COUNTRY COMPARATIVE GUIDES 2020

The Legal 500 Country Comparative Guides

United Kingdom

REAL ESTATE

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This country-specific Q&A provides an overview of real estate laws and regulations applicable in United Kingdom.

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UNITED KINGDOM
REAL ESTATE

1. Overview

The United Kingdom of Great Britain and Northern Ireland (commonly described as the "**UK**") comprises the kingdoms of England, Wales, Scotland and Northern Ireland. England and Wales share the same real estate law and registrations system. Scotland and Northern Ireland have their own real estate law and registrations systems. There are also differences between residential and commercial land law in each jurisdiction. Our answers to the questions in this Guide are limited to the English and Welsh system.

English and Welsh real estate law is a patchwork of:

- practical legislation governing, for example, the registration of real estate at the English and Welsh Land Registry;
- legislation aimed at addressing perceived market abuses and other political or social issues of the day;
- medieval concepts of tenure; and
- complex and often very old case law (i.e. court decisions).

Despite attempts to modernise and consolidate the law, English and Welsh real estate law remains full of seemingly anachronistic rules and many traps for the unwary.

In the last 20 years there has been a governmental drive to ensure that ownership of most of the land and other estate interests (e.g. leases and mortgages) in the UK are registered on a publicly available governmental register. More than 85% of land in England and Wales is now registered at the English and Welsh Land Registry with a target of 100% registration by 2030.

The historic nature of much of English and Welsh real estate law means that relatively little of the legislation (outside of planning, environmental and health and safety etc.) derives out of or from European legislation and therefore the legal impact of Brexit is likely to be limited.

Various temporary legislative measures have been introduced since March 2020 to reduce the spread of Covid-19 and address the economic impact of the pandemic. Many of these affect real estate investments (e.g. enforced closures or restricted hours for certain business types) or landlord and tenant relationships (e.g. restrictions on landlord's remedies for unpaid rent). Given the temporary and variable nature of these measures, our answers to the questions in this Guide do not take into account any such Covid-19 related measures.

2. What is the main legislation relating to real estate ownership?

Interests in land: Law of Property Act 1925: This act governs the nature of land interests that can be created, deals with third party interests in land and how third party rights, in some cases, can be overridden.

Land Registration: Land Registration Act 2002 and Land Registration Rules 2003: This act and accompanying regulations set out the main legislation for registration of land interests in England and Wales at the Land Registry.

Land Trusts: Trusts of Land and Appointment of Trustees Act 1996: This act governs the creation of trusts of land and sets out the statutory powers of trustees. These powers can be supplemented by a trust deed. The act also gives the Court power to order the sale of a trust property in certain circumstances.

Commercial leases:

- Landlord and Tenant Act 1927 and Leasehold Property (Repairs) Act 1938: These statutes deal with the right of tenants to carry out improvements to leasehold property and controls landlords' rights to enforce tenants' repairing covenants.
- Landlord and Tenant Act 1954: This act gives commercial tenants the right to a new lease at the end of the term of their current lease subject to certain conditions.

- Landlord and Tenant Act 1927, Landlord and Tenant Act 1988 and Landlord and Tenant (Covenants) Act 1995: These acts regulate on what terms tenants (and their guarantors) are released on assignment of their lease. Similarly, they regulate on what terms landlords are released when they sell their interests. The 1927 act also imposes a duty on landlords to act reasonably, in certain circumstances, when considering a tenant's application for consent to assign, underlet or charge its lease.

3. How is ownership of real estate proved?

As mentioned above, there are three different land registration systems in UK, the English and Welsh system, the Scottish system and the Northern Irish system. Our answers to the questions in this Guide are limited to land situated in England and Wales.

Land in England and Wales is a mix of registered land (which is registered on a publicly available government register) and unregistered land. The vast majority of land is now registered. Most of the unregistered land is owned by historic estates or governmental bodies. Unregistered land must be registered at the Land Registry if is sold. It is therefore uncommon to come across unregistered land in commercial transactions. For this reason we have limited our answers to the questions in this Guide to registered land.

Proof of ownership to registered land is by reference to the register. The register is an electronic register, which lists, in particular, the registered owner/s, all registered encumbrances (e.g. mortgages and leases) and rights and includes a plan showing the extent of the registered land. Each registered interest (see Q5 below) is given a unique title number. An official copy of the register for each title number can be obtained online for a small administrative fee. In broad terms, the register is definitive although in some circumstances it can be subject to "rectification" to deal with matters such as errors and fraud.

Compensation is potentially payable by the Land Registry in the cases where there are errors in the register.

4. Are there any restrictions on who can own real estate?

No, save in the case of minors and incapacitated persons. In the case of registered land, where the land is owned by multiple people or entities, the Land Registry will only register a maximum of four people or entities as the registered owners. Those registered owners will hold the legal title in the land on trust for all of the beneficial owners.

