and anyone who has made written submissions or observations to the planning authority on a planning application, can appeal a subsequent planning decision to the Bord.

Planning permission is required for any development of land or property, unless the development is exempt from this requirement under legislation. "Development" includes the carrying-out of works on land or buildings and the making of a material change of use of land or buildings.

Planning permission may not be required for certain non-structural works to the interior of a building or for works which do not materially affect the external appearance of the structure. However, an application to the local authority for a Fire Safety

Certificate may be required in accordance with Building Regulations.

The Building Regulations require a commencement notice to be lodged with the building control authority prior to commencing works, together with plans and specifications, a preliminary inspection plan and various certificates and notices. It is an offence not to submit a commencement notice and failure to do so cannot be rectified at a later date. A Certificate of Compliance on Completion must be submitted to and registered by the building control authority before the building or works may be opened, occupied or used.

In addition, certain licences may be required depending on the type of property and the type of development proposed. These include licences issued under the Environmental Protection Agency Acts 1992 to 2011, the Water Services Acts 2007 to 2017, the Air Pollution Acts 1987 and 2011 and the Waste Management Acts 1996 to 2011.

4.4 Obtaining Entitlements to Develop a New Project

If the planning authority consents to an application for planning permission, it will issue a decision to grant planning permission and notify the relevant parties of its decision. The applicant and any third party who made a submission or observation in relation to the application will have four weeks to appeal the decision to the Bord. In certain circumstances, a third party who did not make a submission or observation may also appeal the decision. The Bord has a statutory timeframe to determine appeals within 18 weeks of receipt of an appeal.

Recent planning legislation provides for a fast-track planning process for large-scale housing developments called “strategic housing developments”. This process applies for a limited period up to 31 December 2021. Strategic housing developments must consist of 100 or more houses or 200 or more student bed-spaces on land zoned residential or mixed residential and other uses (provided housing constitutes at least 85% of the total gross floor area of the development). There is a strict 16-week period for the Bord to make its determination where there is no oral hearing involved. Should it fail to abide by this timeline it must pay a penalty to the applicant.

4.5 Right of Appeal Against an Authority’s Decision

Anyone applying for planning permission and anyone who has made written submissions or observations to the planning authority on a planning application can appeal a subsequent planning decision to the Bord. See **4.4 Obtaining Entitlements to Develop a New Project** for further detail.

4.6 Agreements with Local or Government Authorities

As outlined in **2.8 Permitted Uses of Real Estate Under Zoning or Planning Law**, the 2002 Act enables local authorities to enter into PPP arrangements with the private sector. Types of PPPs include Design-Build-Finance-Maintain PPP (this may be used to provide schools and similar infrastructure where the public sector has use of the asset but does not require the private partner to provide the service, ie, in the case of a school, the public sector employs the teaching staff) and Design-Build-Finance-Operate-Maintain PPP (this may be used in the case of a water-treatment plant where the private sector staffs the plant to ensure service delivery on behalf of the public sector contractor).

4.7 Enforcement of Restrictions on Development and Designated Use

The Planning Acts govern restrictions on development and permitted use. The procedure for planning offences is as follows:

- issue of a warning letter;
- service of an enforcement notice; and
- institution of legal proceedings.

The warning letter, which must be served within six weeks of receiving a complaint, allows a developer up to four weeks to rectify or make a submission in respect of the issue.

Regard must be had to any submission received from a developer or owner when making a decision whether or not to serve an enforcement notice. An enforcement notice sets out the requirements of the local authority to rectify the issue and also contains a timeframe within which the work must be completed. Non-compliance with an enforcement notice is an offence and the local authority may institute legal proceedings in the District Court.

In urgent cases, the local authority may apply to the Circuit or High Court for an order directing that particular actions take place or cease, as the case may be. The statute of limitations applies to planning enforcement for unauthorised development. Typically, this means that the period during which enforcement action for breach of a condition of a planning permission is limited to seven years from the life of the planning permission (usually five years). This is often referred to as the “seven-year rule”. Exceptions to this are contained in the Planning Acts in respect of developments involving quarries and peat extraction.

