PROPERTY

Law guide - Commercial property

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Property development overview

When buying land or property for development, a purchaser should take various steps to ensure that it is suitable for the type of development they have in mind before committing to purchase it. This will include ensuring that the land is not contaminated, is connected to the public sewer and drainage systems and that there are no physical or legal reasons which would impede the development in any way.

It is also important to undertake a physical inspection of the site and it is always advisable to get a property surveyed by a suitably qualified person.

There are also a number of different types of purchase agreements available which may be used depending on the particular circumstances.

Planning permission is nearly always needed before the building work commences. A number of procedures have to be followed to obtain planning permission. A successful application may be made conditional upon certain matters being undertaken to the satisfaction of the local authority. If the application is denied an appeal may be possible.

Usually there are a number of different parties involved in a development and the relationships between them can be complex. Even the simplest of developments would usually require the services of an architect, structural and/or quantity surveyor and the building contractor. However, there may be other parties involved such as sub-contractors and suppliers who may have an impact on the success of the development.

Property development contracts

When property is bought specifically for development, the purchaser needs to look out for a number of things. They need to be satisfied that the land itself is suitable for development and there a number of different types of purchase agreements available in these situations. The construction project itself also needs to be considered.

Types of contract

There is no standard rule as to what kind of contract is to be entered into between the seller and buyer of a site. There are various contracts to choose from, e.g. private treaty, auction, tender, conditional agreement, option agreement, etc. We will look at conditional and option agreements.

Conditional agreements

These are contracts where the buyer agrees to purchase the property subject to certain conditions being fulfilled. Once these conditions are fulfilled, the buyer is obliged to buy. Public auctions are almost always unconditional – once the hammer falls, the buyer is obliged to buy. Offers made by tender and contracts which are privately negotiated from the beginning may or may not be conditional.

It is normally the buyer who suggests a conditional exchange of contract in a situation where they are anxious not to lose the site to another buyer, but are not yet themselves in a position to commit. A conditional agreement rarely serves a useful purpose for the seller. Conditional agreements may be suitable in the following circumstances:

- where planning permission for the development of the site has not yet been obtained
- where the results of the buyer's local search and enquiries of the local authority have not been yet been received
- where vacant possession of the site is not yet available [i.e. the site is still occupied)
- when the site is leasehold property and the consent of the landlord is required in respect of the proposed assignment to the buyer

In drafting a conditional clause, one should clearly set out what is required to be done, by whom, and by when, in order for the condition to be fulfilled. Once any conditions have been fulfilled the contract will become unconditional, meaning that it will be capable of being enforced if a party breaches its terms. These are a few examples:

- If a contract has to be conditional because the buyer's local search and enquiries of the local authority have not been received yet, the contract can be made conditional upon the buyer receiving what they consider to be satisfactory results and replies by a set date. The contract should also contain an obligation upon the buyer to submit the correct forms to the local authority and to pay the fees.

- If a buyer is not prepared to commit because planning permission for the development of the site has not been finalised, the contract may be made conditional upon the receipt of an acceptable planning permission by a set date.

Again, the buyer should be obliged to submit a valid planning application without delay, to serve the correct statutory notices and to pay the fees for the application. Further, the seller may wish to include a clause imposing on the buyer an obligation to appeal an unfavourable planning decision.

Option agreements

The usual form of an option agreement entered into by a buyer with a seller, gives the buyer the right to serve notice upon the seller within a specified time, requiring the seller to sell the site to the buyer at an agreed price or at market value.

Compared to a conditional contract, an option agreement is more flexible as the buyer can exercise their option if they want to, or pass up the opportunity if they want.

Option agreements may be suitable in the following circumstances:

- If planning permission for the development of the site has yet to be applied for, the buyer may wish to secure an option before investing resources into making an application for permission.
- If the site to be developed is sub-divided amongst owners and there is no guarantee that all of them will sell, the buyer can assemble the development site gradually by acquiring options over each parcel of land.
- If a buyer feels that its development may extend to adjacent land in the future, they may acquire an option which can be exercised when the prospect becomes a reality.

In terms of drafting, the option agreement should set out the correct method of serving the option notice. The option will usually be granted subject to payment of an option fee, which may be a considerable sum, depending on the development potential of the site.

When the option is exercised, the agreement will require the land to be conveyed to the potential buyer for a further consideration which may be fixed by the agreement at the outset, or may be determined at the time of the exercise of the option either by reference to the market value or the development value of the site.

Checking the site

Local searches and enquiries

In commercial transactions, apart from making the usual enquiries with the local authority, it is often worth considering the possibility of making additional enquiries. An example could be checking the location of footpaths or bridleways that may cross the site or the location of gas pipelines that may run close to the site.

Planning matters

Enquiries have to be made by the developer relating to the current use of the land as indicated by the development plan as well as whether planning permission is currently in force. Furthermore, the developer may wish to know whether there have been any past applications for permission that have been unsuccessful. A full planning history of the site can be obtained from the local authority. It is prudent to obtain a pre-contract planning search.

