



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Ireland: Real Estate

This country-specific Q&A provides an overview to real estate laws and regulations that may occur in the Ireland.

It will cover the most pertinent issues including ownership structures, restrictions, transfers, taxes and environmental contamination.

This Q&A is part of the global guide to Real Estate. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/real-estate>



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1. **Overview**

Stamp duty for commercial property was increased from 2% to 6% last year for Budget 2018 however this does not appear to have had a significant impact on investment in commercial property over the past year and the Irish property market continues to perform very strongly with strong international investor demand allied to Irish REIT and institutional demand underpinning performance.

The 4% stamp duty rebate scheme that was introduced last year in respect of land purchased to develop residential property has encouraged residential development,



particularly in the PRS Sector. Approximately €400 million of development land sales were completed in the first half of 2018. Co-living concepts and PRS/Build to Rent schemes are becoming increasingly mainstream, accounting for 25% of investment spend in the first half of the year, with a strong appetite to forward fund/forward commit. A major deal in this sector was Kennedy Wilson's acquisition of 247 apartments and 3.97 acres of development land at the Grange, Stillorgan, Dublin from NAMA-appointed receivers for a reported €160 million.

The introduction of a vacant site levy, in order to promote the development of vacant under-utilised sites in urban areas has led to an increase in the disposals of sites for development.

Ireland's 12.5% corporate tax rate on residential construction profits has led to an increase in the number of international investors establishing residential development companies, particularly in the Dublin area.

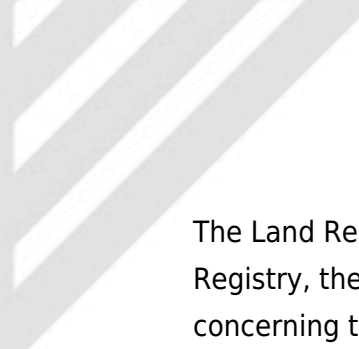
The Dublin office market continues to benefit from relocations due to the uncertainty around Brexit with particular growth in the serviced office sector.

The introduction of tax reforms in 2017 and 2018 which negatively impacted Irish regulated funds focused on Irish property (so called Irish Real Estate Funds or "IREFs") has led a decline in the popularity of such structures. There are now fewer tax advantages to larger non-Irish investors which has, together with the recovery of the domestic investor sector, led to an increase in the number of Irish based buyers of Irish property.

2. **How is ownership of real estate proved?**

The Property Registration Authority (the "PRA") is the State body responsible for the registration of property transactions in Ireland and the system of registration of title (ownership) to land in Ireland.

The main functions of the PRA are to manage and control the Land Registry and the Registry of Deeds and to promote and extend the registration of ownership of land.



The Land Registry was established in 1892. When ownership is registered in the Land Registry, the deeds are filed with the Land Registry and all relevant particulars concerning the property and its ownership are entered on folios which form the registers maintained in the Land Registry. In conjunction with folios, the Land Registry also maintains maps (referred to as filed plans). Both folios and maps are maintained in electronic form. Owners of registered real estate generally prove their title via the Land Registry folio, which is prima facie evidence of title. The legal owner of the registered property is recorded in part 2 (the ownership section) of the folio. However, mapping is not definitive as the Land Registry operate a non-conclusive boundary system.

The Registry of Deeds was established in 1707 to provide a system of voluntary registration for deeds affecting land and to give priority to registered deeds over unregistered but registrable deeds. There is no statutory requirement to register a document in the Registry of Deeds, but failure to do so may result in a loss of priority. The effect of registration is generally to govern priorities between documents dealing with the same piece of land. The primary function of the Registry of Deeds is to provide a system of recording the existence of deeds affecting unregistered property. When a deed is lodged in the Registry of Deeds it must be accompanied by the relevant application form (in a prescribed form) which is a summary of the essential information of the relevant deed. The registration of a deed in the Registry of Deeds alone is not proof of ownership. The underlying title must also be fully investigated to determine ownership.

Any unregistered property (Registry of Deeds) purchased in the State after 1 June 2011 is subject to compulsory first registration in the Land Registry. Registration is also compulsory where land is bought under the Land Purchase Acts or where land is acquired after 1 January 1967 by a statutory authority.

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

There are no legal restrictions on the ownership of real estate in Ireland. However, anti-money laundering legislation requires that a number of checks be carried out on a potential buyer, and the identity of the buyer, the source of funds and the ability to fund the acquisition of real estate will need to be verified.

