



# Commercial Real Estate

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# Ireland

Gillian Beechinor, Brian O'Rourke & Mark Barr  
Arthur Cox

## Leasing

### Practical points

#### (a) *Securing the premises*

Following a satisfactory inspection of the premises and conclusion of the negotiations, the parties will sign “heads of terms” setting out the principal terms of the agreement. Unless stated otherwise, the heads of terms are not legally binding but are considered to comprise a “gentleman’s agreement” regarding the headline terms of the deal.

If the premises are not immediately available or there is any other conditionality to the deal (e.g. a requirement to secure planning permission for works/change of use or to obtain vacant possession of the premises), the parties will enter a legally binding “agreement for lease” whereby the landlord agrees to grant, and the tenant agrees to take, a lease of the premises following the satisfaction of the relevant pre-condition(s). The agreed form of lease is appended to the agreement for lease and, in most cases, will be fully executed and held in escrow by the landlord’s solicitor pending satisfaction of the pre-condition(s).

#### (b) *Taxes and fees payable*

Stamp duty of 1% of the annual rent is payable on the lease or agreement for lease. An additional charge of €12.50 is payable on each counterpart and €12.50 is also payable if there is a rent review clause in the lease. Stamp duty must be paid within 44 days of the execution of the lease or agreement for lease. Failure to pay stamp duty within this period results in the imposition of penalties and interest by the tax authorities.

The rules regarding value added tax (VAT) on rent are complex, however if VAT is payable then it will generally be at a rate of 23% (tax advice is always recommended).

While not obligatory, the tenant should register the lease in either the Registry of Deeds or the Land Registry (as appropriate) in order to preserve its priority and put third parties on notice of its existence.

#### (c) *Fitting-out works*

The landlord will generally supply the premises in a “shell and core” condition. The tenant should submit its plans for the proposed fit-out works to the landlord for approval in advance of signing the lease or as soon as possible thereafter. A tenant will generally not be granted access to the premises to carry out works prior to the granting of the lease, however it can be permitted at the landlord’s discretion.

A landlord’s consent to the works is usually documented by way of a “licence for works”, which will provide that the tenant must engage a reputable contractor to carry out the works, put all necessary insurance(s) and statutory/regulatory approvals in

place, including planning permission, building control, fire safety and disability access certificates, etc. The cost associated with the application for consent (including legal and professional advisers' fees, e.g. architects' and surveyors') are usually borne by the tenant.

The tenant will often be granted a rent-free period at the commencement of the lease in order to complete its fit-out works and as an incentive to take up occupation as soon as possible. Most commercial leases require the tenant to remove its fit-out works on lease expiry. Tenants will generally require their fit-out works to be disregarded for the purposes of any rent review.

In the case of newly constructed buildings, tenants increasingly wish to have input into the finish or design of the premises. In such cases, the agreement for lease will document which aspects of the building works are to be carried out by the landlord and the tenant. Where the tenant's works involve structural elements or require fire safety certification, the parties must agree on a single "assigned certifier" who will be responsible for certifying compliance with the Building Control Regulations.

(d) *Codes of practice*

There are no widely applied codes of practice in Ireland relating to leasing.

Key commercial terms

The terms of commercial leases vary depending on the type of property being let and the relative bargaining power of the parties. In cases where the premises is located within a larger scheme with established precedent lease documentation, any concessions which are personal to the tenant or unique to the transaction will be documented in a separate side letter/agreement.

(a) *Rent*

The rent is usually expressed as a rate per square foot/metre, together with a flat rate for any car space(s). The measurement of the premises will be agreed between the parties prior to the execution of the lease and disputes can be referred to an expert or arbitrator. Turnover rents are not uncommon, particularly in the case of retail tenants.

Service charge and insurance contributions can often be reserved as rent in order to strengthen the landlord's position in the event of non-payment. Rent is usually paid quarterly in advance. Unless otherwise agreed (albeit rarely conceded by a landlord), a tenant may not set-off or deduct any amounts from the rent in the event of a landlord breach of covenant.

