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Real Estate

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Maples Group

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Law and Practice

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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. With offices in key jurisdictions around the world, it 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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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 Landlord and Tenant Acts 1967-1994 and the Residential Tenancies Act 2004 to 2016 (the RTA).

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

1.2 Main Market Trends and Deals

2018 was another strong year in terms of performance in the Irish Commercial Real Estate market.

Brexit-related activity added an extra layer of activity in the office sector as well as the industrial and logistics sector.

The Dublin office market remained buoyant in 2018. The growth in activity by 'flexible' office providers during 2018 was a noteworthy feature of the market.

Industrial rents rose in 2018 and new development in this sector was noteworthy.

One of the key standout developments of 2018 was the growth in the volume of demand for 'build-to-rent' schemes. The build-to-rent sector has become a mainstream investment sector in its own right, with an ability to assist in alleviating some of the well-documented pressures in the Irish housing market.

2018 appears to have been a record year in the development land sector, with transactional activity reported as being the highest in the last ten years.

1.3 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 and is held from the owner of the freehold or the owner of the superior leasehold title in the relevant property. A leasehold interest is based on a contractual relationship between the lessor and the lessee.

2.2 Laws Applicable to Transfer of Title

The 2009 Act reformed Irish real estate law, replacing much of the old law and modernising this area of law and conveyancing practice. Historically Irish law was based on old legislation, pre-dating the establishment of the Irish state. There is modern legislation governing registration of title (the Registration of Title Act, 1964, which was modified by the Registration of Deeds and Title Act, 2006) in order to facilitate the increasing computerisation of the property registration system in this jurisdiction, as well as succession law (the Succession Act, 1965).

Extensive statutory protection is afforded to family property in particular, which affects conveyancing practice (eg, the Family Home Protection Act, 1976). Ireland has a written constitution which enshrines certain fundamental rights that override any other law, including legislation.

2.3 Effecting Lawful and Proper Transfer of Title

The Property Registration Authority (the PRA) is the body responsible for the registration of title to real estate in Ireland. The PRA is a statutory body which was established on 4 November 2006 under the provisions of the Registration of Deeds and Title Act 2006 (the '2006 Act').

The primary function of the PRA is to manage and control the Land Registry and the Registry of Deeds, and to promote and extend the registration of ownership of property in Ireland.

The Land Registry was established in 1892. When ownership of 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 in 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 effect of registration is to govern the priority between deeds affecting the same property. When a document is lodged with the Registry of Deeds it must also be accompanied by an application form which will contain a summary of the information set out in the deed.

The quality of the title to registered land generally falls into four categories, namely:

- *Absolute Title* – this is the best type of title to land that can be acquired in Ireland.
- *Possessory Title* – this category of title is granted where an applicant does not have paper title to land but is in occupation of the land and/or in receipt of the rents and profits issuing from the land.
- *Qualified Title* – this category of title is granted where an applicant can only establish title for a limited period and/or where the title is subject to reservations.
- *Good Leasehold Title* – this category of title applies where the Land Registry has not investigated the title of the lessor to grant the lease to the applicant (note that if the superior title is already registered, then the lessee will be registered with an absolute title).

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 defects are identified in the title (such as restrictive covenants impacting on the development potential of property).

2.4 Real Estate Due Diligence

When carrying out real estate due diligence, a buyer's lawyer will investigate the seller's title to the relevant property to ensure that the buyer will acquire a good marketable title. The underlying principle is one of caveat emptor (buyer beware). The buyer must be satisfied from its own due diligence that good marketable title to the relevant property is being offered by the seller.

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 contains a memorandum of the agreed terms of the sale (parties, price, description of property, and completion date). The document also requires the seller to list the documentation and searches to be provided in relation to the property. It also incorporates the Law Society of Ireland General Conditions of Sale (the 'General Conditions'). These 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. This way, the buyer should be on notice of any deviations from the template document.

The General Conditions were updated in January 2019 and the new edition is recommended for use for all transactions commencing on or after 1 January 2019. The primary change to the General Conditions requires the buyer to investigate title pre-contract, which now 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).

These General Conditions deal with formalities such as:

- the seller's title;
- the identity and condition of the subject property;
- possession of the subject property;
- the disclosure of notices by the seller;
- planning and development of the subject property;
- completion of the sale, completion notices and interest due if completion is delayed;
- rescission of the contract;
- forfeiture of deposit and resale of the subject property;
- risk between exchange and completion of the sale; and
- boilerplate issues such as time limits, arbitration, notices and apportionment.

The General Conditions are intended to be general in nature and can therefore be excluded or amended by agreement between the parties by way of a specific special condition. These special conditions of sale will generally be negotiated between the parties to reflect the nature of the particular transaction. For commercial property transactions, it is normal for the seller to seek to limit the warranties being provided. 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 contained in the General Conditions.

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 these searches which affect the seller and/or the relevant property before the completion of the sale can occur.

Another formality that will need to be adhered to is the Conveyancing Conflict of Interest Regulation, which prohibits the same legal office or firm acting for both the seller and buyer in real estate transactions, apart from in the case of very limited and defined exceptions.

