



The Essential Guide  
to UK real estate

Dechert  
LLP

# This Essential Guide provides an overview of the legal and regulatory issues likely to affect developers, occupiers and investors in UK real estate.

## Real estate

Real estate law in England and Wales can trace its origins back almost 1,000 years to the Norman Conquest of 1066. Over the centuries, there have been many changes in the law relating to land ownership resulting in the two different “estates” or interests in land that we have today: the freehold estate and the leasehold estate.

### Freehold estate

The freehold estate provides the owner with as close to absolute ownership of the land as is possible (for historical reasons the Crown still retains absolute ownership of all land in England and Wales).

The owner of a freehold estate has an unrestricted right to use and develop the land as it chooses (subject to any title restrictions, planning or other regulatory issues). The owner is free to grant leases out of the estate and to grant charges over it. The interest extends not only to the surface of the land itself but also to the airspace above it (‘to such height as is necessary for the ordinary use and enjoyment of the land and the structures upon it’) and to the subterranean space below it (although the Crown retains ownership of gold, silver, coal, oil and natural gas). The owner of a freehold estate is also presumed to own the subsoil up to the centre line of an adjoining public highway, which means that they may be able to construct basement premises extending under the highway.

### Leasehold estate

In contrast to the freehold estate, the owner of a leasehold estate only has an interest in land for a finite period of time. The precise terms of the lease creating the interest will vary from one property to another and will depend on the relevant bargaining position of the parties. However, most leases will require the tenant to pay an annual rent and to comply with detailed obligations relating to the repair of the property, restricting how it may be used and disposed of and many other matters.

There are two main types of lease:

- **The “ground lease”**

Ground leases are typically granted in return for the payment of an initial premium followed by a nominal yearly rent or, in some cases, no yearly rent. The premium payable on the grant of a ground lease is likely to be comparable with that payable for a freehold estate. However, the lease will bring with it various restrictions and prohibitions in relation to the tenant’s use of the property that would not exist in relation to a freehold. Ground leases are usually granted for a term of 99 years or more and are considered similar to a freehold estate in that they have a capital value and are capable of being used as financial security.

- **The “rack rent lease”**

Unlike ground leases, no initial premium is usually paid for a rack rent lease. Instead the tenant will pay an annual rent (usually by quarterly installments in advance) by reference to what is known as the “open market rate”. Rack rent leases can be granted for terms of anywhere between a few weeks and 25 years or longer. The recent trend in the UK though has been for shorter terms, and so most office and retail leases will now be for terms of between 5 and 15 years. Full Repairing and Insuring (FRI) leases pass all financial obligations with regard to the maintenance and repair of the property to the tenant, yielding an annual rental income free from deductions for the landlord. Rent reviews are carried out usually every five years (although the period can be shorter) and the rent payable under the lease aligned with the “open market rent” prevailing at the time of the review. It is also possible to link the rental increase to an index such as the UK Retail Prices Index so that the rent rises in line with that index, in this case, with inflation. Rent reviews are generally carried out on an “upwards only” basis, which means that an investor has the assurance

that their rental income will not decrease over the life of the lease.

### Commonhold

Commonhold is a relatively new form of freehold ownership that was introduced into England and Wales in 2002. It enables freehold owners of units on large developments to have a share in the ownership of the communal parts of the building or estate serving the units through their shareholding in a commonhold association. Despite the apparent benefits of passing control of communal areas to unit holders, commonhold ownership has not been widely used in practice to date.

### Business lease protection

Where premises are occupied under a lease for the purposes of a business, the tenant may acquire “security of tenure” under the Landlord and Tenant Act 1954 (the 1954 Act). This means that the lease will not automatically terminate on expiry of the term but will continue until either party brings it to an end in accordance with the 1954 Act. The 1954 Act also gives tenants the right to renew a protected lease at the end of the term, on substantially the same terms as the original lease, or to receive compensation if the landlord does not renew the lease on certain “no fault” grounds.

Landlords may object to the renewal of a lease in certain circumstances. These include cases where there has been a substantial breach of the tenant’s obligations in the lease, where there has been a failure by the tenant to repair the property or where the landlord intends to redevelop the property or take back possession of it for its own use.