(b) *Rent adjustments*

Most commercial leases provide for a rent review every five years. Leases which were executed prior to 2009 usually contained "upwards only" rent review provisions, however these were abolished by a change in law of 2010. Rent is now generally reviewed on an "open market" basis, however it can also often be linked to changes in the Consumer Price Index.

It has become increasingly common for leases to include a cap on the amount by which the rent can increase, and also a limit on the amount by which rent can decrease.

If a rent abatement is agreed, this is typically documented in a side letter as a personal concession to the tenant and is disregarded for rent review/adjustment purposes.

Disputes in relation to rent reviews are generally referred to an expert or arbitrator for determination.

(c) *Other occupational costs*

Occupational tenants will be required to pay a contribution towards the landlord's insurance and (in managed schemes) service charge costs. This service charge can include contributions towards the upkeep of the building, overall estate (such as common areas and landscaping) and car park. Tenants should carefully check the service charge budget to ensure that they are not charged for services from which they do not derive a benefit, e.g. car parking, out-of-hours access, etc. Similarly, purchasers of buildings which have already been let to multiple tenants should carefully review the service charge provisions in the occupational leases to ensure they can recoup all of the costs of providing services to the building from those tenants.

Commercial rates are payable to the local authority and must be discharged by the rateable occupier of the premises.

If the lease is full repairing and insuring (FRI), the tenant is obliged to bear the sole cost of the repair and maintenance of the premises.

(d) *Period of occupation*

Lease terms are quite flexible but, on average commercial leases will be for a term of five to 15 years. Terms of over 35 years are unusual, however 20/25-year leases have been returning to the market in recent years. Tenants often negotiate break options which coincide with the five-yearly rent reviews, however this is a matter of commercial negotiation between the parties.

(e) *Remaining in occupation*

A tenant accrues statutory rights of renewal once it has been in continuous occupation of a business premises for five or more years. Landlords are advised to insist that a tenant taking a lease for a term of up to 10 years formally renounces these rights at the same time as the lease is granted. Tenants are required to confirm that they have been advised by a solicitor of the consequences of "contracting out" of these renewal rights.

Landlords can offer shorter-term lettings, however in the absence of a deed of renunciation, this can be perilous from the landlord's perspective should the tenant overhold and remain in occupation for the requisite five-year period. In cases where a tenant has been in occupation for five years or more and has not executed a deed of renunciation, it may (*inter alia*) request a further/renewed lease on the same terms as the existing lease for a term of between five and 20 years (at the tenant's option) and at an open market rent. The tenant is not obliged to take this further lease, however. If the terms of the new lease cannot be agreed between the parties, the matter may be referred to court.

There are a number of statutory grounds upon which the landlord can refuse to grant the new lease. For example, if the tenant has breached any of its covenants during the term of the existing lease, the landlord is entitled to refuse to grant a new lease. If the landlord wishes to develop or sell the property at the expiration of the term, then it is also not obliged to grant a new lease to the tenant. The tenant will, however, generally be entitled to claim compensation *in lieu* of the new lease.

If a tenant remains in occupation following the expiration of the term of its lease, it is considered to be "overholding". A landlord can serve an overholding tenant with a notice to quit the property in the event that a new lease is not being granted. There are prescribed notice periods for the duration of such a notice to quit, which should be consulted prior to its service. If the tenant refuses to leave, the landlord can apply to the court for an order of possession.

(f) *Disposing of the premises*

If a landlord disposes of the premises, the tenant's rights will not be affected as, unless otherwise specified or agreed, the landlord's successor in title is bound by the terms of any existing lease and any ancillary side letter/agreement.

Most commercial leases provide that a tenant cannot dispose of its interest in the lease without the landlord's consent. A landlord will often make it a condition of consent that the assignee or sub-tenant pays a security deposit and provides a guarantee or furnishes evidence of its strength of financial covenant. The landlord cannot unreasonably withhold its consent to the assignment of a lease, and it is not possible to absolutely prohibit assignment pursuant to Irish landlord and tenant legislation.

It is increasingly common for a tenant to insist upon the right to share occupation with other group companies without the landlord's consent.