2.5 Typical Representations and Warranties

As outlined in **2.4 Real Estate Due Diligence**, 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 and the existence of any other interest in the relevant property. These warranties can be excluded or amended by agreement between the parties. In addition to any specific disclosures, sellers often limit the warranty provided in respect of planning and building control compliance by reference to documentation and opinions/certificates of compliance in the seller's possession and provided to the buyer. Where the property is being sold in an enforcement scenario (by a receiver, liquidator or a mortgagee), it is usual that many of the warranties contained in the General Conditions are expressly excluded or varied/limited by reference to the knowledge of a receiver, a liquidator or a mortgagee in connection with the property. The warranties had a radical overhaul in the 2017 as sellers were routinely excluding important conditions or varying the conditions to such a degree that, in effect, no warranty was being given. The new wording provides that a seller only warrants compliance with matters of planning and building control compliance in respect of its period of ownership. There has been no material change to this position in the updated 2019 edition of the General Conditions.

There are also implied covenants as to ownership contained in a purchase deed (which are detailed in the 2009 Act). However, a buyer's lawyer will fully investigate the seller's title to the relevant property to ensure a buyer will acquire a good marketable title.

A seller can be liable for misrepresentation. General condition 37 of the General Conditions (2019 Edition) provides that a buyer shall be entitled to compensation for any loss suffered by the buyer in respect of the sale as a result of an error which includes any 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, statutory protection from fraud is also provided in the 2009 Act, which provides that it is an offence for a seller to fraudulently conceal or falsify material information relating to their title to the property.

2.6 Important Areas of Law for Investors

It is worth noting that Ireland offers a range of tax-efficient regulated investment vehicles and structures to international investors for acquiring and holding real estate. Provided certain criteria are met, the investment vehicle will not be subject to Irish tax on income such as rent.

Typically, rent paid in respect of Irish real estate will be subject to Irish taxation on account of it having an Irish source, regardless of the identity or location of the landlord. An Irish-resident company, or a foreign company that holds real property as part of or on account of a trade carried on in Ireland, will be subject to Irish corporation tax on the rental profits. Income tax is applied to rent received by individuals.

2.7 Soil Pollution or Environmental Contamination

The buyer may have a secondary liability in circumstances of soil pollution or environmental contamination. If the person or entity that caused the pollution or contamination cannot be identified, the current owner of the property could then become liable for the remediation under the applicable environmental legislation. A buyer should always carry out its own due diligence where non-compliance with environmental law is a concern.

2.8 Permitted Uses of Real Estate Under Zoning or Planning Law

The Local Government (Planning and Development) Acts 1963 to 1999 and the Planning and Development Acts 2000 to 2017 (the 'Planning Acts') govern planning and zoning matters. The Planning Acts regulate the zoning and permitted uses of areas through a variety of development, sustainability, landscape conservation and special amenity plans. The local planning authority where the relevant property is situated is responsible for enforcing the Planning Acts. There are 31 local authorities in Ireland, each one responsible for monitoring and enforcing compliance with planning laws in relation to property in its area and responsible for making decisions regarding applications for planning permission.

Each local authority will have a development plan setting out the overall planning policy of the local authority for a six-year period. A development plan is a document which details the overall strategy of the local authority for the proper planning and sustainable development of an area and generally consists of a written statement and accompanying maps. The plan usually includes the broad aims of the council for specific topics, eg, housing, infrastructure and community facilities, which are reinforced by more detailed policies and objectives.

The State Authorities (Public Private Partnership Arrangements) Act, 2002 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, the private sector contractors become long-term providers of a service rather than building an asset upfront. The private sector is responsible not only for constructing the asset, but also for the long-term operation and maintenance, and possibly financing, of the asset. This allows local authorities freedom to plan resources and monitor services, rather than provide them directly.

2.9 Condemnation, Expropriation or Compulsory Purchase

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

Local authorities can compulsorily acquire land in the following circumstances:

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

Compensation is available to all persons with an interest in the land if a property is compulsorily acquired by a local authority.

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

The IDA also has the ability to compulsorily acquire property if it thinks that development is likely to take place on the identified land under existing legislation. A key function of the IDA's role, under legislation, is acquiring land for development purposes; as a result, the IDA's power to compulsorily acquire land has been considered to be very broad. However, in a decision of the Supreme Court delivered in November 2015, this view was somewhat curtailed. The IDA sought to compulsorily acquire land for which it had no immediate use, so that if and when a particular undertaking should seek to develop the land, it would be immediately available at such time. The Supreme Court, considering the constitutional protection given to property rights and applying the appropriate principles of construction, held that the IDA Act does not confer any power on the IDA to acquire lands not required for immediate use, but which might be utilised at some future time. There is a proposed bill currently before the Irish legislature which will provide more extensive rights for the IDA to compulsorily purchase land in response to this decision.

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 the stamp duty, although in certain transactions, such as voluntary transfers, both parties to a contract can technically be liable.

Where an instrument is liable to stamp duty, a stamp duty return must be filed online via the Revenue's e-stamping system.

The full amount of the stamp duty must be paid within 30 days of the date of execution of the instrument of transfer (typically the sale deed). In practice, Irish Revenue allow a further period of 14 days within which to file an e-stamping return and pay the stamp duty. Failure to file and pay within this 44-day period will result in late filing and interest charges.

The rate of stamp duty payable on the transfer of non-residential (commercial) property was recently (in Budget 2018) increased from 2% to 6%. The 6% rate is applicable to acquisitions of commercial property taking place after 10 October 2017. There is a stamp duty refund scheme where land (stampable at the increased rate of 6%) is purchased for the purpose of development of residential housing.