5. What types of proprietary interests in real estate can be created?

There are three main proprietary interests:

- *Freehold*: where the owner owns the property in perpetuity. A freehold most commonly includes the land, the soil below and airspace above the surface of the land and any building on that land, but parties are free to agree other arrangements (for example a freehold could include only land and airspace within certain defined limits, or could just be of airspace or just of land),
- *Commonhold*: where a building is split into a number of units. The common parts of the building are owned in perpetuity by a commonhold association. The owner owns a unit in perpetuity (rather like a freehold interest) and is a member of the association. Though commonhold interests were introduced in 2004 and were intended for use with apartment blocks, few such interests have been created. Most apartments are instead owned through leasehold interests (see below). In 2020, the Law Commission of England and Wales recommended changes to the commonhold regime with a view to encouraging its wider adoption for apartment blocks but such recommendations have yet to be implemented.
- *Leasehold*: where the owner (tenant) is granted a lease of an agreed area for a fixed term. There is no minimum or maximum term and the lease can include renewal rights. Leases granted for more than seven years must be registered at the Land Registry. Subject to the terms of the lease, the tenant of a leasehold interest can, in turn, grant a further lease of all or part of the land/building (for a period less than the term of their lease). This means that chains of subsidiary leasehold interests can be created.

6. Is ownership of real estate and the buildings on it separate?

Not unless otherwise agreed. Buildings are treated as part of the land and transfer with it unless otherwise agreed (for example, it is possible to carve out a

specified block of airspace and the buildings structures within it from a transfer of a freehold or the grant of a lease). However, it is unusual (and frequently problematic) to separate ownership of the land and the buildings at the freehold level and where it is necessary to do so, this is typically achieved by creating separate leasehold interests out of the freehold interest.

7. What are common ownership structures for ownership of commercial real estate?

Commercial real estate can be held directly by individuals or through entities, although it is more common for high value commercial assets to be held through specifically created structures, often formed outside of England and Wales.

Common ownership structures include:

- limited liability companies;
- offshore property unit trusts; and
- limited partnerships.

Limited liability companies: Limited liability companies, formed specifically for the purpose of holding the real estate in question, have historically been a common holding structure, often based offshore. Corporate vehicles offer limited liability, which allows investors to ringfence assets and liabilities. They can also be tax efficient, for example selling the shares in a corporate vehicle means that a purchaser should not have to pay stamp duty land tax on the transfer of the property. However, the tax efficiency of corporate holding structures has been impacted by changes in April 2019 to the UK's rules on the taxation of non-residents' capital gains on UK real estate, which now usually fall within the UK Corporation Tax net. These rules apply to gains both on direct asset disposals and on certain indirect disposals of interests in entities that are UK-property rich. This can lead to effective double taxation on indirect disposals since the seller will be taxed on its gain at the share level, but may also suffer a price reduction on account of latent capital gains sitting within the vehicle being sold. This has given rise to increased interest in offshore property unit trusts which can be treated as direct-tax transparent (see below). Companies within a qualifying group may benefit from an exemption election from tax on capital gains: the rules here are complex.

Offshore property unit trusts: Under these structures, the property is held by trustees (usually two to allow a purchaser to have the comfort of "overreaching" the trust on a sale see Q14) on behalf of investors who hold units in the unit trust. Property unit trusts are a commonly formed in Jersey (JPUTs) or Guernsey (GPUTs). Offshore property unit trusts can have a number of key tax advantages – if the trust document is drafted correctly, and the trust is managed properly, the transfer of units in a property unit trust should not give rise to stamp duty land tax and typically does not give rise to UK stamp duty either. Property unit trusts that were properly created and managed used to be treated as tax transparent for income purposes but tax opaque for capital gains by the UK tax authorities. However, this changed in April 2019. Under the UK's new approach to taxing capital gains of non-resident investors, a property unit trust defaults to being tax opaque for capital gains purposes, but may in certain circumstances elect to be treated as fully tax transparent for capital gains (i.e. as though it were a partnership), which can make them attractive to tax-exempt investors in particular. The entity must be UK-property rich, transparent for UK income purposes and notify HMRC within the applicable window in order for this transparency election to be available. Property unit trusts are an increasingly popular and tax efficient way of holding UK real estate, albeit the inability of property unit trusts to be a member of an SDLT group means they can cause difficulties if intra-group restructurings are necessary.

Limited partnerships: Limited partnerships are a common holding structure for English and Welsh property, with English, Jersey and Guernsey limited partnerships commonly used. The exact nature of the limited partnerships varies with some having legal personality whilst others (including English limited partnerships) do not. Limited partnerships are typically transparent for most tax purposes (including income and capital regimes) and are therefore a popular structure for tax-exempt investors (although the transparent nature means that transferring interests in a partnership that holds property is normally subject to stamp duty land tax). Limited partnerships are a flexible structure, without many of the rules and restrictions that apply to corporate vehicles.

8. What is the usual legal due diligence process that is undertaken when acquiring commercial real estate?

For asset sales of commercial, registered real estate, the buyer's lawyer will typically:

- review the title documents (i.e. a copy of the Land Register for the property, any land agreements noted on the title and, if the property is leasehold, the lease and other ancillary letting documents);
- where the property is subject to leases, review those leasehold interests (though the

extent of this review will depend heavily on the nature of the property and why the buyer is buying the property);
- raise enquiries of the seller using both standard industry forms (known as the Commercial Property Standard Enquires or "**CPSEs**"), which ask about disputes, boundaries etc., and through bespoke enquiries arising from the buyer's lawyer's wider due diligence; and
- raise searches of public bodies, utility providers etc. to ascertain issues arising from the location of the property (e.g. to check that the building has all necessary planning consents).

The buyer's lawyer's due diligence process can take several weeks (particularly as the results of some of the key searches can take a number of weeks to be provided) and is expensive as sellers do not generally give buyers warranties regarding their title, the state of the property or on compliance of laws. In certain cases (such as where the seller is selling complex or numerous properties via a competitive bid process), the seller may decide to instruct its lawyers to prepare a due diligence pack including searches in order to speed up the sale process or to avoid numerous bidders having to carry out the same due diligence.