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

Irish property can be held under freehold title which confers absolute ownership, or a leasehold title which confers ownership for the period of years granted by the relevant lease and held from the owner of the freehold or the owner of the superior leasehold title in the relevant property. A leasehold interest is based on a contractual relationship between the lessor/landlord and the lessee/tenant.

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

Real estate in Ireland comprises all immovable property. This includes land and any buildings or fixtures on the land. No distinction is made between title to land and title to buildings where they are in the same ownership. Typically, the owner of land is also the owner of any buildings erected on the land.

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

Ownership structures for commercial real estate in Ireland range from private individuals, corporate entities, co-ownership structures and limited partnerships.

The most popular structure for international investors in recent years is an Irish Collective Asset-management Vehicle (ICAV) – a vehicle designed for investment funds and attractive to investment managers seeking to market their funds in the U.S. The introduction of tax reforms in 2017 and 2018 which negatively impacted Irish regulated funds focused on Irish property (so called Irish Real Estate Funds or "IREFs") has led a decline in the popularity of such structures. International investors are increasingly using non-Irish resident structures, such as Luxembourg companies.

Irish resident investors will typically utilise Irish resident companies, or limited partnerships.

Real Estate Investment Trusts (REITS) were introduced in 2013 as a new vehicle for investment. Subject to meeting certain criteria, a REIT will not be liable to either Corporation/ Income Tax on its property rental income or property profits, or Capital Gains Tax on disposals of assets of its property rental business.

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

To ensure consistency in drafting and avoiding protracted negotiations, the Law Society of Ireland produces a pro forma contract for sale for use in real estate transactions, which is designed to give a fair balance of rights between buyers and sellers.

The contract for sale:

- contains a memorandum of the agreed terms of the sale (parties, price, description of property, and completion date),
- lists the documentation and searches to be provided by the seller, and
- incorporates the Law Society of Ireland General Conditions of Sale (the “General Conditions”). The General Conditions make a number of assumptions about the property and place certain disclosure obligations on a seller, which the seller can only exclude by inserting special conditions. This way, the buyer is on notice of any deviations from the standard contract. The General Conditions were updated in 2017 for use in respect of transactions commencing on or after 3 January 2017.

By virtue of the General Conditions of the contract for sale the seller gives various contractual warranties in respect of the property for sale. It is typical for a seller to limit the scope of warranties through the careful drafting of special conditions in the contract for sale, in particular for commercial property. Despite the existence of warranties, a prudent seller (or his legal advisers) will still carry out his own due diligence of the property as the principle of caveat emptor is at the heart of

commercial property transactions.

There are typically implied covenants as to ownership contained in a purchase deed but there is no form of title warranty. However, a buyer's lawyer will investigate the seller's title to the relevant property to ensure a buyer will acquire a good marketable title. The buyer's lawyer also carries out a number of searches against both the seller and the property. The seller must explain and/or discharge any adverse matters resulting from the searches which affect the seller and/or the relevant property before the completion of the sale can occur.

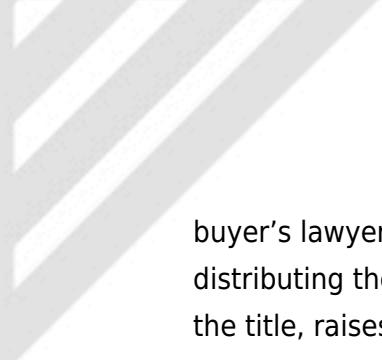
8. What legal issues (if any) cannot be covered by usual legal due diligence?

There are certain legal issues that potentially may only be identified through a physical inspection of the property in sale such as environmental issues, issues with access and services, and unknown occupants. Also issues of technical compliance with the planning laws. Best practice is for the buyer to arrange for a professional survey and valuation of the property in sale to be carried out.

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

The relevant property is usually marketed on behalf of the seller by an agent who advertises the property and advises on the market value of the property. In commercial real estate transactions, the parties often appoint agents to act on their behalf and the commercial terms are negotiated between the parties and their respective agents. Once the commercial terms are agreed, they are reduced to a non-binding heads of terms document.

Between heads of terms being agreed and a binding contract being signed, the parties may put in place exclusivity agreements and confidentiality agreements (which is becoming more widespread in the sale of commercial real estate). A seller's lawyer is responsible for drafting contracts, dealing with pre-contract enquiries raised by the



buyer's lawyers, replying to requisitions on title, redeeming mortgages/charges and distributing the balance of sale proceeds to the seller. A buyer's lawyer investigates the title, raises requisitions on the title, drafts the purchase deed, conducts closing searches, attends the closing appointment and stamps and registers the title.