Stamp duty on the transfer of Irish shares deriving their value from real estate is charged at 1% of their value.

2.11 Legal Restrictions on Foreign Investors

There are no restrictions on foreign investors acquiring real estate in Ireland. A foreign investor will have to comply with anti-money laundering legislation (such as the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010) by providing certain information and documentation to verify their identity and source of funds.

3. Real Estate Finance

3.1 Financing Acquisitions of Commercial Real Estate

Acquisitions have traditionally been financed by banks, but in recent years 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 using 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 domestic 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 domestic 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.

There has also been an increase in the types of vehicles by which commercial real estate assets and portfolios are acquired. Irish collective asset-management vehicles and REITs have been used to house such acquisitions, taking advantage of tax efficiencies.

Typically, real estate finance transactions involve the granting of an all-assets debenture from a corporate borrower (encompassing security over leases and rental income), together with the borrower's parent granting a charge over its shares in the borrower. The debenture typically contains wide-ranging powers enabling the lender to appoint a receiver to take possession of the secured assets upon the occurrence of specified events of default.

3.2 Typical Security Created by Commercial Investors

A lender will provide finance that is secured over the relevant property and such 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, and step-in rights. The lender will also typically appoint its own project monitor (at the cost of the borrower).

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; in general, lending to an Irish company is not a regulated financial services activity and, pursuant to Section 158(3) of 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 generally and its constitutional documents in particular. A company's constitutional documents should therefore be checked to ensure that it has the power to borrow, guarantee and/or create security.

There are no restrictions under Irish law in relation to repayments made to a foreign lender under security documents or loan agreements.

On the basis that the Foreign Investment Risk Review Modernization 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, we do not envisage any implications for Irish real estate finance transactions.

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 over real estate with the Companies Registration Office. Registration of security granted to an Irish company is obligatory.

The creation of security does not attract tax, although a written notification must be made to the Revenue Commissioners where a company creates a fixed charge over its book debts.

Where repayments being made 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 that make payments of Irish-source interest to foreign lenders; the exemptions available can also be dependent on the borrower in question. Foreign lenders falling within certain categories of 'qualifying lender' should be entitled to receive Irish-source interest payments free of the 20% withholding tax; these categories include certain foreign banks, companies resident for tax purposes in the EU or jurisdictions that have agreed a double tax treaty with Ireland which impose tax on interest received or are exempt under the relevant double tax agreement, and certain treaty lenders.

Enforcement of Security by Disposal of Property

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 less acquisition and enhancement costs, and less the incidental costs of acquisition and the incidental costs of disposal.

Irish capital gains tax has priority over secured debt and therefore could be deducted from the sales proceeds realised by a lender.

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 unless the seller provides a clearance certificate from the Revenue. A capital gains clearance certificate is automatically available on application to the Revenue 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 current at the date of the transfer agreement (currently EUR500,000 or EUR1 million if the asset disposed of is a house).

The standard rate of capital gains tax is 33% for disposals made on or after 5 December 2012.

3.5 Legal Requirements Before an Entity Can Give Valid Security

Section 82 of 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 the 12 months following the giving of the financial assistance. The shareholders of the company must then, within 30 days of the directors' declaration, resolve to approve the financial assistance. Both the directors' declaration and shareholders' resolution must be filed with the Companies Registration Office within the prescribed time periods.

Section 239 of the Companies Act contains a general 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 general prohibition if the relevant debts or obligations are debts or obligations of another group company.

There is a general requirement that Irish companies derive benefit from transactions which they enter into. 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

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 a debenture or mortgage or other 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 circumstances of a receiver's appointment depend to a large extent on the provisions of the security document pursuant to which he or she is appointed.

The Companies Act affords extensive powers to a receiver appointed to the property of a company. It provides that a receiver of the property of a company has 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 specifies powers which such a receiver may exercise (in addition to the powers conferred on him by the order or instrument pursuant to which he was appointed or by any other law).

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

- the security holder will notify the borrower that an event of default has occurred in connection with the relevant

facilities and will demand repayment in full of the facilities by issuing a letter of demand and serving it on the borrower;
- the borrower must then be given an opportunity to repay the debt, but the time period required should be no more than would be necessary to effect the mechanics of payment, ie, to instruct funds to be transferred (in practice, one business day is standard); and
- after the 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 for some reason 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 Irish Companies Registration Office. Where a company creates a registrable charge, particulars of the charge must be delivered in the prescribed form to the Registrar of Companies 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 noted in **2.6 Formalities When a Borrower is in Default**, above, a real estate lender must register the charge/mortgage with the Irish Companies Registration Office within 21 days of its creation in accordance with the procedures set out in the Companies Act in order to perfect the creation of the 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
- intercreditor arrangements.

3.8 Lenders' Liability Under Environmental Laws

Lenders are reluctant to enforce share security in circumstances where the relevant company has environmental liabilities, due to the application of the principle of strict liability under Irish environmental legislation.

3.9 Effects of Borrower Becoming Insolvent

In Irish law, both the creation of security and the making of payments by a company prior to it being placed into 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. Security can be set aside as an unfair preference if it was created within six months preceding the liquidation of the company. If the beneficiary of the transaction is a 'connected person', this period extends to two years. In the case of a connected person, the transaction is deemed, unless the contrary is shown, to have been done with a view to giving such 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 prior to the commencement of the winding up, if the floating charge is created in favour of a connected person) shall be invalid, unless it is proved that the company was solvent immediately after the creation of the charge. This provision does not apply to 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 subsequently to the creation of, and in consideration for, the charge, nor does it apply to interest on that amount at the appropriate rate. For these purposes, the value of any goods or services sold or supplied by way of consideration for a floating charge is the amount in money which at the time they were sold or supplied could reasonably have been expected to be obtained for the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were sold or supplied to the company.