Where a property is sold by way of a transfer of the entity or structure through which it is held, the process is typically the same but with additional due diligence in respect of the relevant entity or structure. In transactions of this type, the seller will typically only give relatively limited warranty protection on the entity or structure and little or no protection in respect of the property itself.

Where the purchase of a property is financed by external debt, the lender will usually require a standard industry form of report from a law firm, which is known as the City of London Law Society Certificate of Title ("**CLLS Certificate**"). The CLLS Certificate comprises numerous statements about the property's title, the nature of any occupational leases, statutory compliance and disputes. For example, the CLLS Certificate will state that the property is not subject to a compulsory acquisition order. If a statement is untrue, the firm producing the CLLS Certificate will make an appropriate disclosure. In order to produce a CLLS Certificate, the law firm will have had to carry out the legal due diligence steps mentioned above. In bid scenarios and/or where the title is very complex, the seller's law firm will often produce the CLLS Certificate. In most other cases, the CLLS Certificate is produced by the buyer's law firm.

9. What legal issues (if any) cannot be covered by usual legal due diligence?

There are some land interests that bind a buyer even though the interest is not registered at the Land Registry. These are known as "overriding interests". Details of these rights are set out in the land registration legislation. Some of these interests may be apparent from inspection e.g. squatters' rights. As lawyers do not generally inspect properties, the buyer will need to satisfy itself on this issue. For overriding interests that are not apparent from inspection, the CPSEs (see Q8 above) will ask about these interests.

In addition, buyers' lawyers do not cover building control, health and safety or environment issues as part of the legal due diligence. Specialist surveyor and experts can be employed to deal with these issues.

10. What is the usual process for transfer of commercial real estate?

Transaction Steps	Seller	Buyer	Comments
Heads of terms ("HoT")	Prepare and negotiate HoTProduce sales pack comprising title documents and property information (e.g. if property let, leases, tenant arrears and service charge details) For leasehold property where landlord's consent required, consider approaching landlord for consent in principle to transfer	Negotiate HoT For leasehold property where landlord's consent required, collate relevant information about buyer and any guarantor, such as accounts and references and provide to seller	HoT not binding save for agreed exclusivity and confidentiality provisionsMost sale packs are hosted on virtual data sites For leasehold property landlord must respond in principle to consent request within reasonable time (usually 4 weeks) assuming all required information on buyer provided. Documenting consent thereafter will take at least 6-8 weeks
Preparation of sale agreement ("Agreement")	Prepare draft AgreementPrepare draft property transfer deed Prepare any ancillary documents (e.g. if property let, assignment of rent arrears and rent deposits and, if property new or recent building, assignment of construction documentation) Negotiate Agreement For leasehold property where landlord consent required, submit application for consent and negotiate form of consent. Where confidentiality is a concern this stage may be delayed till after signing of the Agreement.	Carry out legal due diligence (see Q8) Buyer will arrange a valuation and structural survey Negotiate Agreement and ancillary documents For leasehold property where landlord's consent required, negotiate form of consent. If consent not obtained before signing, closing of sale will be conditional on obtaining landlord's consent	No prescribed form of Agreement but industry standard termsLand Registry prescribed form of transfer deed For leasehold property where landlord's consent required, the terms of the consent are regulated by a mixture of the provisions of the lease and various statutory provisions. A landlord will typically require its costs to be paid and very often will require the seller to guarantee the buyer's performance of its leasehold obligations under an authorised guarantee agreement ("AGA")
Signing to closing	Satisfy any seller's conditions to closingAgree redemption statement and arrangements with current lender for discharge of mortgage on closing including execution of Land Registry discharge form Agree apportionment schedule Execute transfer deed and ancillary documents For leasehold property, finalise and execute landlord's consent to transfer and any ancillary documents (e.g. AGA)	Pay deposit to seller's lawyerArrange funding including third party debt Satisfy any buyer's conditions to closing (e.g. ensuring that releases for all seller's mortgages are produced on closing) Agree apportionment schedule Execute transfer deed and ancillary documents For leasehold property, finalise and execute landlord's consent to transfer and any other ancillary consent documents (e.g. parent company guarantee for buyer)	A deposit of up to 10% of the purchase price is typically paid on signing which will be forfeited if the buyer fails to complete sale (unless failure was due to the seller)Apportionment schedule deals with rental income, arrears and service charge Transfer deed to be executed in accordance with Land Registry requirements (the Land Registry will now accept esignatures on transfer deeds provided their requirements met e.g. use of an esigning platform and two factor authentication). Legal opinion required if buyer is a non- UK entity. Notarisation not required All parties including seller's lender must be represented by a conveyancer (type of English & Welsh qualified lawyer) or must provide other evidence of identity
Closing	Use price to pay off existing debt Hand over transfer deed, ancillary documents and Land Registry discharge form Arrange completion phone call/meeting with lawyers for buyer, seller's lender and buyer's lender for dating of documents and release of funds For leasehold property, pay landlord's costs for consent Transfer tenants' rent deposits to buyer	Pay balance of price plus/less apportionments to seller's lawyers Satisfy buyer's lender's loan conditions precedent Attend closing phone call/meeting Complete buyer's mortgage documentation	Loan condition precedents will require preparation in advance of Land Registry application forms and an undertaking from the buyer's lawyers to make the applications and pay any SDLT (see Q16) Loan condition precedents will also require a Land Registry priority search with at least 20 working days' priority from closing
Post-closing	Pay seller's lender mortgage redemption monies if not sent at closing Send rent authority letter to tenants with new payment instructions Hand over originals documents relating to the property (e.g. leases) to the buyer.	Pay SDLT and file SDLT return Apply to Land Registry to register release of seller's mortgage, the property transfer and the new mortgage Serve all notices of assignment, including on the landlord where the property is leasehold If property leasehold and mortgaged, serve notice of charge on landlord	SDLT must be paid within 14 days of closing Land Registry will not accept application without proof SDLT return has been submitted Land Registry application must be made within the priority search period to maintain priority of transfer Maximum Land Registry registration fee £910 Registration takes 3 – 6 months