5. Investment Vehicles

5.1 Types of Entities Available to Investors to Hold Real Estate Assets

Irish companies and non-Irish companies, as well as Real Estate Investment Trusts (REIT), are used by investors to acquire real estate assets. Subject to meeting certain criteria, a REIT will not be liable to either corporation/income tax on its property rental income or property profits, or capital gains tax on disposals of assets of its property rental business. The 2020 Budget has limited the existing provision which allows a REIT to avoid any latent capital gains tax exposures when it ceases to be within the regime, so that the provision applies only where REITs have been in operation for a minimum of 15 years.

In recent years, non-resident and institutional investors have most commonly used Irish regulated funds (or Qualifying Investor Alternative Investment Funds (QIAIFs)) to acquire Irish real estate. QIAIFs are regulated by the Central Bank of Ireland (the CB). QIAIFs may be established as Irish Collective Asset-management Vehicles (ICAVs), unit trusts, investment companies, common contractual funds or investment limited partnerships. The ICAV is by far the most popular corporate structure for a QIAIF investing in real estate.

5.2 Main Features of the Constitution of Each Type of Entity

Regulated Fund Structures

The ICAV is a corporate vehicle similar to an investment company and may be structured as an umbrella fund with segregation of liability between sub-funds.

The Instrument of Incorporation is the ICAV's constitutional document.

Unregulated Structures

Irish companies

A Private Company Limited by Shares (LTD) is one type of Irish company. This is a simplified entity which has the capacity of a natural person. The constitution of an LTD comprises one document. The LTD does not have an objects clause and has full unlimited capacity to carry on any legal business, subject to any restrictions in other legislation.

An Irish company may also be formed as a Designated Activity Company (DAC). The DAC is a private limited company. The constitution of a DAC comprises a memorandum of association and articles of association. The memorandum of association sets out the objects of the DAC and the DAC has the capacity to do any act or thing stated in the objects.

A Public Limited Company (PLC) is another type of Irish company. The liability of members is limited to the amount, if any, unpaid on shares held by them. Similar to a DAC, the constitution of a PLC comprises a memorandum of association and articles of association. The memorandum of association sets out the objects of the PLC and the PLC has the capacity to do any act or thing stated in the objects.

REITs

A REIT is a type of Irish PLC aimed at facilitating collective investment in real estate. The constitution of a REIT comprises a memorandum of association and articles of association which will contain provisions typical of an Irish public limited company. The articles of association will impose certain restrictions and obligations on the shareholders of the company to enable the company to qualify as an Irish REIT.

5.3 Minimum Capital Requirement

There is no mandatory minimum capital requirement for Irish private companies.

The CB does not apply a minimum capital requirement for QIAIF ICAVs, which are externally managed by an AIFM. However an internally managed QIAIF ICAV must have a minimum paid-up share capital equivalent to EUR300,000.

Additionally, ICAVs structured as QIAIFs must apply a minimum initial subscription requirement of EUR100,000 per investor. Exemptions from this minimum subscription requirement can be sought by certain categories of knowledgeable investors, including the directors of the QIAIF, the investment manager and its senior employees.

5.4 Applicable Governance Requirements

REITs

REITs must comply with the corporate governance provisions set out in the Companies Act applicable to public limited companies. In addition, any market on which a REIT's shares are admitted to trading will have regulatory, listing and other relevant rules, as applicable.

The UK Corporate Governance Code 2018 issued by the UK Financial Reporting Council (the UK Code) sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders. Irish REITs listed on the London Stock Exchange and/or Irish Stock Exchange (ISE) are required to report on how they have applied the main principles of the UK Code. The Irish Corporate Governance Annex to the UK Code published by the ISE contains additional requirements applicable to Irish REITs listed on the ISE.