3.10 Consequences of LIBOR Index Expiry

The key consequences of the LIBOR index expiry for borrowers are:

- the uncertainty regarding forward-facing term rates, which present enormous practical and operational difficulties, and impact particularly on borrowers' ability to manage cash flow and compliance with debt and interest service cover covenants; and
- the existing fallback rates which are triggered if LIBOR is unavailable are likely to reflect a higher cost of fund-

ing and therefore increase the interest payable on a loan. Existing credit agreements envisage any period during which LIBOR might be unavailable as being brief enough 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 for an existing facility is to renegotiate the provisions around LIBOR and the application of a replacement benchmark rate when LIBOR is unavailable, although the costs of such amendments will likely have to be met by the borrower. Whilst uncertainty remains as to what will replace LIBOR in the event 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 perspective, it would also 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 Governmental Controls Applicable to Strategic Planning and Zoning

The Planning Acts apply to strategic planning and zoning. The Planning Acts regulate the zoning and permitted uses of areas through a variety of development, sustainability, landscape conservation and special amenity plans. The local planning authority where the relevant property is situated is responsible for enforcing the Planning Acts. There are 31 local authorities in Ireland, each one responsible for monitoring and enforcing compliance with planning laws in relation to property in its area and responsible for making decisions regarding applications for planning permission.

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

The Environmental Protection Agency (the EPA), the Office of Environmental Enforcement and local authorities are responsible for environmental regulation. The main laws which govern environmental matters are as follows:

- the Environment (Miscellaneous Provisions) Act 2015;
- the Environmental Protection Agency Acts 1992–2011;
- the Waste Management Acts 1996–2011;
- the European Union (Environmental Impact Assessment) Regulations;
- the Water Services Acts 2007–2015;
- the Air Pollution Acts 1987 and 2011;
- the Building Control Acts 1990–2014;
- the Building Regulations 1997–2014;
- the Building Control Regulations 1997–2015;
- the Wildlife Acts 1976–2012;
- the Petroleum (Exploration and Extraction) Safety Act 2010;
- the Finance (Local Property Tax) (Amendment) Act 2015; and
- the Climate Action and Low Carbon Development Act 2015.

4.2 Legislative and Governmental 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 1997–2015 (together the 'Building Regulations'). The Building Regulations provide for proper building standards, fire safety, workmanship, conservation of fuel and energy and access for people with disabilities.

4.3 Regulatory Authorities

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

An Bord Pleanála is responsible for the determination of planning appeals. It is an independent body which was set up by the Irish Government to operate an open and impartial planning appeal system. Anyone applying for planning permission and anyone who made written submissions or observations to the planning authority on a planning application, can appeal a subsequent planning decision to *An Bord Pleanála*.

4.4 Obtaining Entitlements to Develop a New Project

Generally, a valid application for planning permission is dealt with by the local planning authority within eight weeks of the date of receipt of the application. This period can vary, in particular where the local authority requests further information from the applicant. If the planning authority consents to the application for permission, it will issue a decision to grant planning permission; however, this is not a full permission. The planning authority will then notify the relevant parties of its decision, and the applicant and any third party that made a submission or observation in relation to the application have four weeks to appeal.

An appeal is determined by *An Bord Pleanála*. In certain circumstances a third party that did not make any submissions or observations may also appeal the decision. *An Bord Pleanála* has a statutory timeframe of 18 weeks from the receipt of an appeal within which to make its determination.

In Ireland public inquiries are not very common. They are sometimes held in relation to large/strategic infrastructure projects.

Recent planning legislation provides for a fast-track planning process for large-scale housing developments called 'strategic housing developments'. This is for a limited period running until 31 December 2019. Strategic housing developments will 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 75% of total gross floor area of the development). Applicants availing themselves of this scheme will undergo a detailed statutory nine-week pre-application planning process, including consultation with the relevant local planning authority and prescribed bodies, prior to the submission of a planning application with a new Strategic Housing Division of *An Bord Pleanála*. Upon submission, the local planning authority must send its opinions on the proposed development to *An Bord Pleanála* with a recommendation as to whether permission should be granted or refused, or propose amendments. There is a strict 16-week period for *An Bord Pleanála* to make its determination. 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 made written submissions or observations to the planning authority on a planning application can appeal a subsequent planning decision to *An Bord Pleanála*. Please refer to **4.4 Obtaining Entitlements to Develop a New Project**, above, for more detail.

4.6 Agreements with Local or Governmental Authorities

The State Authorities (Public Private Partnership Arrangements) Act, 2002 enables local authorities to enter into joint venture PPP arrangements with the private sector. As mentioned in **2.8 Permitted Uses of Real Estate Under Zoning or Planning Law**, above, a PPP is an arrangement between the public and private sector for the provision of infrastructure or services. Under this model, the private sector contractors become long-term providers of a service rather than building an asset upfront. The private sector is responsible not only for constructing the asset, but also for the long-term operation and maintenance, and possibly financing, of the asset. This allows local authorities freedom to plan resources and monitor services, rather than provide them directly.