Surveyors and/or architects may be engaged before the buyer signs contracts to carry out a structural survey of the relevant property. Depending on the nature of the transaction, an environmental expert may also be engaged to provide an environmental report in respect of the property.

In the sale of commercial real estate asset portfolios, the commercial and legal due diligence is usually facilitated by providing interested parties with access to information contained in an online data-room. Before access is granted, the interested parties will typically be required to execute a non-disclosure agreement.

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

Historically yes, but it is not as common in the last six years mainly as there was only a small difference in respective stamp duty rates on asset and share transfers. This is likely to become more commonplace again as stamp duty for commercial property was increased from 2% to 6% in Budget 2018 (unless the Government increases duty on transfers of shares deriving their value from real estate).

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

Yes.



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

Common rights, interest and burdens that can be created or attach over real estate would for instance include mortgages and charges, leases, easements, wayleaves and covenants (positive and negative).

In the case of registered land, there are certain rights which must be registered in the Land Registry to gain protection; otherwise these rights will not be protected against a bona fide buyer for value without notice (e.g. rights of residence, restrictive covenants, leases for a term exceeding 21 years). There are also a number of burdens which affect registered land without registration, such as public rights and occupational tenancies for terms not exceeding 21 years.

In the Registry of Deeds (unregistered land), priority is determined by the serial number allocated to the instrument. Registered instruments have legal priority over unregistered instruments or instruments registered later in time. An exception applies where the owner of a registered instrument had actual notice of a prior unregistered or unregistrable instrument.

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

There is a split between legal title and beneficial ownership of property in Ireland. The 2009 Act provides that the entire beneficial interest in property passes to the buyer on the making of an enforceable contract for the sale or other disposition of land. The beneficial interest in property can also be held through a traditional “off-title” trust.

In respect of registered land, the Land Registry does not recognise a split between legal title and beneficial ownership and only the legal owner of property will be recorded in part 2 (the ownership section) of the folio. A beneficial owner may, however, protect his or her interest in the property by registering a caution or an inhibition against the folio in question. The purpose of a caution is to obtain notice of dealings by the registered owner so that the cautioner has an opportunity to assert his or her unregistered right(s). An inhibition, on the other hand, operates as a restriction on registration that prevents all registrations except those made in compliance with the terms thereof.

There are currently no proposals to change the split between legal title and beneficial ownership of property in Ireland.

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

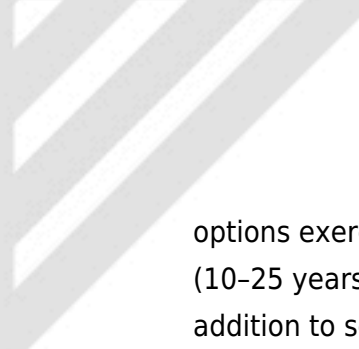
The sale of Irish real estate, or of unquoted shares in companies deriving the greater part of their value from Irish real estate, will be subject to Irish capital gains tax. The current rate is 33%. The gain is calculated on the proceeds of sale less acquisition and enhancement costs, and less the incidental costs of acquisition and the incidental costs of disposal.

Irish capital gains tax is subject to a withholding procedure. The buyer must generally withhold 15% of the consideration and pay this amount to Revenue unless the seller provides a tax clearance certificate from Revenue. A clearance certificate is automatically available on application to Revenue if the seller is resident in Ireland for tax purposes. A non-resident seller will need to agree and discharge its capital gains tax liability in order to obtain a clearance certificate. This withholding procedure only applies to a buyer where the consideration payable to the seller exceeds the relevant threshold current at the date of the transfer agreement (currently €500,000 or €1,000,000 if the asset disposed of is a house).

A capital gains tax exemption applies to disposals of land acquired between 7 December 2011 and 31 December 2014 (inclusive), provided the land was held for four years. The relief applies to residential and non-residential real estate located within any EEA state acquired by an Irish resident during the period set out above.

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

The term of a lease of business premises has traditionally ranged from short-term up to 35 years, but recent legislative changes and market forces are resulting in shorter term leases, with the maximum term now being 15–20 years (typically including break



options exercisable during the term). The structure of a typical medium- to long-term (10–25 years) commercial lease usually follows the same traditional format which, in addition to securing rent payments to the landlord, also passes the cost of maintaining, insuring and occupying the relevant property from the landlord to the tenant. This allows the landlord to enjoy the rent without deduction.