Regulation (EU) No 596/2014 on market abuse and the Transparency (Directive 2004/109/EC) Regulations 2007 apply in respect of Irish REITs listed on EU-regulated markets.

ICAVs

An ICAV is represented by its board of directors (the Board), at least two of whom must be Irish-resident. The appointment of directors is subject to the prior approval of the CB under its fitness and probity regime. The Board has a general fiduciary duty to ensure that the requirements of the ICAV Act are complied with, and remain ultimately responsible for the management of the ICAV and the supervision of all delegates thereof.

The Board must observe Irish Funds' Industry's Corporate Governance Code (the Code). The Code aims to ensure that the board performs effective oversight of the ICAV's activities. Among other subjects, the Code contains recommendations in relation to board composition, which include the requirement for at least one representative of the AIFM/investment manager and at least one director to be fully independent of all service-providers to the ICAV.

ICAVs are required to be audited annually. ICAVs must also submit their annual reports and monthly statistical returns to the CB.

Each ICAV is required to appoint numerous regulated service-providers to carry out various governance roles. Most significantly, AIFMD requires that each QIAIF must identify an AIFM, which is the entity primarily responsible for the investment management and risk management of the QIAIF, subject to the overall supervision of the Board.

It is also possible for an ICAV to be authorised as an internally managed QIAIF, whereby the Board assumes the responsibility as the AIFM.

Every ICAV must appoint an independent Irish-regulated depositary. The depositary carries out multiple functions, including safekeeping of assets, regulatory oversight and cash-flow monitoring obligations. In addition, the depositary must enquire into the conduct and management of the ICAV in each financial year and report to the shareholders.

5.5 Annual Entity Maintenance and Accounting Compliance

Annual maintenance and accounting compliance costs vary from structure to structure.

6. Commercial Leases

6.1 Types of Arrangements Allowing the Use of Real Estate for a Limited Period of Time

A person or entity may enter into either a lease or a licence with the owner of a property in order to occupy and use the property, without needing to acquire the property outright.

A licence is more suitable for shorter-term arrangements and a licensee under a licence does not obtain exclusive possession of the property but rather has a mere permission from the owner to enter the property. A licence does not transfer any estate or interest in the property to the licensee and may not be assigned or transferred to a third party by the licensee.

In contrast, a lease confers a legal interest in the property to the tenant under the lease and typically this interest may be assigned or transferred, subject to the requirement to obtain consent from the landlord and subject to the provisions of the lease.

6.2 Types of Commercial Leases

There are two main categories of commercial leases, a lease on a short-term basis for a term of up to five years, or a lease on a medium- to long-term basis, usually for a term from ten years to 25 years.

6.3 Regulation of Rents or Lease Terms

Commercial leases are freely negotiable, subject only to statutory provisions.

6.4 Typical Terms of a Lease

Recent legislation and market conditions have resulted in most leases having shorter terms, with the maximum term usually ten to 15 years.

Generally, commercial leases in Ireland are full repairing and insuring leases and a tenant will have extensive repairing obligations. The obligations are either imposed directly by a repair covenant in the lease or, in the case of a multi-let development such as an office block, shopping centre or business park, the obligations may be imposed indirectly through a service charge which imposes an obligation on the tenant to reimburse the landlord for repair works carried out to the structure and common areas of the development.

Rent is normally payable quarterly in advance. While open to negotiation between the parties, the typical quarterly payment days or "Gale Days" are January 1st, April 1st, July 1st and October 1st in each year.

6.5 Rent Variation

Usually, a commercial lease will provide for a rent review to occur periodically throughout the lease, generally at five-yearly intervals. The rent may be either increased or decreased. Previously rent review clauses contained upwards-only provisions, which meant that the rent under the lease could only be increased; however, the 2009 Act altered this position and now any open market rent-review provisions in a commercial lease must be on an upwards or downwards basis. Commercial landlords and tenants employ certain mechanics on occasion to control the variation in the rent. For example, a fixed or stepped rent over the term of a lease may be provided for or the rent may be linked to the variation in the Consumer Price Index.