4.7 Enforcement of Restrictions on Development and Designated Use

Planning enforcement and control became more streamlined in 2002 with the introduction of Part VIII of the Planning and Development Act, 2000 (the '2000 Act'). The 2000 Act sets time limits within which complaints regarding planning infringements must be investigated. It establishes a common procedure for all types of planning offence, as follows:

- issuance 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 the complaint, allows a developer up to four weeks to rectify the offence or to make a submission.

When deciding whether or not to serve an enforcement notice, regard must be had to any submission received from the developer. An enforcement notice sets out the requirements of the local authority to rectify the offence and also contains a timeframe within which the work must be completed. Non-compliance with an enforcement notice is an offence.

Should any person served with an enforcement notice fail to comply with its requirements, the local authority may institute legal proceedings in the District Court.

In urgent cases, the local authority may alternatively apply to the Circuit or High Court for a court 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 enforcement for a breach of a condition of a planning permission time out after seven years from the life of the planning permission (usually five years). This is often referred to as the 'seven-year rule'.

5. Investment Vehicles

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

A range of entities available to investors to hold real estate assets.

Irish companies and non-Irish companies have typically been used for commercial property investment. Investors may also consider holding such assets through a Real Estate Investment Trust (REIT). The REIT regime was introduced in 2013. An Irish REIT is an Irish-incorporated company which complies with the Irish tax provisions applicable to REITs. This includes a requirement that its shares be listed on the main market of an EU stock exchange.

However, 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 'Central Bank') and are classified as an alternative investment fund (AIF) for the purposes of the Alternative Investment Fund Managers Directive 2011/61/EU (AIFMD). QIAIFs may be externally managed by an EU-authorised alternative investment fund manager (AIFM) or internally managed (ie, authorised as both the AIF and the AIFM).

QIAIFs may be established as Irish Collective Asset-management Vehicles (ICAVs), unit trusts, investment companies, common contractual funds or investment limited partnerships. However, the ICAV is by far the most popular corporate structure for a QIAIF investing in real estate. For this reason the remainder of this section will focus on real estate ICAVs. Unit trusts and/or investment limited partnerships are occasionally still utilised for structuring real estate transactions and their use is typically driven by investor preference.

5.2 Main Features of the Constitution of Each Type of Entity

Regulated Fund Structures

As outlined in **5.1 Types of Entities Available to Investors to Hold Real Estate Assets**, above, the ICAV is by the far the most popular regulated fund vehicle for structuring real estate investments.

The ICAV is a corporate vehicle similar to an investment company, with the key advantage that the ICAV was specifically created for the Irish funds industry, meaning that it is a more flexible structure from a corporate law perspective. The ICAV legislation essentially drew upon the best and most successful aspects of Irish company law, improving it in several material respects.

The ICAV came into existence in March 2015 and has quickly established itself as the EU regulated fund structure of choice. Furthermore, it is possible to structure the ICAV as an umbrella fund with statutorily recognised segregation of liability between sub-funds.

The ICAV (in the form of a QIAIF) is a specialist investment fund targeted at professional investors and high net worth individual investors. The main advantage of the QIAIF is that the general conditions/restrictions of the Central Bank relating to asset diversification, borrowing and leverage are disapplied. One trade-off to this flexibility is that the Central Bank restricts QIAIFs' availability to professional/institutional investors, by applying minimum subscription (EUR100,000 or currency equivalent) and other investor eligibility requirements.

This, in addition to the structuring flexibility and tax efficiencies of the ICAV, has led to the success of the QIAIF ICAV in the real estate space. Increasingly, we are seeing investors utilise the ICAV for pan-European real estate investments.

Key factors to the success of the ICAV in structuring real estate investments include:

- *No Risk Spreading Rules* – ICAVs are not subject to risk spreading obligations, making them extremely useful for single asset funds and funds with very concentrated positions. This has been particularly appealing to managers establishing real estate ICAVs.
- *Flexibility* – the ICAV can accommodate a full suite of liquidity options, making it suitable for closed-ended or limited-liquidity real estate funds.
- *No Borrowing or Leverage Limits* – the Central Bank does not impose any borrowing or leverage restrictions on QIAIF ICAVs, thereby facilitating the financing and/or refinancing of real estate assets held within an ICAV on a leveraged basis.
- *Property Holding Companies* – the corporate nature of the ICAV, its ability to have real estate held through property holding subsidiaries ('Property HoldCos') and the segregation of liabilities between sub-funds means that it is now the default option for large-scale real estate investment.
- *EU Passport* – the ICAV is classified as an alternative investment fund (AIF). As such the ICAV can avail itself of the pan-European AIFMD marketing passports, enabling it to be sold to professional investors in within the EEA on a cross-border basis.

Unregulated Structures

Irish companies

An Irish company can be formed as a Private Company Limited by Shares (LTD). This is a simplified entity which has the capacity of a natural person, can have one director and must have a separate secretary. 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 can also be formed as a Designated Activity Company (DAC). The DAC is a private limited company. The constitution of a DAC comprises of 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. The DAC must have a minimum of two directors and a person may not be a director of more than 25 companies.

REITs

A REIT is an Irish public limited company aimed at facilitating collective investment in real estate. Provided the conditions in the taxation legislation are satisfied, REITs benefit from a preferential tax regime.

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.