11. Is it common for real estate transfers to be effected by way of share transfer as well as asset transfer?

Yes. As noted in Q7, real estate is commonly held through specially formed entities or structures and there can be a tax advantage to transferring the interests in those entities or structures rather than the underlying real estate (for example, a transfer of units in a JPUT will typically not require any stamp duty or transfer tax, compared to the stamp duty land tax that would be payable on a direct asset sale – see Q16 below for more details).

12. On the sale of freehold interests in land does the benefit of any occupational leases and income automatically transfer?

Yes – no formalities are required beyond the registration of the sale itself (see Q10 above for more details).

13. What common rights, interests and burdens can be created or attach over real estate and how are these protected?

A wide variety of rights, interests and burdens can be created or attached to real estate, but given the historical nature of real estate law in England and Wales, there are a large number of complex rules that govern them, which can create somewhat arbitrary distinctions around exactly when certain rights, interests or burdens will attach and "run" with the land. Some of the key interests are:

- *Easements*: for example, rights of way over a property;
- *Restrictive covenants*: for example, an agreement not to build more than one house on a plot of land;
- *Legal mortgages*; and
- *Options to purchase*.

All of the above rights and interests must be registered at the Land Register in order to be protected. However, as mentioned at Q9 above, there is a further class of interests called overriding interests which do not require registration. Legislation has sought to gradually reduce the list of overriding interests but they still include certain important interests such as short leases (i.e. of less than seven years), certain interests of people in actual occupation of the property and certain easements.

As an example of some of the complexities that can arise, positive covenants (e.g. to pay a sum of money towards the repair of a shared access way) do not attach to the land (although positive covenants between a landlord and tenant do attach to the land). However, there are various devices used to ensure that future

owners are liable to perform these types of covenants, for example, the owner of the shared access may register a restriction at the Land Registry on the adjoining property prohibiting the sale of the property unless the new owner agrees to comply with the positive covenants.

14. Are split legal and beneficial ownership of real estate (i.e. trust structures) recognised

Yes, English and Welsh law recognises the splitting of legal and beneficial ownership; however, it is not possible to register the beneficial ownership of land at the Land Registry as the register only records the ownership of the legal estate.

A person dealing with registered proprietors can generally assume they have unlimited power to dispose of the property, unless there is a restriction or other entry in the register limiting their powers.

Where the Land Registry is notified that a property is subject to a trust, the Land Registry will register a trustee restriction which prohibits disposals of the property without the consent of at least two trustees (unless the trustee is trust corporation) or pursuant to a court order. A trustee restriction is automatically entered on the register when two or more owners are registered (as this will necessarily mean that a trust exists).

A buyer does not need to investigate the terms and nature of the trust (e.g. that the trustees have power to sell the property) provided the buyer pays the purchase price to at least two trustees or a trust corporation. In such a case, the beneficial owners' interests are said to have been "overreached". Where there is only one trustee, who is not a trust corporation, buyers will generally insist that a second trustee is appointed in order to benefit from the overreaching rule.

15. Is public disclosure of the ultimate beneficial owners of real estate required?

Currently there are no specific requirements to disclose the ultimate beneficial owners of real estate. However, there are general requirements to disclose the beneficial owners of corporate vehicles and certain trusts and proposals for greater transparency in relation to overseas ownership of UK real estate as set out below:

- *PSC Regime*: Statutory obligations under the "Persons with Significant Control Regime" to register the persons directly or indirectly holding or controlling 25% of the interests in, or otherwise having significant influence or control over, a UK corporate entity at the UK central company registry ("**Companies House**"). This can be satisfied by identifying an entity with control which itself has equivalent disclosure obligations allowing the chain of control to be traced up the ownership chain. The information at Companies House is publicly available.
- *Beneficial ownership of trusts*: A new trust registration regime requiring disclosure of beneficial owners of trusts will come into effect in 2022. As noted in Q7, real estate is commonly held through specially formed entities or structures. Some of these commonly used structures (e.g. limited partnerships which do not have legal personality (so cannot hold the legal title to land in their own right) and off-shore unit trusts) use trusts to acquire real estate and so will need to comply with the disclosure regime. The new rules will come into effect from March 2022 and have retrospective effect – i.e. they will apply to registrable trusts even if they were created prior to March 2022. Until March 2022, only trusts which have a UK tax consequence are registrable, which in practice means that it is probably only unit trusts.