6.6 Determination of New Rent

Usually, rent is reviewed upwards or downwards to market rent and will be agreed between the landlord and the tenant. If agreement cannot be reached between the parties, the lease may provide for referral to an expert or an arbitrator for determination.

6.7 Payment of VAT

In the case of a commercial/business lease, a landlord may elect (but is not obliged) to charge VAT on the rents, in which case VAT applies at the relevant rate (currently 23%).

6.8 Costs Payable by Tenant at Start of Lease

Stamp duty is payable on commercial leases at 1% of the average annual rent. It is the tenant's responsibility to discharge the stamp duty. A tenant may also be obliged to pay insurance rent and any initial service charge contribution and, if required in the circumstances, a rent deposit, on the commencement of a lease.

6.9 Payment of Maintenance and Repair of Communal Areas

A landlord or management company will normally maintain common areas in a multi-let building or estate and recoup the costs from the tenants through a service charge.

6.10 Payment of Utilities and Telecommunications

Normally, a tenant is responsible for all outgoings consumed on the premises and usually these are metered and paid directly by the tenant to the provider. Utilities and telecommunications consumed on the common areas are normally paid by the landlord and recouped from the tenants via a service charge.

6.11 Insuring the Real Estate that is Subject to the Lease

Normally, the landlord will insure the property and the tenant will refund the amount of the premium to the landlord as insurance rent under the lease. Typical risks insured against for property damage are fire, flooding, storm, malicious damage,

subsidence and lightning. Terrorism insurance is also available in the Irish market.

6.12 Restrictions on Use of Real Estate

The lease will contain a user clause outlining the permitted use of the property by the tenant. If a tenant wishes to change the permitted use, they normally need the consent of the landlord (legislation provides that such consent may not be unreasonably withheld). Planning laws also govern the use of a property.

6.13 Tenant's Ability to Alter and Improve Real Estate

Depending on the provisions of the lease, a tenant may be permitted to alter or improve the property, usually subject to the landlord's consent and the tenant's obligations on yield-up of the premises, which normally oblige the tenant to return the property to its original condition. Structural alterations are generally prohibited, with internal non-structural alterations permitted subject to the prior written consent of the landlord.

6.14 Specific Regulations

The RTA govern leases of residential property in Ireland provided the term does not exceed 35 years. Any residential property for lease must meet certain standards under the Housing (Standards for Rented Houses) Regulations 2017. The LTA govern leases of industrial, office, retail or hotel space.

6.15 Effect of Tenant's Insolvency

Commercial leases usually include a provision entitling a landlord to terminate a lease by way of forfeiture if the tenant becomes insolvent. If the obligations of the tenant under the lease are guaranteed by a guarantor then the guarantor may be required to take a new lease on the same terms as the previous lease for the length of the term remaining.

6.16 Forms of Security to Protect Against Failure of Tenant to Meet Obligations

Normally, where a tenant's covenant strength is less than that required by a landlord, the landlord will seek either a surety to join in the lease to guarantee the obligations of the tenant or a bank guarantee or rental deposit.

6.17 Right to Occupy After Termination or Expiry of a Lease

Where a commercial tenant has been in continuous occupation for a minimum period of five years, it will obtain a statutory right to a new tenancy (known as a business equity) unless it has renounced its renewal rights. A lease term will expire automatically and so while a landlord is not required to serve notice on a tenant to ensure the tenant vacates a premises, in practice, where a deed of renunciation has not been executed by a tenant, a landlord will be in contact with the tenant to arrange an

orderly yield-up of the premises and ensure compliance by the tenant with the covenants in the lease and, in particular, with the repair and yield-up obligations.

6.18 Right to Assign Leasehold Interest

Usually, the provisions of a commercial lease contain restrictions on a tenant's right to assign or sub-let the lease without the landlord's prior written consent. Under the LTA, a landlord cannot unreasonably withhold consent to the assignment or subletting of the entirety of a premises; this provision overrides the contractual terms of any business lease. The assignment or subletting of part of a premises is usually prohibited under the terms of a commercial lease.