(g) *Alterations*

Most tenants will be prohibited from carrying out structural alterations to the premises. Non-structural alterations can be carried out with landlord's consent, however there is an increasing trend for tenants to insist that they be permitted to carry these out without prior consent but subject to subsequent notification and submission of all associated plans and specifications to the landlord.

The tenant's works will be subject to compliance with all statutory requirements such as planning, building control and fire safety regulations. The tenant must furnish evidence of compliance with such requirements once the works have been completed.

A tenant may be entitled to compensation at the end of the term if their alterations are considered to be an "improvement" to the premises. Accordingly, a landlord may choose to carry out the works itself and recover the cost through increased rent. A tenant will usually be required to remove any alterations on the expiry or determination of the term of the lease.

(h) *Repair of the premises*

Most leases of standalone buildings or units in Ireland are full repairing and insuring (FRI) leases. The tenant is obliged to keep the premises in good repair and condition and to renew, repair or replace the premises (including all landlord's fixtures, fittings and equipment) as necessary.

If the lease relates to an internal demise only (commonly encountered with retail units in a shopping centre or parts of an office building), the landlord will recover the cost of maintenance works and repairs to the building through the tenant's service charge contribution.

On the expiry of the lease, a landlord will usually serve the tenant with a "schedule of dilapidations" outlining the repair works required to be carried out prior to vacating the premises. This can often be a substantial cost for a tenant and any dispute may be referred to an expert or arbitrator to determine. In order to avoid subsequent disputes arising and also for the purposes of giving both parties clarity as regards the repair/maintenance obligation, landlords and tenants now often attach an agreed condition survey/schedule of condition to the lease at its commencement, so as to benchmark the tenant's repair/maintenance obligation.

## Investment

### Practical points

#### (a) *Exclusivity*

A purchaser will often seek an exclusivity period when it makes an offer to purchase a property. This will be documented in a non-legally binding heads of terms which can be difficult to enforce in the event that the agreed exclusivity period is not adhered to. The exclusivity period will often be a period of a few weeks in order to give the parties sufficient time to negotiate the terms of the sale before contracts are exchanged.

#### (b) *Restrictions on disposing of property*

If a property is secured by a financial institution, the charge document may contain a restriction on the disposal of the property without the lender's consent. A seller should be asked to furnish a letter from its lender setting out the amount required to redeem a loan or confirming the lender's consent to the sale (the lender's consent may also be required to the grant of an occupational lease, and this should be borne in mind in the context of practical points of leasing). A purchaser must ensure that the security is adequately released on closing, so that an unencumbered title is acquired.

The purchaser's solicitor will carry out a full title due diligence prior to the purchase, including carrying out searches in the relevant public registers. The purchaser is protected in the event that there is a restriction on disposal which should have been registered against the title but has not. In such cases, the purchaser is deemed to be a "*bona fide purchaser for value without notice*" and, all things being equal, may take the property free from encumbrances.

#### (c) *Impacts on timing*

Following the completion of a satisfactory structural/technical survey of the property, a purchaser is advised to carry out full title and planning due diligence against the property – which can take time. The seller is obliged by law to furnish evidence of tax clearance on completion, and this can also delay closing. If evidence of tax clearance is not available, the purchaser is required to withhold 15% of the purchase price and pay this to the Revenue Commissioners within 30 days of completion.

If the purchaser is borrowing to fund the purchase, its lender may carry out its own legal due diligence and will often require that certain additional conditions are satisfied. This can also have a potentially significant impact on timing.

#### (d) *Key milestones in the acquisition process*

The three milestones in an acquisition are generally: (i) heads of terms; (ii) exchange of contracts; and (iii) completion.

The heads of terms are not legally binding but will set the parameters for the negotiations and drafting of documents. The majority of the legal due diligence is carried out before contracts are signed.

On the exchange of contracts, the purchaser usually pays a deposit of 10% (albeit this figure is open to negotiation), which is held by the seller's solicitors as stakeholders pending completion. The deposit can be forfeited by the seller if the purchaser does not complete and the delay is the purchaser's own fault. Once contracts are exchanged, the seller will apply to the Revenue Commissioners for tax clearance and will also arrange for the appropriate releases to be prepared by its lender (if any).