In most cases, tenants will seek to negotiate an option to break or terminate the term of the lease, i.e. after five or 10 years of the term. Any business lease granted for a term in excess of five years would typically have a provision for the periodic review of rent to the current open market rents.

Most business leases in Ireland are of a full repairing and insuring nature, whereby the tenant will be subject to extensive repairing obligations. These will be imposed directly by a repairing covenant entered into by the tenant or, in the case of a multi-let development like an office block, shopping centre or business park, indirectly through a service charge regime which will include reimbursing the landlord for repair works carried out to the structure and common areas of the relevant development.

Usually the provisions of a business lease place restrictions on a tenant's contractual right to assign or sub-let without the landlord's prior written consent. Under Section 66 of the Landlord and Tenant (Amendment) Act, 1980, a landlord cannot unreasonably withhold consent which will override the contractual terms of any business lease.

Sharing a business premises with companies in the same corporate group is generally a matter for negotiation between the landlord and tenant but it is commonplace for leases to have such a provision permitting such sharing of occupation, subject usually to a requirement to notify the landlord and provided that the sharing is by way of licence only.

It is less common to see provisions in a lease relating to reorganisation or change of control of the tenant. Again, these are matters for negotiation. While landlords will generally agree on request to provisions allowing sub-letting to or sharing space with a group company without consent, it is rare that a landlord will permit assignment to a group company without consent. Normally, there are no restrictions on the change of control of a tenant company included in a lease.

Commercial business leases are freely negotiated subject only to statutory provisions.

The introduction of the Commercial Leases Register now requires the particulars and terms of all leases and related documentation to be disclosed on a public register.

In 2011, the draft Landlord and Tenant Law Reform Bill was published. While not yet enacted, the Bill is worthy of note as the objective is to consolidate and modernise much of the general law of landlord and tenant under one act going forward, including landlord and tenant obligations and their enforcement, statutory rights and termination.

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

The Planning and Development Acts 2010–2017 (the “Planning Acts”) govern planning and zoning matters. The Planning Acts regulate the zoning of areas through a variety of development, sustainability, landscape conservation and special amenity plans. Most of the functions reserved by the Planning Acts are exercised by the local authority in the area where the relevant property is situated. There are currently 31 local authorities in Ireland, each a planning authority for the purposes of the Planning Acts, responsible for monitoring and enforcing compliance with planning laws in relation to property in its area and responsible for making decisions regarding applications for planning permission. Where suitable grounds for appeal exist, the decision of the planning authority, including conditions imposed, may be appealed by the applicant to An Bord Pleanála (the Planning Appeals Board).

Generally, planning permission is required for any development of land or property, unless the development is specifically exempted from this requirement. The term “development” includes the carrying out of works (building, demolition, alteration) on land or buildings and the making of a material change of use of land or buildings.

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

Liability for environmental contamination is not limited to the polluter although the polluter is likely to be pursued in the first instance by the relevant authority. Liability can extend to the owner of the property affected.

Certain statutory bodies are required to publish periodic reports which identify specific properties which are hazardous or which do not comply with certain environmental requirements. However, Ireland has no dedicated register of contaminated land. A potential buyer would always be advised to carry out its own due diligence where non-compliance with environmental law is a concern.

18. **Is expropriation of real estate possible?**

Yes. Local authorities can compulsorily acquire lands in limited circumstances such as (1) where a site is derelict and poses a danger in the community, (2) for the purpose of developing infrastructure and (3) for conservation/preservation purposes. Where property is compulsorily acquired by a local authority, compensation is payable to all persons with an interest in the lands. The assessment of compensation generally falls under a number of headings of claim to include the value of the land acquired, compensation for disturbance and any diminution in value of any retained lands.

Section 158 of the National Asset Management Agency Act, 2009 (the "NAMA Act") outlines the National Asset Management Agency ("NAMA") powers to acquire land compulsorily in certain circumstances where the compulsory acquisition is necessary to allow NAMA to deal with the property charged to NAMA.

Section 16 Industrial Development Act, 1986 (the "IDA Act") enables the Industrial Development Agency (the "IDA") to acquire lands either compulsorily or by agreement for the purpose of industrial development. A large part of the IDA's role, under legislation, is acquiring land for development and, as a result, the IDA's power to compulsorily acquire land was considered broad. However, in a recent decision of the Supreme Court delivered in November 2015, this view was somewhat curtailed. The

IDA sought to compulsorily acquire land for which it had no immediate use so that if and when a particular undertaking should seek to develop the land, it would be immediately available at such time. The court, considering the constitutional protection given to property rights and applying the appropriate principles of construction, held that the IDA Act does not confer any power on the IDA to acquire lands not required for immediate use, but which might be utilised at some future time.