Whilst not specific to real estate, the provisions require the registration of details about trusts including details of the beneficial owners in a central register. The provisions apply to any express trust which has only UK resident trustees (or at least one UK resident trustee and a UK resident settlor) and any express trusts with non-UK resident trustees which acquire land in the UK. It will be an offence to (i) fail to register a trust or (ii) update the register where details change, in each case within 30 days.

Beneficial owners includes the direct beneficiaries of the trust and any individual who has direct or indirect control over the trust (including the ability to end the trust or change the trustees). The details of these beneficiaries in this register will be available to law enforcement agencies and members of the public who can demonstrate a legitimate interest. However, although a trust which has no UK trustees and which purchases real estate in the UK must register details of beneficial owners in the central register, these details are not publicly available.

- *Beneficial ownership of overseas entities*: There are proposals for a new public register showing the beneficial ownership of overseas

entities who own UK real estate. All overseas entities wishing to purchase or sell UK real estate would be required to register with Companies House and provide details of their "registrable beneficial owner". The test for registrable beneficial owners is proposed to be aligned with the PSC Regime (persons directly or indirectly holding or controlling 25% of the interests or otherwise having significant influence or control). The initially proposed consequences of failure to register are draconian – the Land Registry would not register any sale or purchase involving an unregistered overseas entity. The progress of these proposals has stalled due to other pressures on parliamentary and governmental resources this year and revised legislation addressing the concerns raised in response to the consultation is awaited.

16. What are the main taxes associated with commercial real estate ownership and transfer of commercial real estate?

Ownership: business rates, which are payable to the local authority. The rates are calculated by multiplying the property's "rateable value" by a multiplier set by central government. The rateable value is currently the property's open market rental value on 1 April 2015, based on an estimate by the Valuation Office Agency. The next estimate will take place in April 2023 based on 1 April 2021 open market values. The standard multiplier for 2019/2020 is 50.4. Where a property is let, the tenant will be liable to pay the business rates. Business rates can be significant sums if a property is situated in an expensive area e.g. central London.

Direct taxes: corporation tax, or income tax, or capital gains tax may apply to income, profits and gains arising from the ownership of commercial real estate. Which tax treatment applies will vary depending on whether the real estate is owned by an individual, or by a non-natural person/entity, and the nature of that entity.

The current corporation tax rate is 19%, which rate applies to UK corporates and to non-resident corporates making direct disposals of UK real estate and certain indirect disposals of interests in entities that are UK-property rich.

Taxes on asset transactions are:

Stamp Duty Land Tax (SDLT): this is payable by purchasers of commercial real estate interests in England and is calculated on the basis of a slice rate system by reference to the amount of "chargeable consideration" (normally the stated purchase price plus any VAT, but also includes any other money or money's worth) given for the real estate, starting at 2% on £150,001 – £250,000 and 5% on £250,001 and above for commercial property. There is an equivalent tax, "Land Transaction Tax", charged on purchases of real estate interests in Wales.

On the grant of a lease, SDLT is also payable on the net present value of the rents (plus VAT if any) payable during the term of the lease on a slice system at the rates of 1% on £150,001 – £5,000,000 and 2% on £5,000,001 and above. This is in addition to SDLT on any lease premium paid.

Value Added Tax (VAT): at 20%; The seller normally must make an election to charge VAT (which typically it would do to enable it to recover VAT it incurs in relation to the real estate). However, sale of commercial real estate can be exempt from VAT or be treated as a VAT-free transfer of a going concern (i.e. a business that is operating and making a profit), depending on the facts.

As mentioned above at Q7, UK commercial real estate is often owned by offshore entities. We have not summarised any non-UK taxes which may be payable in offshore jurisdictions.

17. What are common terms of commercial leases and are there regulatory controls on the terms of leases?

The common terms of commercial occupational leases are set out below. This summary is focused on occupational leases, rather than 'long leases' which are granted for an upfront sum and have substantially different terms.

Normal market practice in England and Wales is for occupational leases to be granted on a 'full repairing and insuring' ("**FRI**") basis under which the costs of insuring and repairing the premises are passed down to the tenant (ignoring void costs etc.), although there are certain areas (such as damage through risks which are uninsurable) where this principle does not always hold true.

- Duration
- Rent
- Rent review
- User
- Repair
- Service charge and insurance
- Assignment
- Underletting
- Renewal rights

For each of the above terms we have summarised below the key features and what, if any, regulatory controls apply.

Duration: leases must be granted for a fixed period (i.e. they cannot be indefinite). There is no legal maximum or minimum duration. In the market, retail leases are often between 5-15 years. The duration of offices and industrial leases can be up to 25 years or more, particularly if the lease is of a whole building, although the typical duration ebbs and flows in accordance with market sentiment – currently there is a trend for shorter leases giving tenants more flexibility. Tenant break rights are common in longer leases (see below).

Rent: there are no regulatory controls as to the amount of rent. Rent is usually payable in advance often every quarter; however, monthly rents are becoming common for retail leases. On the grant of a new lease, landlords will generally give tenants rent free periods (or capital sums in lieu of such periods) to cover fit out works and, in poor market conditions, as an incentive to take the lease.

Rent review: there are no regulatory controls as to when or how the rent may be increased and parties are free to determine the type and frequency of the review. There are four main types of review (see below), although they are sometimes used in combination for certain situations (e.g. the rent might comprise a base rent which increases on a stepped or index linked basis, with a turnover rent also payable). As a general principle, it is very rare for a landlord to agree a rent review mechanism which could ever result in the rent being decreased. Reviews are therefore predominantly "upwards only".