On completion, the purchaser pays the balance of the purchase price to the seller (subject to variation depending on any apportionment that may need to be carried out in respect of any outstanding or prepaid income or outgoings, e.g. rent from a tenant) and the seller executes a deed transferring the property to the purchaser. Completion usually takes place within 28 days of exchange of contracts.

The post-completion work stream typically includes the payment of the stamp duty and registering the sale deed in the appropriate public register. The registration process can be time-consuming and may take several months to complete. Additional costs may be incurred by the purchaser if it is required to file an application for first registration of the title with the Land Registry (see below).

(e) *Requirement for transfer of monies*

Most transfers take place by electronic funds transfer (“EFT”) between the parties’ solicitors. The timing of these transfers should be planned well in advance due to the differing clearance times that are applied by both the Irish domestic banks and also any non-resident financial institutions. If the parties bank with different financial institutions, the EFT may need to be made before 11am to ensure that the funds reach the seller’s account on the same day. If the parties use the same bank, the EFT can often be made much later in the day, at any time perhaps up to 4pm, in order to obtain same-day value. Cheques and bank drafts are less common but may also be accepted. In that case, however, the funds may take up to five business days to clear and completion will not take place until cleared funds have been received.

(f) *Execution procedure*

A contract is usually executed “under hand”, i.e. it does not need to be sealed. The contract can be signed by any duly authorised officer of the purchaser. The document transferring the title of the property to the purchaser must be executed as a deed, which means (in the case of Irish companies) that it must be signed by either two directors or one director and the company secretary of the purchaser. The company seal must also be affixed to the deed. Different execution rules apply to foreign companies, which should be checked/verified by the purchaser’s solicitor in advance of completion. If the purchaser is an individual, the document is also executed as a deed and witnessed by another individual. If the purchaser is a foreign company, the seller will usually require that it furnish a legal opinion from a practising lawyer in the relevant jurisdiction confirming the purchaser’s capacity, power and due execution of the deed.

(g) *Other procedural requirements*

All disposals of property in Ireland are now subject to compulsory registration in the Land Registry (the state-backed registry with a title guarantee). While most property in Ireland is now “registered”, a large number of city centre properties in Dublin and Cork remain “unregistered”. The application for first registration in the Land Registry must be submitted within six months of the sale and must be accompanied with the relevant fees.

Lenders will also need to register their security in the appropriate registry and within the prescribed time limit, so a lender’s solicitor will often insist that it takes charge of the registration of both the purchase deed and the security document (and also the application for the stamp duty certificate, in some cases).

(h) *Taxes and fees payable*

Stamp duty of 2% of the purchase price is payable on all commercial property sales. In certain circumstances, VAT at a rate of 13.5% may also be payable. It is recommended

that all parties obtain tax advice (including VAT, stamp duty and capital gains tax) prior to any acquisition or disposal to ensure that no adverse tax liabilities are triggered (e.g. a disposal may trigger a clawback of VAT on development costs).

### Key commercial terms

(a) *Deposit*

A deposit of (typically) 10% is payable on the exchange of contracts. All things being equal, the deposit is refundable only if the seller refuses or is unable to complete. If the purchaser does not complete due to some fault of its own, the deposit may be forfeited. Either party may serve a “completion notice” on the other if the completion has not occurred by the agreed closing date, provided the party serving the notice is ready, willing and able to complete. If a completion notice is served, the parties must complete the sale within the relevant period, which is usually 28 days from the service of the notice.

(b) *Timing*

Timing will depend on the nature of the transaction and whether any conditions must be satisfied prior to closing. Completion will typically take place within 28 days of exchanging contracts.

(c) *Employees*

Employees are not usually relevant to a real estate transaction, unless the property is being sold as part of a transfer of a business or if the building itself is serviced by personnel which are exclusively employed there. If this is the case, the contract should address the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (“TUPE”). Depending on the nature of the transaction, one party may require an indemnity from the other in respect of the TUPE obligations. Purchasers are recommended to take detailed advice on this issue, should the need arise.

