Global Corporate Real Estate Guide - England and Wales

Real Estate Law

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# What is included in the term “real estate”?

The term "real estate" includes the following:

Land

Any buildings or structures on it

# What laws govern real estate transactions?

Property law in England and Wales is governed by statute and English common law principles.

# What is the land registration system?

The system of land registration in England and Wales was first introduced in the late 19th century and is dealt with by the Land Registry pursuant to various United Kingdom statutes. All dealings with freehold interests in England and Wales are registerable as are all dealings with leases with terms of seven or more years.

# Which authority manages the registration of titles?

In England and Wales, the relevant authority is the Land Registry, a quasi-governmental body that has regional offices throughout England and Wales.

# What rights over real property are required to be registered?

In addition to transfers of freehold land and leases for more than seven years, all charges over land should be registered to be fully enforceable.

In addition, other rights and interests are capable of being registered. These include the following:

Rights over land

Restrictive covenants

Easements

Options

Contracts for sale

It is also possible for third parties to register certain notices against registered titles without the consent of the owner (registered proprietor). Such notices are often used to protect third parties who believe that they have an interest in the property or the proceeds of sale.

# What documents can landowners use to prove ownership over real property?

The Land Registry no longer issues formal title deeds since the land registers are open to public inspection. Accordingly, the entries at the Land Registry are regarded as sufficient proof of ownership.

Upon application, the Land Registry will issue an official copy of the entries relating to any given property. Such official copy comprises the following:

The Property Register describes the property and any appurtenant rights.

The Proprietorship Register shows the name and address of the registered proprietor, and any noted restrictions placed on dealings with the property.

The Charges Register shows any encumbrances (including mortgages) that may affect the property. If the property is subject to leases that are registerable, then such leases will usually be listed in a Schedule of Leases that forms part of the Charges Register.

The File Plan shows the location and boundaries of the property, usually edged in red.

# Can a title search be conducted online?

Yes. All registered titles are available to the public upon payment of a fee and most related documents are also available online.

# Can foreigners own real property? Are there nationality restrictions on land ownership?

There are no nationality restrictions on land ownership whether as individuals or corporate entities.

However, any overseas legal entity (not including an individual) that wishes to own freehold or registrable leasehold property (i.e., a lease for a term exceeding 7 years) in England & Wales must first register itself in the Overseas Entities Register at Companies House, and identify its beneficial owner(s). In order to register the acquisition of property at the Land Registry, an overseas entity will (subject to limited exceptions) have to provide its overseas entity identification number, and thereafter comply with its annual duty to update the Overseas Entities Register. Failure to do so would place a block on the entity's ability to dispose of, lease or mortgage that property, and expose it to penalties.

# Can the government expropriate real property?

Property can be expropriated by government, quasi-governmental authorities and local authorities but appropriate compensation must be paid.

# How can real estate be held?

Broadly speaking, there are two ways (or estates) in which property can be held:

Freehold

Leasehold

There are two main categories of registered title:

Absolute title is the best form of title and applies to most registered titles.

Possessory title implies that, upon application to the Land Registry, the applicant could not deduce a satisfactory paper or documentary title to the property in question notwithstanding that the applicant is, in fact, in actual occupation or possession of the land in question.

There is an additional category for leasehold land, namely "good leasehold" title. This form of title is usually granted where the tenant applicant cannot deduce the freehold title from which the lease is derived.

# What are the usual structures used in investing in real estate?

Any person or entity with a separate legal identity can be registered as a proprietor of registered land. These would include the following:

Corporations

Co-owners

Partnerships (subject to a maximum of four partners, as registered proprietors who would hold the registered estate in trust for the remaining partners, if any)

Limited partnerships (typically holding through the General Partner)

Limited liability partnerships

Charities

Trusts (bare or nominee)

More often than not, investment in real estate will be through the direct acquisition of the real estate asset. However, there may be circumstances where it is preferable to invest indirectly, for instance, through the acquisition of shares of the company holding the property.

The actual structure used will be driven by tax considerations.

# How are real estate transactions usually funded?

Traditionally, real estate transactions have been funded by banks or other lending institutions where the interest rate charged is a margin over the base rate of the Bank of England or the London Interbank Offered Rate (LIBOR). The length of such funding will vary depending on the commercial terms agreed.

Generally speaking, borrowing to finance a residential property would be over a long period, usually 15 to 25 years, whereas borrowing to finance commercial property is usually on a short-term basis of three to five years. Longer funding terms for commercial property are available in the market place.

Typically, it will be the borrower’s responsibility to pay for all the lender’s legal and other costs such as commitment and processing fees, valuations and surveys.

In commercial loans, lending institutions would typically take a first charge over the property in question together with a charge over any rental income. Often, other collateral security is also sought.

The typical security package is as follows:

Debenture over the borrowing company

Share charge over the shares in the borrowing company from its parent

A deed of subordination in relation to any shareholder’s funds or parent loan

An intercreditor deed if any mezzanine or secondary loans are to be secured against the property

A duty of care deed with the managing agents

Possibly a guarantee from the parent or a director of the borrowing company

Banks and other institutions lending in the UK market are generally regulated under UK legislation.

# Who usually produces the documentation in real estate transactions?

Generally, the seller’s lawyer will prepare the draft sale agreement, particularly where the property is being sold in a traditional asset sale.

In fact, even where the property owning vehicle is being sold by way of a share sale, it is often the seller’s solicitor who will prepare the initial share sale and purchase agreement.

Likewise, the landlord’s solicitor will prepare the draft lease and associated documents where a property is being let.

# Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

In relation to freehold interests, broadly speaking, a purchaser inherits the liabilities of the seller and, accordingly, a full due diligence exercise is recommended in relation to any real estate acquisition in England and Wales. This is to ensure that any contingent liabilities are properly reflected in the purchase price and that appropriate indemnities and guarantees are negotiated.

From an environmental perspective, while the concept that the “polluter pays” is applicable under UK law, the current owner of the land from which the contamination or pollution emanates would be primarily liable even if the contamination was historic, hence the need for appropriate indemnities.

In relation to leasehold, depending on the lease terms, the tenant can take on a number of the landlord's liabilities, and so again, full due diligence is recommended.

# Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

It is possible for a seller to retain liabilities relating to real estate after a sale since most obligations entered into in relation to real estate are deemed to be of a personal contractual nature between the original contracting parties.

Accordingly, appropriate indemnities are important to a seller to ensure that it is adequately indemnified against future breaches of covenants affecting the land, which were given by the seller or which affected the land during the seller’s period of ownership. As a result, a “chain” of indemnity covenant is continued and extended whenever the property is sold.

In relation to leasehold land, where the lease was granted before 1996, the original tenant (and usually all subsequent tenants) retain direct personal liability to the landlord to observe and perform all covenants within the lease during the term, including the payment of rent. However, for leases granted on or after 1 January 1996, an outgoing tenant is only liable on its covenants to the landlord (a) until it assigns the premises, or (b) if later, and where reasonable for the landlord to request the tenant to guarantee the assignee's lease compliance, whilst its assignee remains the tenant under the lease.

For example, if the landlord grants a 10-year lease to A, which A then (subject to its guarantee) assigns to B after two years, A is liable to the landlord throughout the period of B’s ownership. If B assigns to C after a further three years, then A has no further liability from the point of such assignment, but B is liable (subject to giving its own guarantee) to the landlord for so long as C remains as the tenant.

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