It is possible, however, for a landlord and tenant to agree to exclude a lease from the protection of the 1954 Act by adopting a warning notice and declaration procedure. This is particularly common in relation to short-term leases of five years or less.

### Title

Title to most land in England and Wales is recorded centrally by the Land Registry. However, leases for a term of less than seven years are not registered and land that has not been sold for many years may not yet be registered.

Registered titles are accessible online via the Land Registry’s website. These registers record the nature of the legal estate, the rights and restrictions affecting it, details of the current “registered proprietor” and any charges over it or third-party interests in it. The title register is accompanied by a title plan showing the extent of the property comprised in the title, although the plan does not define exact boundaries. A fee is payable for registration in line with the value of the interest transferred or granted in the case of a lease. The fee is currently capped at £910.

Registered titles are subject to a grading system that indicates the level of strength or security of the title. “Title Absolute” acts as a guarantee that the estate (freehold or leasehold) is in the ownership of the person registered as proprietor. “Possessory” title on the other hand indicates that the proprietor may be occupying the land adversely to the interests of another party, i.e. they were not able to prove their entitlement to the land on registration. “Good Leasehold” title indicates that the interest out of which the lease was granted was not itself registered and so it was not possible for the Land Registry to confirm the landlord’s entitlement to grant the lease. “Qualified” title indicates that there was some issue or defect with the title upon registration and details of this will be noted on the register.

The Land Registry provides a statutory guarantee of the information recorded on the title registers and is obliged to compensate anyone who suffers loss as a result of a mistake.

Whilst the land registration system has greatly improved access to title information and has provided clarity as to ownership, there still remain a number of “overriding interests” that are not capable of registration and will nonetheless bind a purchaser of land. It is necessary therefore for a purchaser to look beyond the information recorded at the Land Registry and make further enquiries of the seller to establish whether any such interests affect the land being acquired.

### Land ownership

A wide range of legal entities, including companies, private individuals, limited liability partnerships, trusts, charities, local authorities, joint venture vehicles, government bodies and foreign corporations can

hold title to land in England and Wales. Title can also be held jointly by up to four legal entities either without a particular share in it, as “joint tenants”, or with individual shares in it, as “tenants in common”. Tenants in common can divide ownership between them in any proportions they choose.

### Transfers and contracts

The process of transferring land has been greatly simplified by the registered land system. All transfers now follow a prescribed format laid down by the Land Registry. The form will be executed by the buyer and seller and, in addition to the standard provisions transferring title, may include covenants and indemnities by the buyer in relation to ongoing liabilities.

Once the transfer has been completed, it is submitted to the Land Registry, along with the appropriate fee, for registration. Where the purchaser is a foreign entity, it will be required to provide a copy of its constitution in English. The Land Registry will also require certain identity checks to be carried out on applicants unless a solicitor qualified in England and Wales represents them. These checks are designed to prevent fraud and ensure the identity of all landowners is verified.

The transfer itself is usually preceded by the parties entering into a contract for the sale and purchase of the land. This process of entering into the contract is known as “exchange” as solicitors acting for the buyer and seller physically exchange their clients’ respective signed parts of the contract. It is customary for the buyer to pay a 10% deposit on exchange of contracts, which is usually held by the seller’s solicitors as “stakeholders” on the basis that it cannot be released to the seller until completion of the sale. As exchange commits the seller to sell and the buyer to buy the property, it is essential that before exchange occurs, the buyer has completed its title investigations and due diligence and has satisfied itself with all matters, including the state of repair and condition of the property.

On an acquisition of a vacant property, the contract is likely to be relatively straightforward. However, on the acquisition of a large multi-let property, the contract will be much more detailed and will need to provide for such things as apportionments of rent and service charge, refunds of insurance premiums, collection of

rent arrears, assignments of rights to pursue defaulting tenants, payment of rent deposits, etc. There may also be ancillary construction documents and service contracts, the benefit of which will need to be passed to the buyer on completion.

### Tax

A key consideration for non-UK resident investors in UK property will be any UK tax arising on the acquisition and letting of the property.