Types of rent review:

- *open market*, where the rent is reviewed by reference to the rents payable in comparable properties. If the parties cannot agree what the open market rent is, it is typically determined by reference to an independent expert. Open market reviews are every 3 or 5 years depending on the duration of the lease;
- *stepped*, when the rent is increased at agreed intervals by agreed amounts;
- *index linked*, where the rent increases in accordance with an agreed index (such as the consumer prices index) at an agreed frequency (often every year); and
- *turnover*, where the rent is an agreed percentage of the tenant's turnover subject to agreed minimum and maximum rents. These types of review are common in retail leases.

User: there are regulatory controls on how property may be used. Leases will also usually restrict a tenant's ability to change the use of the premises.

Repair: there are few regulatory controls regarding either party's obligations. Parties are therefore free to agree who is responsible for each type of repair. As mentioned above, the practice of FRI leases means landlords will try to ensure that the tenants are liable for all repairs, which may include those arising from inherent defects in the building. There are regulatory controls in respect of the landlord's remedies where a tenant has failed to repair; the landlord may not enter the premises to carry out repairs unless it has an express right to do so (and consequently it is normal to see such a right in a lease). The amount a landlord may recover from the tenant may also not exceed the amount by which the landlord's interest in the property has been diminished due to the disrepair unless the express right provides otherwise (again, this is therefore typically expressly addressed).

Service charge and insurance: there are no regulatory controls in the commercial context (compared to the residential context where this is heavily regulated). Where the lease is of part of a building the landlord will repair, maintain and insure the structure of the building in addition to arranging the lighting, heating etc. of the common shared areas (e.g. reception, stairwells) and providing shared security, reception, etc. services for the building. The tenant will be required to pay their share of the costs incurred by the landlord in providing these services. Where the let premises are on an estate, the landlord will also charge the tenant for similar costs the landlord incurs in respect of the estate roads, service areas and shared amenities. Leases of part on an estate therefore frequently contain more than one service charge, one for the building and one for the estate. Parties are free to agree what items and services are to be covered by the service charge. The practice of FRI leases means landlords will, however, try to recover all their costs in relation to such matters and services from their tenants (including insurance costs). Each tenant's share of the charge is usually calculated on a pro-rata floor area basis. Tenants will seek to resist the landlord's ability to charge the tenant for the initial construction or the improvement of premises.

Assignment: this is an area of greater regulation. Landlords will generally only allow tenants to assign the whole of the let premises (and even then only with the landlord's consent, such consent not to be unreasonably withheld or delayed). If the landlord wishes to impose a condition for giving its consent (e.g. the new tenant must meet a profit test), legislation provides that the condition must be set out in the lease. If the condition is

not set out in the lease, the landlord may only impose such a condition if it is reasonable to do so. A common express condition is that the tenant enters into an authorised guarantee agreement ("**AGA**").

Under the AGA, the tenant guarantees the new tenant's obligations. The AGA ceases if the new tenant assigns the lease. Guarantors of the outgoing tenant will also be required to guarantee the outgoing tenant's obligations under the AGA. The form of the AGA is prescribed by legislation.

Underletting: there are few regulatory controls. Though the parties are free to negotiate terms, landlord will often insist that tenants may not underlet if their leases are for less than 10 years. Where the lease permits underletting, it will typically set out the conditions on which the underletting must take place. For example, the underlease must be on the same terms, at market rent and not give the undertenant any right to a new lease.

Termination rights: leases expire at the end of the term unless the tenant has a statutory right (see below) and/or a contractual right to a new lease. Leases also usually provide that landlords can terminate ("forfeit") the lease if the tenant breaches its obligations. Technically no court process is required but is often followed as criminal liability can result if the landlord's self-help process is followed incorrectly. The tenant may apply to the court to stop the termination. The court will usually give the tenant relief from forfeiture on condition that the breach is remedied unless the breach cannot be rectified (e.g. the tenant is insolvent) or there have been breaches in the past. Parties commonly agree contractual termination rights. In a 15 year lease, tenants will often insist on a break right in the 5th and 10th year of the lease term. Landlord break rights are less common.

Renewal rights: subject to certain regulatory conditions, tenants have statutory rights to a new lease at the market rent for a maximum term of 15 years unless this right has been excluded by agreement. A key condition is that the tenant has complied with its obligations. Landlords can ask the court not to grant the new lease on certain grounds e.g. the landlord wishes to redevelop the property. If the landlord is successful in opposing the tenant's request, the landlord will have to pay the tenant compensation. Not surprisingly, most landlords often try to exclude this statutory right, but this is a factor for the overall commercial arrangement (with tenants potentially willing to pay a higher rent for a lease with the benefit of statutory renewal rights). Tenants often also have a contractual right to a new lease. Due to changes in how stamp duty tax is calculated (see Q16.) and a growing requirement for flexibility by tenants, lease terms have become shorter (from 20-25 years to 10-15 years) in order to minimise the tax payable at day one and to avoid tenants being committed to space for long periods of time. As a result, tenants often require contractual renewal rights.

18. How are use, planning and zoning restrictions on real estate regulated?

In England and Wales, the use and development of land are regulated primarily by the town and country planning legislation, which establishes a system of "development control" and "development planning" for these purposes.