6.19 Right to Terminate Lease

Generally, a commercial lease is terminated by the expiry of the term or the exercise of a break option or by agreement between the landlord and the tenant.

Usually, a commercial lease contains a re-entry clause, which entitles a landlord to forfeit the lease where the tenant breaches an obligation. Forfeiture is an equitable remedy and a landlord should exercise caution if it intends to forfeit a lease. Forfeiture can be effected without a court order, if done peaceably; however, forcible re-entry is a criminal offence. The landlord must seek an ejection order from the court if the tenant remains in occupation and resists re-entry by the landlord.

6.20 Registration Requirements

Leases are required to be executed as deeds. Leases with a term in excess of 21 years should be registered either in the Registry of Deeds or the Land Registry, as appropriate.

Leases with a term in excess of 25 years should be registered with the Land Registry and a new leasehold folio will be opened in respect of the lease, provided that the term of the residue of the lease at the time of registration exceeds 21 years.

Leases for a term not exceeding 21 years do not need to be registered and are capable of affecting registered land without registration.

6.21 Forced Eviction

As previously stated, a commercial lease may be terminated by forfeiture. While this can be effected without a court order, in some circumstances a court order will be required, if for example if the tenant refuses to vacate the property. If a court application is required then it may be a lengthy process and can take six to 12 months.

6.22 Termination by Third Party

Generally speaking, a commercial lease may not be terminated by a third party and can only be terminated by the parties to the lease.

7. Construction

7.1 Common Structures Used to Price Construction Projects

The most common basis for the pricing of construction contracts is a fixed-price lump sum, where the price includes the risks associated with the construction of the works except to the extent excluded under the contract. Other forms of pricing such as re-measurable contracts (where the client takes the risk for the quantities needed for the works) or target-cost contracts (an open-book system where the client takes the risks for quantities up to a certain target price, subject to a set pain/gain share allocation with the contractor, depending on whether the out-turn contract price is below or above the target price) are also used.

7.2 Assigning Responsibility for the Design and Construction of a Project

The most common method for assigning responsibility for the design and construction of a project is for the client to award a design-and-build contract (D&B) to a main contractor whereby it takes full responsibility for both, including the work of its external professional team and sub-contractors. Alternatively, a client may appoint its own design team and enter a build-only construction contract with a contractor where the client wishes to maintain more control over the design of the development. The D&B model is preferred by funders for projects as there is a sole point of responsibility for design and construction.

7.3 Management of Construction Risk

A contractor normally provides warranties and indemnities to the client as part of the construction contract. Recently, contractors have sought to limit their liability by setting a cap on their general liability under the contract and excluding certain damages, such as indirect and consequential damages and losses. Such exclusions have not become the market norm but more and more contractors are pushing for such concessions in light of the strong market demand for experienced and capable contractors.

7.4 Management of Schedule-Related Risk

Most forms of construction contracts in Ireland make provision for the application of liquidated damages in the event that the contractor does not reach completion by the agreed date. The liquidated damages must be based on a pre-genuine estimate of the losses to be incurred by the client if the works do not complete on time and are often capped at a percentage of the

contract value. In the event of delay due to the default of the contractor, the client is entitled to set off the liquidated damages against payments due to the contractor.

7.5 Additional Forms of Security to Guarantee a Contractor's Performance

It is normal for a client to seek the provision of a performance bond from the contractor as a form of security for the proper performance of the works and this would typically be in addition to the retention by the client of a set percentage (normally 5%) of the payments to the contractor during the construction of the works. Depending on the financial robustness of the contractor, a parent-company guarantee may also be required.

7.6 Liens or Encumbrances in the Event of Non-payment

The creation of liens and encumbrances is not usual. However, under the Construction Contracts Act 2013, contractors and sub-contractors are entitled to suspend their works or refer a payment dispute to statutory adjudication in the event of non-payment of a due payment.