#### Stamp Duty Land Tax

Purchasers of interests in UK property, whether UK resident or not, are generally liable to pay Stamp Duty Land Tax (or SDLT) immediately following completion of the purchase by reference to the consideration paid for the interest. Rates of SDLT are determined by certain thresholds — for non-residential property, rates are based on the purchase price with the top rate being 4% (which applies to acquisitions over £500,000). For residential property, SDLT is charged at increasing rates for each portion of the purchase price. The top rate for individual purchasers is currently 12% and applies to any portion of the purchase price in excess of £1.5 million. A higher rate of 15% applies to corporate purchasers of residential property in excess of £500,000.

#### Stamp duty

Stamp duty is a tax payable on the acquisition of a UK company at the rate of 0.5% of the purchase price. As this rate is considerably lower than the corresponding SDLT rate, the purchase of property holding vehicles can be an attractive option to investors. It should be noted though that the acquisition of a property holding vehicle will involve further due diligence on the vehicle itself, which may delay the acquisition process and lead to increased costs. Also, where the property has been held by the vehicle for less than three years, there is a risk that SDLT could also be payable on the transfer of the shares (in addition to stamp duty on the transfer of the vehicle) where SDLT had been avoided, through one of the reliefs available, on the acquisition of the property by the vehicle. In addition, if the property purchased is residential, an annual tax can apply if the property is owned through a non-natural person such as a corporate vehicle (the Annual Tax on Enveloped Dwellings or ATED). The charge can apply

where the residential property is valued at more than £1m (as of April 2015) and rises from £15,400 p/a residential properties valued between £2m and £5m, up to £143,750 p/a for properties valued at more than £20m.

### **Value Added Tax**

Value Added Tax (or VAT) is not payable on the transfer of residential properties but may be payable by a purchaser of non-residential property. The VAT treatment will depend on a number of factors, including VAT registration in the UK and the current and future use of the property. Acquisitions of investment properties subject to existing occupational leases will generally be outside the scope of VAT and, where this is not the case, any VAT incurred should, subject to certain limitations, generally be recoverable by a purchaser intending to let the property.

Consideration must also be given to the VAT treatment of any tenants occupying the property.

### **Income and corporation tax**

Any rental income from UK properties will be subject to income tax (in the case of an individual) or corporation tax (in the case of a company) (as appropriate) in the UK, whether or not the investor is a UK resident. Rental payments to non-resident landlords will generally be paid after a tax withholding unless the landlord has approval from UK tax authorities to receive payments gross.

### **Capital allowances**

Any UK tax liability may be relieved or reduced by capital allowances that are available in respect of expenditure on plant and machinery or integral building features. Maximising the availability of capital allowances will be a priority for many investors.

Capital allowances are a form of tax relief allowing property owners and investors to write down against their taxable profits each year a proportion of expenditure on certain plant and machinery. The current rate of allowance for plant and machinery is 18%. Allowances are also available in respect of certain types of buildings such as research and development facilities.

### **Business rates and CRC Energy Efficiency Scheme**

Although not a property tax as such, owners of UK real estate will also be required to pay business rates to the local authority in which the property is situated. Rates are assessed on a property-by-property basis and in some areas can involve quite significant sums. Where a property is occupied by tenants, the tenants will, as part of their obligations under the lease, be required to pay the business rates associated with their occupation. Where a property is vacant or becomes vacant following the expiry of a lease, the obligation to pay the business rates reverts to the landlord. There is a short period of relief (three months for offices and six months for industrial premises) for empty properties, but after this period has expired the full rates again become payable. This can act as a real incentive for landlords to secure lettings on their properties even in cases where the rents payable may not be very high.

Property owners may also be liable for payments in respect of the CRC Energy Efficiency Scheme that was introduced recently in the UK. This scheme attempts to offset the use of carbon fuels by levying an additional charge on high energy users. The scheme involves the purchase of allowances that can then be offset against energy consumed. The aim of the scheme is to ensure that new buildings are constructed to high efficiency standards and to incentivise property owners to improve the energy efficiency of existing buildings. There has been much debate in the UK recently as to who should bear the cost of compliance with this scheme. The prevailing view is that tenants will generally pick up the cost of the scheme but this will depend on the particular terms of each lease.

### **Planning**

Planning control is a major consideration for investors in UK real estate wishing to construct new developments or extend or alter the use of existing developments. Failure to comply with planning requirements can lead to enforcement action being taken that could ultimately result in a building being demolished and those responsible facing large fines or imprisonment.