The articles of association of a REIT are, in addition, likely to include provisions to enable the REIT to demonstrate to the Irish Revenue Commissioners that it has taken reasonable steps to avoid paying a dividend to a person who is beneficially entitled, directly or indirectly, to at least 10% of an entire dividend or is beneficially entitled to or controls, directly or indirectly, at least 10% of the share capital or voting rights in the REIT (a 'substantial shareholder'). These provisions are necessary because the REIT would become subject to a tax charge if it paid a dividend to a substantial shareholder in circumstances where it had not taken such reasonable steps.

The articles of association of a REIT are likely to provide powers of investigation to directors to require any shareholder to notify the company of full and accurate particulars of his/her/its interest in shares. If any shareholder is in default in supplying to the company the information required, the directors may serve a disenfranchisement notice on the shareholder directing that in respect of the shares in respect of which the default has occurred, the shareholder shall not be entitled to attend, speak or vote either personally, by representative or by proxy at any general meeting of the company or to exercise any other right conferred by membership in relation to any such meeting. The articles of association may also allow the directors to require the disposal of a shareholder's shares in certain prescribed circumstances.

5.3 Minimum Capital Requirement

In relation to Irish private companies, the typical minimum capital required to set up an entity used to invest in real estate is EUR2.

QIAIF ICAVs may be incorporated with a typical minimum capital amount of EUR2. The Central Bank 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, as noted above, ICAVs structured as QIAIFs must apply a minimum initial subscription requirement of EUR100,000 (or currency equivalent) on a per-investor basis. 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

The principal legislation under which a REIT operates is the Companies Act, and a REIT must comply with the corporate governance provisions set out in the Companies Act applicable to public limited companies. There are detailed more requirements under the Companies Act for companies admitted to EU regulated markets such as the main market of the Irish Stock Exchange (the ISE) and the main market of the London Stock Exchange (LSE) and Irish REITs will be required to comply with these if their shares are admitted to trading on such markets. In addition, any market on which a REIT's shares are admitted to trading will have listing and other relevant rules, as applicable.

The UK Corporate Governance Code issued by the UK Financial Reporting Council in April 2016 ('UK Code') sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability and relations with shareholders in respect of a company listed on the LSE (where three of the Irish REITs are currently listed) and/or the ISE. Irish REITs listed on the LSE and/or ISE are required to report on how they have applied the main principles of the UK Code, and either to confirm that they have complied with the UK Code's provisions or, where they have not, to provide an explanation. The Irish Corporate Governance Annex to the UK Code published by the ISE (the 'Irish Annex') contains additional requirements applicable to Irish REITs listed on the ISE.

Regulation (EU) No 596/2014 of the European Parliament and of the Council on 16 April 2014 on market abuse (the 'Market Abuse Regulations') and the Transparency (Directive 2004/109/EC) Regulations 2007, as amended (the 'Transparency Regulations') apply in respect of Irish REITs listed on EU regulated markets.

ICAVs

This section will focus on the key governance requirements applied by the Central Bank to ICAVs structured as QIAIFs.

An ICAV is represented by its board of directors, at least two of whom must be Irish-resident. The appointment of directors is subject to the prior approval of the Central Bank 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 remains ultimately responsible for the management of the ICAV and the supervision of all delegates thereof.

The board of an ICAV must observe the Irish funds industry's Corporate Governance Code. This code aims to ensure that the board performs effective oversight of the ICAV's activities. The governance structure put in place by each board must be sufficiently sophisticated to ensure that there is effective oversight of the activities of the ICAV, taking into consideration the nature, scale, complexity and outsourcing arrangements of the activities being conducted. Among other subjects, the code makes recommendations regarding board composition, which include that there should be at least one representative of the AIFM/investment manager and at least one director who is fully independent of all service providers to the ICAV.

Finally, ICAVs are required to be audited annually by entities permitted to carry out audits under Irish law. ICAVs must also submit their annual reports to the Central Bank. Confidential monthly statistical returns are also required to be submitted (these are typically handled by the ICAV's administrator).

Each QIAIF ICAV is required is 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. Pursuant to the requirements of AIFMD, an AIFM must act honestly, with due skill, care and diligence, and fairly in conducting its activities, and in the best interests of the QIAIFs and its investors at all times.

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

Every QIAIF ICAV must appoint an independent Irish-regulated depositary. The depositary must carry 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 thereon to the shareholders. The depositary's report shall state whether in its opinion the ICAV has been managed in that period in accordance with the limitations imposed on the investment and borrowing powers of the ICAV by its constitutional document and by the AIFMD, and otherwise in accordance with the provisions of its constitutional document and the AIFMD. If for whatever reason the ICAV has not been managed in accordance with these principles, then the Depositary must state why this is the case and outline the steps which the Depositary has taken to rectify the situation.

5.5 Annual Entity Maintenance and Accounting Compliance

Annual maintenance and accounting compliance costs would vary from structure to structure, and it is therefore difficult to provide guide figures.

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 buy the property outright.

A licence is more suitable for shorter-term arrangements. The licensee under the licence does not obtain exclusive possession of the property but rather has 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 does confer a legal interest in the property to the tenant under the lease. This interest may in some circumstances be assigned or transferred subject to the requirement to obtain consent from the landlord in certain circumstances. Depending on the circumstances, a tenant may accrue renewal rights and be entitled to apply to the landlord for a new lease of the property on the expiration of the previous lease.