Development Planning framework: National authorities, each Local Planning Authority ("**LPA**") and in some cases, neighbourhood bodies, create a hierarchical framework of plans which go together to create the "Development Plan" for the relevant area. Development Plans contain policies as to how land should be used and the types of development that should be permitted or prohibited. At a local level, plans often allocate specific areas or individual sites for suitable uses or types of development. These plans are periodically reviewed and updated.

Development Control framework: Planning permission is required to carry out the "development" of land (meaning the carrying out of building or engineering works on the land or the making of a material change in the use of land). Any person can make an application for planning permission, although in practice, the owner's consent is often required. In most cases a planning application is made to the LPA. Larger projects will often require an Environmental Impact Assessment to be submitted with the application. The LPA (usually the local council, or unitary authority of the area) should determine the application in accordance with the Development Plan unless there are justifiable reasons to refuse it. Applicants have rights to make an administrative appeal against refusal of planning applications; there are also rights for third parties to challenge, in the courts, the grant of permission on limited legal grounds.

Often an applicant will need to enter into a "Section 106 Agreement" with the LPA in order to obtain planning permission. A Section 106 Agreement requires the applicant to carry out works or pay money, or establishes controls on the use of the land, in order to overcome planning objections to the development proposal. Development of the site may also be subject to a development tax called Community Infrastructure

Levy, which is charged at local level to pay for infrastructure necessitated by development in the area.

It is possible to carry out some development without express planning permission, for example:

- some changes of use (e.g. between industrial and storage uses); and
- the carrying out of various works, for example: alterations to existing premises, demolition, or development by bodies carrying out public functions (statutory undertakers).

Significant planning reforms recently came into force extending the circumstances in which certain changes of use are deemed not to involve 'development', for example changes between, shop, office or restaurant uses; and extending the range of circumstances in which development does not require express planning permission, for example, demolition of certain office, residential or light industrial buildings and their replacement by blocks of residential flats. However, at the time of writing, these reforms are currently subject to legal challenge.

Heritage and Environmental Controls: There are a number of other controls that protect the historic built environment or the natural environment, for example:

- *Listed Buildings*: A building which is of special architectural or historic interest can be "listed" by the Government, meaning that any development affecting its special characteristics is subject to obtaining Listed Building Consent.
- *Conservation Areas*: A wider area which is of special architectural or historic interest can be designated as a Conservation Area – an LPA will need to take this designation into account when determining any planning application within the area.
- *Sites of Special Scientific Interest (SSSI)*: A site of interest for its wildlife or geology can be designated as a SSSI. Consent from governmental body, Natural England, may be required to carry out any development on the site.

Major infrastructure projects: There is a separate system of consenting for nationally significant infrastructure projects. The Secretary of State grants consent for a project under this regime by making a "Development Consent Order".

Devolution of Powers to Wales: At the detailed level, planning rules for England and Wales are beginning to diverge due to devolution of powers to the Welsh Government. Processes and requirements for planning applications and other aspects of development planning and control may therefore be different depending on whether a development is proposed in England or Wales.

19. Who can be liable for environmental contamination on real estate?

Liability for environmental contamination on real estate in England and Wales can arise under a number of key statutes and under the common law (case law). Liability will normally attach to the polluter. However in certain circumstances the owner or occupier of land which has been contaminated can also be held liable.

Statutory liability

Contaminated land regime: This establishes a "polluter pays" principle for clean-up of contaminated land and pollution of waters. If the state of the land (or waters in on or under the land) is such that there is actual significant harm, or a significant risk of significant harm, to the environment, the regulator must designate the land as "contaminated land". It must also serve a remediation notice on the responsible person to clean up the contaminated land / waters. The regulator will be the local authority or, in certain circumstances the Environment Agency (for sites in England) or Natural Resources Wales (for sites in Wales).

Statutory Guidance on the EPA allocates clean-up liabilities among different "appropriate persons". The primary liability to clean up is imposed on the person who caused or knowingly permitted the land to be contaminated (the "polluter"). If that person cannot be found, then the owner or occupier for the time being may be liable.

Even if the owner or occupier of land was not responsible for contaminants initially being present (and is therefore not at that stage regarded as a polluter), it can become liable as a polluter at a later stage as a result of its action or inaction. It is possible that an owner or occupier could be held to have "knowingly permitted" land to be contaminated where it knew, or should have known, that the land is contaminated, and then fails to clean up the land when it has sufficient control to do so.

Under the Statutory Guidance, liability can be passed between parties to exclude a polluter (e.g. a seller of real estate) in certain circumstances, such as where the land is sold to a buyer with full information as to the contaminated state of the land.

The application of the EPA contaminated land framework

has in practice been exceptionally complex and resource intensive for local authorities. A combination of this, and the progressive removal of funding to local authorities to implement the regime, has meant that few remediation notices have been served since the regime came into force. In practice, most contaminated land has been remediated as a result of requirements imposed through planning permissions to redevelop land.

Water Pollution Works: This also imposes liability on persons who cause or knowingly permit pollution of controlled waters (e.g. groundwater or rivers) to carry out clean-up works.

Environmental Damage Regulations ("EDR"): The "operator" of certain, mainly industrial, activities is required to prevent environmental damage from those activities. Environmental damage includes the contamination of land. Where damage does occur, the operator has a duty to remedy the damage and potentially provide compensation for it. There is also an obligation to notify the regulatory authorities where there is an imminent threat of environmental damage. Under the EDRs, the operator is the person who operates or controls the activity. Generally, this will be the person holding the permit to carry out the activity. There are separate sets of EDR covering England and Wales.