The demolition, extension or redevelopment of buildings and the change of use of land or buildings is heavily regulated in the UK. A framework of primary

and secondary legislation and planning policy at national and local level determines what type and where development can occur.

Although the whole of the UK is subject to planning control, England, Wales, Scotland and Northern Ireland have their own separately administered systems based largely on their own legislation and policy. Although there are many similarities, there are significant differences. This guide relates to the planning system as it exists in England.

### **Administration**

Planning control is generally administered by government at local level, for example, in London: the City of London Corporation or Westminster City Council. These government bodies are known as “planning authorities”. The relevant Secretary of State of Government is the planning authority on appeal and reserves a “call-in” power to determine a planning application of more than local significance.

Planning decisions are taken by democratically elected local Councillors at regularly convened planning committee meetings. The Committee receives a report from the planning officer who will usually make a recommendation to the Committee. The Planning Committee can, and often does, delegate authority to the planning officer to take certain planning decisions.

### **The planning function**

Planning control is divided into two main functions: policy formulation and development control.

Successive Governments have published topic-based planning policy documents that are soon to be replaced by a single National Planning Policy Framework. Government is pursuing a “localism” policy agenda and the introduction of a presumption in favour of sustainable development. At the local level, local planning authorities are putting in place a new system of Development Plans to respond to the Government’s objectives. All levels of policy formulation involve public consultation and participation.

The development control function is involved with the determination of applications for planning permission for development. Whilst there are exemptions, most development requires planning permission. The law requires the determination of the planning application to be in accordance with the “development plan”

for the area, unless material considerations indicate otherwise. There is plenty of scope for interpretation and disagreement. There is a right of appeal to the Secretary of State if an application is not determined within certain time frames, is refused or is approved but subject to unacceptable conditions. Local planning authorities also have enforcement powers against breaches of planning control, for example, to bring to a stop an unacceptable unlawful use. Ultimately, a breach of planning control, if not corrected following enforcement action, can result in a fine or imprisonment.

### **Planning applications**

Applications for planning permission can be made in outline, which determines the principle of development, or in full. Outline applications will not be acceptable in all situations due to the need for the local planning authority to assess the proposed development’s more detailed impact, for example, in a conservation area (see below). If an outline application is made and granted permission, then within three years the un-assessed detailed matters, known as the “reserved matters”, must be submitted for approval. Outline permission (with approved reserved matters) must be implemented within two years of the date of approval of the final reserved matter. Full permission must be implemented within three years of its date, although a longer period can be agreed. Planning permission lapses if not renewed or implemented.

Planning applications comprise forms, certificates, plans and drawings and usually a series of technical reports informing the planning authority on matters such as the development’s expected impact on highways and traffic, heritage assets, ecology and neighbours due to noise, privacy and light. Generally the larger the proposed development, and the more complex the location, the more technical reports will be required to assess impact.

Major development proposals may need to be environmentally assessed, requiring an Environmental Impact Assessment to be submitted with the planning application.

### **Special designations**

Across the country, certain areas and buildings enjoy greater protection from development. Within urban areas, these are some of the key designations:

- *Conservation area* – “an area of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance”
- *Listed building* – a building or structure which is considered to be of “special architectural or historic interest”
- *Tree preservation order* – a tree or group of trees that are protected for their public amenity value

Planning authorities’ “development plans” will also contain protective policies relating to, for example, heritage assets, flood risk areas and height restrictions.

### Planning appeals

Planning appeals are made to the Secretary of State and conducted by a Planning Inspector on his behalf. The Inspector determines the appeal, but in a small number of cases the determination is reserved for the Secretary of State following receipt of the Inspector’s report.

There are three methods by which planning appeals are considered: by the submission and exchange of written submissions only and an Inspector’s unaccompanied site visit; by the submission and exchange of written submissions followed by a hearing before an Inspector and an accompanied site visit; and by a public inquiry conducted by an Inspector involving both written and oral evidence with cross-examination and an accompanied site visit. Most appeals for major developments are determined after a public enquiry.