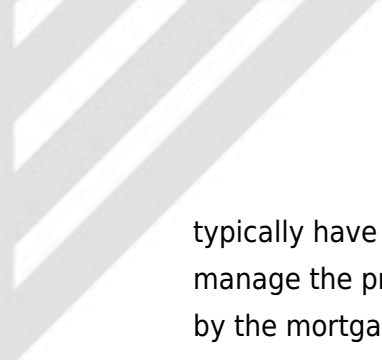
19. **Is it possible to create mortgages over real estate and how are these protected and enforced?**

It is possible to create mortgages over real estate. A mortgage under Irish law is the conveyance of the legal title subject to a proviso that the title is conveyed back to the mortgagor when the loan is redeemed. A mortgage of registered land is referred to as a charge – but its effect is basically the same.

A lender's interest arising from a mortgage/charge is principally protected by the registration of the mortgage with the PRA. Where the security is created over registered land, the charge is registered with the PRA on the Land Registry and its legal is conclusive evidence of the chargee's entitlement to the charge over the relevant property. (In limited and exceptional circumstances – e.g. fraud or mistake – the court may order the PRA to amend the register.) A mortgage of unregistered land must be lodged with the Registry of Deeds (also operated by the PRA) ("**ROD**"). However, unlike the system for registered land, registration with the ROD is not conclusive. Registration of a mortgage with the ROD affects the priority of the security interest.

Where the mortgage/charge is created by a company, particulars of the charge must be registered with the Registrar of Companies ("**ROC**") within strict time periods according to the procedures set out in the Companies Act 2014 ("**CA 2014**"). If the mortgage/charge is not registered with the ROC accordingly, it will be void as against any liquidator appointed to the company, and any creditor of the company.

Banks in Ireland typically enforce mortgages by appointing a receiver over the property. The receiver is deemed to be an agent of the mortgagor and has a duty to obtain the best price reasonably possible in selling the asset. A receiver will also



typically have the power, in the mortgage deed and under CA 2014 (if applicable), to manage the property pending a sale. Otherwise a mortgage may be enforced by a sale by the mortgagee. Where the property is a principal dwelling house of the mortgagor, if the mortgagor does not voluntarily yield up possession, the mortgagee must apply to the Circuit Court for an order for possession. In these cases the mortgagee, or credit servicer, must follow the procedures stipulated by the Central Bank of Ireland ("**CBI**") for dealing with consumer mortgage default. These requirements are set out in the CBI's Code of Conduct on Mortgage Arrears and Consumer Protection Code. If the court makes an order for possession the mortgagor must vacate the property at the stipulated time at which point the mortgagee may sell.

20. **Are there material costs associated with the creation of mortgages over real estate?**

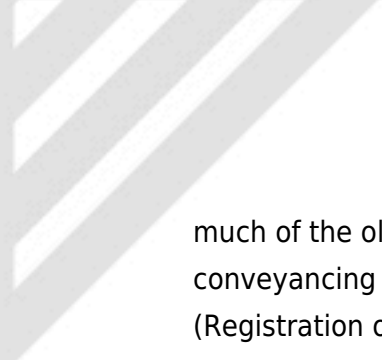
No, only registration and filing fees. The registration fee in the PRA is €50/€175 and the ROC fee for registering a charge under CA 2014 is €40.00.

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

Yes. Trusts, and in particular trusts of real estate, are recognised under Irish law and may be utilised in various commercial contexts to achieve legitimate structural objectives.

22. **What is the main legislation relating to commercial real estate ownership?**

Irish law was historically based on old legislation which predates the establishment of the Irish State in 1922, such as the Conveyancing Acts, 1881-1911 and the Settled Land Acts, 1882-1890. The Land and Conveyancing Law Reform Act, 2009 replaced



much of the old law, including the pre-1922 statute law, and modernised the law and conveyancing practice. There is modern legislation governing registration of title (Registration of Title Act, 1964 which was modified by the Registration of Deeds and Title Act, 2006) to facilitate the increasing computerisation of the property registration system in this jurisdiction and succession law (Succession Act, 1965).

There is extensive statutory protection afforded to family property in particular, which affects conveyancing practice (e.g. the Family Home Protection Act, 1976). This is partly due to the fact that Ireland has a written Constitution enshrining certain fundamental rights which override any other law, including legislation. Thus it is not uncommon to find legislation declared by the domestic courts to be unconstitutional and, therefore, null and void.