(d) *Warranties for construction of building*

Collateral warranties from the contractor and design team may be available for up to 12 years from the date of practical completion of the building. Generally, collateral warranties may be assigned twice without the consent of the original warrantor.

(e) *Transfer of other tax or financial benefits*

The purchaser should carry out a detailed tax analysis of the property to ensure that there are no latent tax issues.

## **Development**

### Practical points

(a) *Land ownership and assembly*

The two systems of registration of land in Ireland are: (i) the Land Registry (“registered land”); and (ii) the Registry of Deeds (“unregistered land”). It is important for a purchaser to carry out searches in both registries to ensure that the developer has title to the property (this should also be borne in mind in the context of practical points of investment). The buyer is also recommended to carry out a full survey of the property, to include rights of access and connection to services. Developers should also carry out planning searches in order to determine: (i) the nature of any existing planning permissions affecting the site; (ii) the relevant “zoning” of the site; (iii) any planning enforcements affecting it; (iv) compulsory purchase orders; and/or (v) any protected structures or items of archaeological importance on the site. Certain zoning categories

(e.g. residential developments) enjoy the benefit of fast-track planning processes.

If the title to the property comprises multiple lots, it is recommended that a “declaration of identity” from an architect or surveyor is obtained in order to verify that the title documents and maps reflect the boundaries of the property on the ground. Issues can arise where access to the property is over land owned by third parties, and purchasers will need to ensure that all necessary rights/easements exist to allow for access and connection to services. The purchaser will also need to register the purchase deed and map with the Land Registry, so care should be taken that the maps provided are in the required format. This is also relevant in the case of multi-storey buildings, where the building can have a different “footprint” at each level.

Recent building control legislation has brought in more stringent compliance requirements in respect of works to commercial buildings and, while these regulations are/were welcome in terms of quality assurance, compliance with the requirements thereunder has often proven to be onerous for developers.

(b) *Land transfer*

Depending on the nature of the scheme of development, the title to the land will be transferred either by way of a freehold conveyance/transfer (perhaps with associated lease/grant of easement), long lease (typically 999 years) or occupational lease.

(c) *Taxes and fees payable*

Stamp duty at a rate of 2% is payable on the purchase price. VAT may also be payable on the purchase price, however, much will depend on whether VAT was paid by the developer when acquiring the land and on the construction/development costs. The developer may also face a capital gains tax liability on the disposal of the property.

Tax advice should be taken by all parties to ensure that the disposal is structured in the most tax-efficient way.

The local authority will usually levy development contributions as a condition of the planning permission for the development. The purchaser will require confirmation from the local authority that any development contributions have been paid in full prior to closing.

Key commercial terms

(a) *Price*

The purchase price is negotiated at the outset. In many cases, the contract for sale will be conditional upon the satisfaction of certain pre-conditions which may lead to a variation in the ultimate purchase price payable or give rise to a right to rescind the contract by either party (e.g. success/failure in obtaining a planning permission for the redevelopment of the property or a change in its permitted use). Where issues such as title defects or non-compliance with planning permission are discovered during the due diligence process, a purchaser will often seek a variation of the purchase price or place a portion of the purchase funds in escrow pending resolution of the issue.

(b) *Payment structure*

Generally, the developer will pay the purchase price for the property to the seller in two tranches (i.e. deposit of 10% at contract exchange and the balance at completion). The developer will then either self-fund or obtain finance to carry out the development works, with a view to recovering the acquisition and development costs when the property is sold or let.

(c) *Deal structures*

The structure of the deal will depend on the nature of the development and the relative bargaining position of the parties. In most cases, a developer (or its funder) will want to pre-let the entire or majority of the development before construction works commence. The agreements for lease (sometimes referred to as “development agreements”) will contractually bind future tenants to take a lease when the property has been constructed (or other pre-conditions have been met) and guarantees a stream of income to the developer against which it may finance the development costs.

(d) *Taxes and fees payable*

Stamp duty of 2% of the purchase price will be payable. An assessment of any VAT liability will also need to be carried out by both parties.