It can take between six and twelve months to obtain a planning appeal decision. Costs vary widely from tens of thousands to hundreds of thousands of pounds depending upon the complexity of the case.

A decision by the Secretary of State can be challenged in court on an error of law.

### Construction

Investors wishing to acquire a recently built property, a property in the course of construction or a property they intend to develop or extend, need to be aware of the issues that may arise in relation to construction law in the UK.

### Procurement

Procurement is the process by which legal responsibility for the different aspects of a construction project is allocated between the different parties involved. There is a wide range of procurement methods in the UK but the two most common are the “traditional contract” route and the “design and build” route.

The “traditional contract” route involves a separation of the design and construction elements. The building contractor is responsible for the construction, whilst a team of professional consultants (such as an architect, M&E engineer, structural engineer, etc.) are responsible for the design of the scheme. The property owner, known as the “employer”, is responsible for appointing each party separately.

The “design and build” route involves the appointment of a main contractor, who then appoints sub-contractors and design professionals to carry out the design elements of the project. The advantage of this route is that the contractor has overall responsibility for the whole project.

Other types of procurement methods include “construction management”, “management contracting”, “Private Finance Initiative” and “Public Private Partnership”. There can also be hybrid procurement methods depending on the precise requirements of the project.

### Forms of contract

Most construction projects will utilise standard form contract documentation prepared by professional institutions such as the Joint Contracts Tribunal (JCT). These standard form documents are usually subject to and incorporate a negotiated set of amendments that may be quite extensive. The contract usually provides for the provision of warranties in favour of purchasers, lenders and tenants.

### Issues arising

As the construction of any building is a complex process, the construction contract must cater to a wide range of issues arising over what may be a long period of time. The issues that tend to arise most frequently include extensions of time due to unforeseen events or lack of availability of materials, variations required either by the employer or as a result of natural

features encountered in the construction process, cost overruns, performance/insolvency of sub-contractors and defects in the finished product.

All of these issues must be catered for in the contract and a means of resolution provided for. In the event that the parties are unable to resolve their differences, statutory rules allow for the matter to be determined by adjudication, which is seen as a quick and effective dispute resolution process. However, if the parties are still unable to settle the matter, they may pursue other resolution methods including arbitration and litigation.

## Legislation

The construction industry in the UK is heavily regulated. All new buildings must comply with the relevant “Building Regulations” that are concerned with the standard and quality of construction. Regular inspections are carried out throughout the construction phase and certificates issued to confirm compliance. Health and safety is a key concern in the construction industry, and all contractors are required to comply with the Construction (Design and Management) Regulations 2007, which impose responsibilities on all those controlling site works. The Construction Industry Scheme is concerned with how payments are made between contractors and subcontractors and provides a means for the government to collect at source tax and national insurance contributions on payments to sub-contractors.

## Courts and civil proceedings

As disputes inevitably arise in the lifetime of any property investment, it is important for investors to have an understanding of the UK legal framework within which disputes may be resolved.

### The courts

Those who own, manage or deal with property in the UK may have reason at some point to bring or defend civil proceedings. There are different substantive and procedural rules depending on where in the UK proceedings are brought (the legal system of England and Wales is distinct from that of Scotland and that of Northern Ireland).

In England and Wales, civil proceedings start in either the County Court or the High Court, depending upon the value and nature of the claim. Only claims over

£100,000 can be started in the High Court, and many property-related disputes have to be brought in the County Court. Appeals can normally be made from the County Court or the High Court to the Court of Appeal, and from there to the Supreme Court. However, there is no automatic right of appeal, and permission to appeal is generally required from the Court. Cases will only go to the Supreme Court if there is an arguable point of law that is of general importance.

The court system in the UK is an adversarial one, although following the introduction of the Civil Procedure Rules in 1999 the parties are expected to co-operate with one another and the Court to ensure that the claim is dealt with quickly and fairly. The Court now actively manages the litigation process, and before the issue of proceedings the parties are expected to follow protocols for the exchange of information and documents about the claim. These developments are aimed at helping parties to avoid litigation by settling before the case formally starts and reducing the length of proceedings once begun.