6.2 Types of Commercial Leases

There are two main categories of commercial lease: a lease on a short-term basis for a term of up to five years; or a lease for a medium- to long-term basis, usually for a term ranging from ten years to 25 years, although in the current market terms are closer to ten or 15 years, typically with tenant break options.

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

Length of Lease Term

Recent legislation and market conditions mean that most leases now have shorter terms, with the maximum term now being ten to 15 years (usually including break options to terminate the lease which are exercisable during the term). The structure of a standard medium- to long-term (ten to 25 years) commercial lease usually secures rent payments to the landlord and imposes the cost of maintaining, insuring and occupying the property on the tenant, enabling the landlord to recoup the cost of these expenses.

Typically, tenants will seek to negotiate an option to break or terminate the term of the lease, after a certain number of years of the term. A commercial lease granted for a term of more than five years would usually have a provision for the periodic review of rent to the current open-market rents, normally every five years.

Maintenance and Repair of the Real Estate Actually Occupied by the Tenant

Generally, commercial leases in Ireland are of a full repairing and insuring nature, and the tenant has extensive repairing obligations under the lease. The obligations can be imposed directly by a repairing covenant entered into by the tenant 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 refund the landlord for repair works carried out to the structure and common areas of the particular development.

Frequency of Rent Payments

Rent payments are normally due quarterly in advance. While open to negotiation between the parties, the typical quarterly payment days or 'gale days' are 1 January, 1 April, 1 July and 1 October in each year.

6.5 Rent Variation

Usually a commercial lease will provide for a rent review to occur periodically throughout the lease (normally every five years). The usual position is that the rent will be reviewed to the current open market rent at five-yearly intervals. The rent may either be 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 changed this position and now any open-market rent review provisions in a commercial lease are on an upwards or downwards basis. Landlords and tenants can on occasion employ certain mechanics to control the variation in the lease rent. For example, the parties may decide to impose a 'cap and collar' arrangement at rent review, which will control the extent to which the rent can either increase or decrease at a particular review date notwithstanding the otherwise open market nature of the review provision. As an alternative, the parties to a lease may decide to agree a fixed or a stepped rent over the term of a lease, or another alternative sometimes employed is to index-link the variation in the rent to the consumer price index for some or all of the term.

6.6 Determination of New Rent

In most circumstances the 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 landlord and the tenant, then 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 do so) to charge VAT on the rents, in which case VAT applies to the rent at the relevant rate (currently 23%).

6.8 Costs Payable by Tenant at Start of Lease

Stamp duty is payable on commercial leases at the rate of 1% of the average annual rent. It is typically the tenant's responsibility to discharge the stamp duty payable on a lease. 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

A landlord or management company will normally maintain common areas in a multi-let building or estate and recoup the costs of the maintenance and repair from the tenants. Generally the amount of the service charge payable by each tenant is a percentage based on the size of the property leased by the tenant compared to the overall lettable area within the building and/or estate, as the case may be.

6.10 Payment of Utilities and Telecommunications

Normally a tenant is responsible for all outgoings consumed on the demised premises, and in most circumstances these are separately metered and paid directly by the tenant to the relevant provider. Utilities and telecommunications consumed on the common areas would normally be 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. The typical risks insured against for property damage are damage by events such as 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 landlord will include a user clause within the lease outlining the permitted uses of the property by the tenant. If a tenant wishes to change the permitted user clause under the lease, then it will normally need to apply to the landlord for its consent to the change of use (legislation provides that such consent may not be unreasonably withheld by the landlord). In Ireland planning laws also govern the use to which a property can be put, so for example an area zoned for residential use will need planning permission for change of use for commercial purposes. Similarly, a building with planning permission for use as offices will need planning permission if, for example, part (or all) of the building was to be put to another use such as retail or as a restaurant.

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 will usually oblige the tenant to return the property to its original condition on the expiration or determination of the lease. Structural alternations are general prohibited, with internal non-structural alterations permitted but subject to the prior written consent of the landlord.

6.14 Specific Regulations
The RTA governs leases of residential property in Ireland, provided that the term of the lease does not exceed 35 years. Any residential property for lease must meet certain standards under the Housing (Standards for Rented Houses) Regulations 2008 and the Housing (Standards for Rented Houses) (Amendment) Regulations 2009, as regards the conditions thereof and the facilities available.

6.15 Effect of Tenant's Insolvency
Commercial leases will almost always include a provision which would entitle 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 or acceptable to the landlord, the landlord will seek a surety to join in the lease to guarantee the obligations of the tenant. This is usually provided by a sister or parent entity to the tenant which has sufficient covenant strength. Alternatively a landlord may accept a bank guarantee or a rental deposit, although these have cost and/or cash flow implications for the tenant.

6.17 Right to Occupy After Termination or Expiration of a Lease
Where a commercial tenant has been in continuous occupation for a minimum period of five years, they will obtain a statutory right to a new tenancy (known as a business equity). This statutory provision can be contracted out of by having a tenant renounce its renewal rights on the signing of the commercial lease. This is normally done by way of a deed of renunciation. It may be the case that market conditions or bargaining power will at times either enable a tenant to resist pressure to provide such a renunciation or allow a landlord insist on its provision. 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 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 Terminate Lease
Generally, a commercial lease is terminated by the expiry of the term or the exercise of a break/termination option, or by agreement between the landlord and the tenant.