7.7 Requirements Before Use or Inhabitation

Under the Building Regulations, a building cannot be occupied or used until a Certificate of Compliance on Completion has been placed on a register by the relevant building-control authority.

8. Tax

8.1 VAT

Sales of commercial property can be divided into two categories – sale of new and old property.

In relation to new buildings, VAT must be charged at the rate of 13.5%.

A property is considered “new” where it has been developed in the previous 20 years, or buildings on it have been developed or redeveloped in the previous five years. The first sale of residential property by the person who developed the property is always subject to VAT.

Sales of old properties are exempt from VAT. In a VAT-exempt sale of property, to avoid a claw-back of VAT which the seller may have previously recovered, the seller and buyer may agree to make an exempt sale VAT-able and jointly opt to tax the sale of the property.

Exemptions

Transfer of Business applies to the sale of a property that has been let in the past, on the basis that the buyer intends to carry on the same sort of business as the seller (ie, letting the property) and it will only apply provided the sale is to an accountable person for VAT purposes (ie, a person who is obliged to register and account for VAT).

Where the transfer of business relief applies to the sale of an “old” property, no VAT adjustment (known as a Capital Goods Scheme Adjustment) should arise for the seller and the buyer will take over the property's obligations under the capital goods scheme from the seller.

Where the transfer of business relief applies to the sale of a “new” property, the seller may be able to claim further VAT input credit where it was not entitled to recover all of the VAT incurred on the acquisition or development of the property.

8.2 Mitigation of Tax Liability

As previously mentioned, where non-residential property is transferred and is subsequently utilised for the construction of residential accommodation, a stamp-duty refund is available which effectively reduces the rate from 7.5% to 2%.

Stamp duty on the transfer of Irish shares is generally charged at 1% of their value. Previously, stamp duty was mitigated on large-scale acquisitions through selling a corporate vehicle, holding the property; however, transfers of corporate entities and partnerships can be subject to 7.5% duty where the entity derives over 50% of its value from Irish land which is intended for development, held as trading stock, or held with the sole or main object of realising a gain on disposal. This provision is subject to a number of conditions, including that the transfer is one which transfers control of the land. Minority holdings may not be impacted. There are stamp-duty exemptions for intra-group transfers of real estate.

8.3 Municipal Taxes

Commercial rates are imposed by local authorities against businesses premises and the local authority determines the level of rates.

An exemption from the payment of commercial rates can be sought where the property is vacant by making an application to the local authority.

8.4 Income Tax Withholding for Foreign Investors

Tenants of non-resident owners of Irish property are obliged to withhold tax at the standard income tax rate of 20% from rental income prior to remitting overseas. This can be avoided if the landlord has employed an Irish agent to collect the rents.

Non-resident individuals and companies investing in Irish property are charged Irish income tax on taxable rental profits, on a fiscal-year basis. A non-resident individual or partnership is subject to rental income tax at between 20-41%. A non-resident company is subject to 20% tax on rental income.

Capital gains tax is applicable at a rate of 33% on the gains made on a disposal of property in Ireland. If the seller is non-resident, this will only relate to the sale of specified assets.

8.5 Tax Benefits

Tax benefits from owning real estate are as follows:

- legal and accounting and management/agent fees are tax-deductible;
- insurance policies relating to rental properties are tax-deductible;
- essential repairs and maintenance are tax-deductible, provided they are not for capital gain.

IRELAND LAW AND PRACTICE

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The Maples Group advises global financial, institutional, business and private clients on the laws of the British Virgin Islands, the Cayman Islands, Ireland, Jersey and Luxembourg through its leading international law firm, Maples and Calder. With offices in key jurisdictions around the world, the Maples

Group has specific strengths in areas of corporate commercial, finance, investment funds, litigation and trusts. Maintaining relationships with leading legal counsel, the Group leverages this local expertise to deliver an integrated service offering for global business initiatives.

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