### Procedure

Proceedings formally begin when a claim form is issued, stating the details of the claim, the parties involved and the amount sought. Court fees on the issue of a claim can be substantial. On receipt of the claim form, the defendant has to indicate whether it wishes to defend the claim and, if so, has to serve a defence within 28 days (although this period can be extended). The court will then hold a case management conference to set a timetable for the conduct of the proceedings, including the time for disclosure of relevant documents and exchange of written factual and expert evidence. It will also set a date for the trial. The duty to disclose documents both helpful and harmful to a party's case is wide ranging and can be extremely time consuming. The parties have some flexibility in varying the procedural timetable, provided it does not impact on the proposed trial date, which will only be altered in exceptional circumstances.

In most cases, the Court will expect the parties to try to resolve their dispute prior to trial by having a mediation. This is a non-binding confidential meeting between the parties, assisted by a third-party mediator, to seek a compromise of the dispute outside of the court process.

If the parties do not settle their dispute, the Court will determine the issue at trial before a single judge.

Normally witnesses will have to give oral testimony and will be subject to cross-examination by the other side.

### Remedies and enforcement

One of the most commonly awarded remedies is an order for payment of damages, but the Court has wide powers to grant other orders, including orders for specific performance or for the sale, mortgaging or exchange of land. In addition, there is a range of interim remedies which parties can seek which include asset freezing orders, search orders and payments into court.

Once the court has awarded a remedy, there are a number of enforcement options available to claimants if the defendant does not comply with the order. The defendant's property can be seized and sold, charging orders can be granted over land as security, insolvency proceedings can be commenced and third-party debt orders can be used to divert to the claimant monies owed by a third party to the defendant.

### Costs

The Court has a wide discretion as to making a particular party pay the costs of the litigation (including fees payable to the Court), but generally the losing party has to pay a substantial proportion of the successful party's costs.

Litigation can be funded through a number of means, including litigation insurance, which can either be before or after the event insurance, third-party funding and conditional fee arrangements. The Court now seeks to actively manage costs by a system of costs budgets.

### Arbitration

Court litigation is not the only method of dispute resolution available in England and Wales. A number of alternative processes exist, including arbitration, which is assuming a growing importance as a means of resolving disputes.

Despite the fact that arbitration is an out-of-court procedure, it is still governed by legislation. The Arbitration Act 1996 governs arbitration in the UK

and mirrors in many respects the provisions of the UNCITRAL Model Law (the international code on arbitration).

A dispute may be arbitrated because the original contract between the parties provides for the arbitration of any dispute (an Arbitration Agreement). Otherwise, the parties may agree in writing to arbitrate once a dispute has arisen.

Arbitration Agreements are usually construed widely. English courts take Arbitration Agreements seriously and will stay litigation proceedings if the parties have not complied with an Arbitration Agreement. The court is sometimes able to issue an injunction to prevent parties from litigating in foreign courts if an Arbitration Agreement has not been complied with.

Traditionally arbitration has allowed parties greater flexibility and choice than litigation in deciding how the process will run. Disputes are often referred to arbitration so that they are resolved in private by a person or group of people who are experienced in the trade or business in question and who have been chosen by the parties. Arbitration avoids a public hearing in open court before a judge who may have no special expertise on the matters in dispute and who will, therefore, have to choose between the conflicting views of each side's expert witnesses.

The parties can determine the procedure that will be followed in an arbitration. Usually the standard rules of a recognised body will be adopted, for example the London Court of International Arbitration or the International Chamber of Commerce.

Generally speaking, an arbitrator has the same powers as any court (including the power to award costs). Nevertheless, in some circumstances the arbitrator will require the court's assistance. For example, an arbitrator does not have the power to make orders such as injunctions, which carry the sanction of imprisonment for non-compliance.

Most Arbitration Agreements stipulate what is to happen if one or more of the parties are dissatisfied with the arbitrator's decision. Generally rights of appeal are limited. Parties cannot appeal to the courts on a question of fact, but there are limited appeal rights on points of law or based on the ground of lack of jurisdiction of the arbitrator or a serious irregularity.

## Employment

Purchasers of UK property assets also need to consider the impact of employment legislation on any employees of the seller, as these employees may in certain circumstances transfer automatically to the buyer. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) operate to transfer to the purchaser employees of the seller engaged “wholly or mainly” in the “undertaking” being transferred.