## Financing

### Practical points

(a) *Level of loan*

Most lenders will insist on a maximum loan-to-value (LTV) ratio of 60–65% of the market value of the property. Each lender will have its own credit assessment criteria and the maximum amount of the loan advanced to a borrower will depend on the financial circumstances of the individual borrower, the location and type of property, the rental income generated or likely to be generated from the property and the risk appetite of the particular lender.

(b) *Security*

A lender will always require a first-ranking fixed charge over the property and any rental income generated from the property (including any bank account into which that rent is paid). The charge document must be executed as a deed and registered in the appropriate public register (e.g. the Registry of Deeds or Land Registry and the Companies Registration Office in the case of Irish companies). The lender will carry out searches before the security is granted to ensure that its charge will rank first in priority over all other security interests. If any form of security interest is granted over leasehold property, the prior written consent of the landlord may be required under the terms of the relevant lease.

The lender may also require an all-asset debenture which captures all other property, assets and undertaking of the borrowing entity. In addition, the lender may require a charge over the shares in the borrowing entity. If the borrowing entity has any borrowings from shareholders or other parties, the lender will require all such indebtedness to be subordinated in favour of all amounts due to the lender by the borrower. If a managing agent is appointed by the borrower to collect rent, the lender will usually require a duty of care agreement to be entered into between the lender, the borrower and managing agent pursuant to which the managing agent agrees to collect the rent and to pay that rent directly into a bank account charged in favour of the lender.

(c) *Lender due diligence*

A lender will carry out full legal due diligence before the drawdown of a loan. This can be done by carrying out a full investigation of title or accepting a certificate of title from the borrower’s solicitors.

If the lender chooses to carry out an investigation of title, it will nominate a firm of solicitors to review the title and prepare a report. This firm will usually draft the security documentation and register the lender's security in the appropriate public register. The borrower will be required to pay the lender's legal costs incurred in carrying out an investigation of title. In certain circumstances, a lender will accept a certificate of title from the borrower's solicitors. Primarily, the lender will need to be satisfied that there is "good and marketable title", i.e. that there are no material defects which would affect the marketability of the property or the ultimate enforcement of the lender's security.

If the property is let, the lender will also require a full review of all occupational leases to ensure that the terms of those leases are market-standard and would not prejudice the lender's position on enforcement. Any unusual provisions, such as restrictions on forfeiture, would need to be considered by the lender.

(e) *Enforcement*

A lender can take steps to accelerate its loan and enforce its security after an event of default has occurred under its loan agreement or, in the case of a demand facility, once the loan has been demanded and remains unpaid. The most common method of realising commercial real estate in Ireland is to appoint a receiver on foot of the contractual powers contained in the lender's security documents. A receiver is appointed by the lender, but acts as an agent of the security provider. A lender or its receiver will also have certain statutory powers which are available to it on enforcement. These include a lender's right to assume possession of the property and to sell the property. Where a lender exercises its statutory power of sale (as opposed to appointing a receiver to sell the property), it can avail of statutory overreaching powers which entitle it to sell the property free of subsequent security interests including judgment mortgages. Lenders and their receivers have a statutory duty to obtain the best price reasonably obtainable when realising their security over a property.

Key commercial terms

(a) *Length of loan*

The term of the loan will be agreed between the borrower and lender but, on average, the terms of most property finance loans would be five years.

(b) *Interest rate and payment dates*

Interest is generally charged at a fixed or floating rate. Fixed rates are common for property financings. If a floating rate of interest applies, this will generally be charged at an agreed number of basis points above the passing European Interbank Offered Rate (EURIBOR) or London Interbank Offered Rate (LIBOR) depending on whether the loan is advanced in euro or sterling. Interest accrues on a daily basis and is generally required to be paid quarterly.

(c) *Repayment*

The repayment terms will depend on the nature of the transaction. For example, on each repayment date the borrower may be required to repay an instalment of principal plus accrued interest or accrued interest only with a single "bullet" repayment of principal on maturity of the loan. The loan agreement will set out the events of default following which the lender can take steps to demand repayment of the loan. A borrower will usually seek to negotiate some concessions, such as a grace period of 3–5 business days if a payment of principal or interest is late due to a technical or administrative fault not within the borrower's control.

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