It is also normal practice for a business lease to contain 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 would be advised to exercise caution if it intends to forfeit a lease. Forfeiture can be effected without a court order if done peaceably, whereas forcible re-entry is a criminal offence. The landlord must seek an ejectment order from the court if the tenant is still in occupation and resists re-entry.

6.19 Forced Eviction
As described in **6.18 Right to Terminate Lease**, above, 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, for example if the tenant refuses to vacate the property. If a court application is required then the process may be lengthy, taking up to six to 12 months.

6.20 Termination by Third Party
Generally speaking, a commercial lease may not be terminated by third parties and can only be terminated by the parties thereto.

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 contractor confirms that its price includes consideration for the risks associated with the construction of the works, except to the extent explicitly excluded under the construction contract, such as client variations and delays with securing planning permission, etc. 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 outturn contract price is below or above 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 let a build-only construction contract to a contractor where it wants to maintain more control over the design of the development, but accepting that the client has to manage the interface between the two teams, and it will have to establish where liability lies in the event of a defect with the works. 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

In order to manage construction risk of a project, a contractor would normally provide warranties and indemnities to the client as part of the construction contract. Contractors have in more recent times sought to limit their liability under construction contracts 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 yet become the market norm, but more and more often Tier 1 contractors in particular are pushing hard 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 and ascertained damages in the event that the contractor does not reach completion by the agreed date. The liquidated and ascertained damages must be based on a pre-genuine estimate of the losses to be incurred by the client if the works are not complete on time, and are often capped at 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 and ascertained 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. 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, the client may also require a parent company guarantee.

7.6 Liens or Encumbrances in the Event of Non-payment

The creation of liens and encumbrances is not normally agreed to by clients in the event of non-payment. However, under the Construction Contracts Act 2013, main 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 Control Acts and Building Control 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 (the local authority).

8. Tax

8.1 VAT

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

In relation to new buildings, VAT must be charged at the rate of 13.5% where the property is considered 'new'. The property is considered 'new' in the following circumstances:

- the first supply of a completed property within five years of its completion is subject to VAT;
- the second and subsequent supply of a completed property within five years of its completion is subject to VAT (provided the building has been occupied for less than two years); and
- any supply of a developed but incomplete property within 20 years of when the development ceased.

Sales of old properties (ie, ones no longer considered 'new') are exempt from VAT. In a VAT-exempt sale of property, to avoid a clawback 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 building. In such a scenario, the seller does not charge VAT and instead the purchaser will account for the VAT on the sale on a reverse charge basis. Should the seller and buyer not exercise this option, any VAT reclaimed previously on the acquisition or development of the property will be clawed back by Revenue for the relevant adjustment period.

Exemptions

Transfer of Business relief is a relief from applying VAT on the transfer of a business. The relief will apply to the sale of a property that has been let in the past, on the basis that the purchaser intends to carry on the same sort of business as the vendor (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 provisions applies to the sale of an 'old' property, no VAT adjustment (known as a Capital Goods Scheme Adjustment) should arise for the vendor and the purchaser will take over the property's obligations under the capital goods scheme from the vendor.

Where the transfer of business provisions applies to the sale of a 'new' property, the vendor may be able to claim further

VAT input credit where they were not entitled to recover all of the VAT incurred on the acquisition or development of the property.

8.2 Mitigation of Tax Liability

Previous structures to reduce stamp duty liability (eg, by way of a sub-sale, etc) are no longer relevant as the government have legislated to prevent such loopholes.

Budget 2018 increased the rate of stamp duty on commercial property from 2% to 6%. A new scheme is being introduced to refund stamp duty on property transactions in respect of commercial land bought for the development of housing. The refund will be subject to certain conditions, including a requirement that developers will have to start the relevant development within 30 months of buying the land.

Previously, stamp duty was mitigated on large-scale acquisitions through selling a corporate vehicle holding the property. This planning, which obviously raises other issues, has been impacted by Budget 2018's introduction of an increased stamp duty charge on certain transfers of corporate vehicles, or partnerships, which hold land which has been developed or is intended for development. For corporate entities which do not hold such land, there may still be a stamp duty advantage to transferring the corporate entity to benefit from reduced stamp duty rates.

There are exemptions for intra-group transfers of real estate.

8.3 Municipal Taxes

Commercial rates are imposed by local authorities on businesses premises, and the relevant local authority also determines the level of rates to be applied. Water rates and waste water charges are separately charged for by local authorities. The charges can be either a flat rate or metered.

It is possible to seek an exemption from payment of commercial rates where the property is vacant, but an application to do so must be made to the relevant local authority.

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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'. The fiscal year operates on a calendar year basis from 1 January to 31 December. 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. Specified assets are set out as follows:

(a) lands and buildings in the state;
(b) minerals or any rights, interests or other assets in relation to mining in the state (this also includes exploration and exploitation rights within the Irish Continental Shelf);
(c) assets situated in the state which were used or were acquired to be used for the purpose of a trade carried on through a branch or agency; or
(d) unquoted shares deriving the greater part of their value from either (a) or (b) above.

8.5 Tax Benefits

Tax benefits from owning real estate are as follows:

- legal and accounting fees are tax deductible where they relate to legal or accounting services required in relation to a property (eg, the drawing up of a lease, etc);
- management/agent fees are tax deductible where an intermediary is used to deal with tenants or collect rent on the owner's behalf; and
- insurance policies relating to rental properties are tax deductible.

Any money spent on essential repairs and maintenance is tax deductible, provided it isn't for capital gain.