The application of TUPE can be triggered in two ways:

- On a “relevant transfer”; or
- When there is a “service provision change”.

A relevant transfer will arise where the business of one entity or part of the business is transferred to another entity and retains its identity. A service provision change occurs where the identity of the person who has the conduct of the activities changes. In other words, the service is outsourced, brought in-house or re-tendered.

In the context of a property acquisition, an example of a “relevant transfer” would be where the seller of a multi-let office employs a receptionist exclusively for that particular property. On the sale of the property, it is likely that the receptionist would transfer to the buyer.

An example of a “service provision change” would be where the seller employs managing agents to manage the property, and they in turn employ staff exclusively for that property. On a sale of the property, if the buyer decides to change the managing agents, it is likely that the staff employed by them will transfer to the new managing agents.

TUPE operates to automatically transfer to the purchaser of the business/new service provider all those employees who are assigned to the business being purchased/service provided on the employees’ existing terms and conditions (with the exception of occupational pension rights) and without breaking their continuity of service.

TUPE provides protection to the transferring employees in the following ways:

- If any of the transferring employees are dismissed post-completion, such dismissals will be automatically unfair where the sole or principal reason for the dismissal is the transfer itself

or, if the transfer is not the reason, a reason connected with the transfer, unless that reason is an economic, technical or organisational reason entailing changes in the work force (an ETO reason). The purchaser will also need to show that the dismissals were procedurally fair. A claim for unfair dismissal can lead to an award of up to £78,335, plus a basic award of up to £14,250.

- The seller must inform and (if they or the purchaser propose any “measures” e.g. redundancies or changes in terms and conditions) consult with appropriate representatives of the affected employees about the transfer. If these obligations are breached, an employment tribunal can award up to 13 weeks’ actual pay for each affected employee.
- The purchaser must provide the seller with details of its proposed measures (usually by formal letter) to facilitate the information and consultation process.
- The transferring employees must be employed under the same (or no less favourable) terms and conditions as those they currently have with the seller. Any detrimental changes to the employees’ terms (even if agreed with them) will be void if the sole or principal reason for the change is the transfer itself or a reason connected with a transfer unless the change is made pursuant to an existing contractual power to vary the employee’s contract or there is an ETO reason entailing a change in the workforce.
- TUPE will also transfer any employment-related liabilities (with the exception of pension rights, which are subject to a separate regime) to the purchaser. Thus any claims that arise due to the act or omission of the seller will transfer to the purchaser on completion. Consequently, it is critical that appropriate warranties and indemnities are included in the transaction documents to allocate the liability for employment claims appropriately between the parties.
- Occupational pension rights that are related to old age or survivor’s schemes do not transfer under TUPE. However, there is an obligation on the purchaser to establish as a minimum a matching contributions scheme. Furthermore, certain rights under the pension scheme may transfer, such

as early retirement and enhanced redundancy schemes. Detailed due diligence on pensions issues should be undertaken.

## Intellectual property

Intellectual property matters may also arise in relation to a property acquisition. In the UK, there are a variety of different intellectual property rights, both registered and unregistered, which can exist. When dealing with property assets, the main intellectual property rights to consider are trademarks and copyright.

When acquiring a property asset, it is important to ensure that all the relevant intellectual property relating to that asset is acquired with the asset, and that appropriate warranties (such as a warranty that the intellectual property does not infringe the rights of others, and a warranty that the intellectual property is not being infringed by others) are given. For example, when acquiring a property that is known by a particular name, care should be taken to ensure that either ownership of that name (and any associated logos) is transferred to the purchaser, or that the continued right to use the name is acquired as part of the transaction. It is dangerous to assume that because a particular property is well-known by a particular name, the rights to that name will automatically be acquired unless expressly dealt with.

When acquiring a company owning a property asset, similar issues will arise. It is important to ensure that all the intellectual property used by the company is either owned by or licensed to the company, and that any licensed rights will continue on a change of control. A purchaser will also want to ensure that the seller gives appropriate warranties in relation to the intellectual property.

## Conclusion

With the myriad legal and regulatory requirements, it is crucial for prospective purchasers to have a good understanding of any legal or political considerations that might arise. A team of tax advisors, political strategists and public relations consultants should also be available to assist the company.

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