Common law: The most likely causes of action are in nuisance and negligence, for example, for contamination that has escaped onto neighbouring land. Responsibility arises from the possession, control and use of the land where the contamination originated, and liable parties can include a combination of owners, occupiers and polluters, such as landlords, tenants, contractors and operators.

20. Is expropriation of real estate possible?

Powers are available to public bodies, and other bodies exercising public functions (an "authority"), to acquire land compulsorily in a variety of situations. These powers of compulsory acquisition are given to help such bodies to fulfil their statutory responsibilities. Commonly used examples include powers of:

- Local Authorities to acquire land for regeneration or housing purposes;
- Highway authorities to acquire land for construction or improvement of highways; and
- Other infrastructure providers and utilities to acquire land to provide major infrastructure – such as railways, airports, ports, power generation facilities or transmission networks, pipelines, and telecommunications.

Some powers are generally applicable and contained in Acts of Parliament, such as the power to acquire land for regeneration purposes. In other cases, particularly for large projects, powers are included in legislation authorising the project to proceed, (e.g. by Act of Parliament in relation to the High Speed 2 rail project, or by Development Consent Order in relation to a nationally significant infrastructure project – see Q18).

While such powers are often exercised by an authority to acquire the land itself, powers of compulsory acquisition can also be used to acquire existing rights over land, or, in many cases, create new rights over land (e.g. rights of way). Powers of compulsory acquisition are mostly given by statute. An authority will make or obtain a "compulsory purchase order" in order to crystallise the power to acquire the land or rights. The complex process to make or obtain a compulsory purchase order will require significant consultation with affected parties. Often some form of public inquiry in front of an Inspector will be involved to consider objections against the order. An order will only be made if it is demonstrated to be in the public interest. Statutory compensation is available to an owner and / or occupier for land or rights acquired compulsorily. Where land is acquired, this broadly comprises three key elements:

- the open market value of the land; there is a considerable amount of law on the subject of how this value is determined;
- any loss caused by reason of losing possession of the land (known as "disturbance"); this can include business losses; and
- loss of value caused to land held by the person claiming compensation by reason of it being severed from the land taken or otherwise detrimentally affected (known as "severance" and "injurious affection").

To the extent compensation cannot be agreed by the parties, the matter can be referred to a tribunal for determination as to the correct amount of compensation due.

Often for large infrastructure projects, the authority will offer additional compensation to compensate for losses or expenses that would not otherwise be covered by statutory compensation.

For residential and mixed-use property comprising a residential element, certain leasehold home owners have a statutory right to acquire their property subject to the payment of compensation. Residential leasehold homeowner also have the right to take over the management of their property. The nature and exercise of these rights are complex and beyond the scope of this

Guide.

21. Is it possible to create mortgages over real estate and how are these protected and enforced?

Yes, mortgages can be created over real estate. As mentioned above, the answers in this Guide only relate to registered land in England and Wales. Where the real estate interest is leasehold, the terms of the lease must be first reviewed to ascertain if consent of the landlord is required in order to create the mortgage.

A legal mortgage will generally be compulsorily registrable at the Land Registry. The main exception is a mortgage over a leasehold property where the lease term has less than seven years to run. If the legal mortgage is not registered at the Land Registry, it may lose priority as against third party interests (including another registered mortgage) even if that interest or mortgage was granted after the unregistered mortgage. Priority is generally determined by the date of registration and not creation.

A company or limited liability partnership incorporated in the UK under the Companies Acts must also register security with the Registrar of Companies within 21 days after the date the security is created. If the mortgage is not registered with the Registrar of Companies, it will be void as against third parties and other security subsequently registered will have priority.

Enforcement is generally straightforward. The lender has a number of methods of enforcing the mortgage, it can:

- appoint a receiver; the receiver will normally have wide powers to deal with the property including the power to sell or lease the property and use the proceeds to satisfy the debt;
- sell the real estate and use the proceeds to satisfy the debt;
- take possession of the real estate (this is unusual because of liabilities assumed by taking possession e.g. environmental liabilities); or
- obtain a court order vesting ownership of the freehold real estate in the name of the mortgage holder (known as 'foreclosure', although this term may also be used in the sense of general enforcement of security over property); however this is rare.

22. Are there material registration costs associated with the creation of mortgages over real estate?

There are a variety of fees and expenses payable in relation to the registration of mortgages with appropriate registries but as a general rule they are unlikely to be significant enough to affect how the transaction should be structured, e.g. Land Registry fees on a scale of up to £250 per property for the registration of a mortgage and a Companies House fee of £15 for online filing of a charge.

There are no notarisation requirements or property taxes payable in relation to the creation of security over real estate. SDLT is not payable on the creation of security over real estate.

23. Is it possible to create a trust structure for mortgage security over real estate?

Yes. Where there are multiple beneficiaries of security it is common to use a security trustee to hold the security on trust for the beneficiaries which may include a syndicate of lenders. Under a trust structure, the beneficiaries of the security can change without any changes being required to the mortgage documentation. Also, the trust assets are not part of the security trustee's assets and are therefore not part of its estate in the event of its insolvency. The security trustee can enforce the security on behalf of the beneficiaries, e.g. by appointing a receiver (see Q21 above). Note that it is common in English law loan agreements for the security trustee to be referred to as a 'security agent'; however, the underlying arrangement is generally still a trust.

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