Drainage

It will be important for the developer to work out how foul and surface water are currently drained away to public sewers, to give an idea of whether the current drainage system could cope with foul and surface drainage from the developed site.

Public roads

The developer will need to know that immediate access to the site can be obtained from a public road, and that there are no new roads proposed nearby which would adversely affect the development.

Enquiries of the seller

Pre-contract enquiries of the seller will be raised to discover further information about the planning status of the site; the location of public drains and roads; the suitability of the land for the developer's purposes; and possible past contamination of the land. Although information regarding these matters can come from other sources, that alone should not be a sufficient reason for the seller to refuse answering.

Survey and inspection

It is always advisable to conduct a survey and/or inspection of the site before exchanging contracts in order to:

- assist in establishing ownership of, or responsibility for boundary walls, hedges and fences
- discover the existence of public or private rights of way

- identify the presence of overhead electricity power lines which would prevent or impede development
- discover the rights of persons in occupation of the land
- ensure that adjoining landowners do not enjoy the benefit of easements of light or air which would impede the buyer's proposed development

Investigation of title

A thorough investigation of title to the site is important to ensure that the seller has the right to sell; that the buyer will enjoy the benefit of all necessary easements, including rights of access and drainage; and that there are no covenants restricting the proposed development or use of the site.

Contaminated land

What is contaminated land?

The issue of contaminated land can have a large significance on commercial property transactions. If the land in question is contaminated or there is a risk that it is contaminated, a potential buyer may not want to proceed with the purchase.

A piece of land is said to be contaminated when, according to the local authority, substances in, on, or under it:

- cause significant harm to be done, or raise a significant possibility of such harm being done; or
- lead to the pollution of controlled waters or the likelihood of such pollution

Harm may be defined as harm to the health of living organisms or other interference with the ecological systems of which they form part and, in case of man, includes harm to his property.

Consequences of contaminated land

The presence of contamination in land can have serious implications. To put it in financial terms, contamination makes it more difficult to sell or mortgage the land. Furthermore, the use of the land for certain purposes may be impossible or only possible if extensive and expensive clean up works are undertaken. Legally speaking, there are a number of risks associated with contaminated land:

- potential civil liability for damage resulting from migrating pollution. If a landowner should have foreseen the consequences of any migrating pollution, they will be liable for any damage caused without any further proof of fault or negligence being required.
- potential criminal liability for offences resulting from migrating pollution
- If an offence is committed by a company, then any of its directors, managers, or secretaries may be held liable if they are shown to have consented to, or conspired in, the migrating pollution, and/or if they are shown to be negligent.
- planning constraint restricting the scope of development of contaminated land

Reducing the risk

Given the financial and legal consequences of contaminated land, those involved in commercial property transactions should take every possible step to ensure that the site they are buying, leasing or accepting as security for a loan is not contaminated. If it is contaminated, appropriate measures should be taken to protect the buyer in the transaction. These are a summary of the steps to be taken:

Document checks

The following document and other checks should be carried out:

- make enquiries with the various regulatory bodies such as local authorities and the Environmental Protection Agency to see if any pollution incidents have occurred on the site
- make enquiries with the occupier(s) of the site
- research the previous planning history of the site
- check through the title deeds to see if there are any documents relating to previous use of land e.g., a history of heavy industrial use will give greater cause for concern than one of agricultural use
- obtain an environmental search over the property

Conduct a survey

If the document check establishes the likelihood of contamination, a survey of the site may be considered. This will be expensive but the risks involved are great which may justify the costs.

Drafting of documents

The buyer may consider inserting the following terms into a commercial sale and purchase of land contract in order to provide for contamination:

- make the contract conditional on satisfactory site investigation or on clean-up by the seller
- include an indemnity from the seller against any future clean-up costs or against damages which are payable as a result of past contamination or pollution (i.e. the seller would have to pay the buyer whatever it cost the buyer to correct the problem)
- include a warranty from the seller that they have no knowledge of any pollution being present on the site and that they have made full disclosure to the buyer of all relevant information

Conclusion

Depending on the bargaining power of the parties, a buyer may seek a reduction in the purchase price to cover the likely clean-up costs. If the buyer considers the risk too high, they can withdraw from the transaction altogether.

Planning permission

Planning permission will nearly always be required before building can commence.
If you are only building an extension or making some other small changes you may not require planning permission. However, it is prudent to first check with your local authority, as to carry out any works without the necessary planning permission is an offence.
If applying for planning permission you must give public notice of the proposed application.

A notice needs to be circulated in a local newspaper and a site notice also needs to be displayed at a prominent position at the site where you intend to build. Anyone can view your application and may, if they wish make a comment on the permission sought. If and when the permission is granted they will also be advised of this by the local authority.

It is important to bear in mind when seeking planning permission that your proposal needs to comply with whatever development plan has been put in place for the area in which you intend to build. Again, your local authority will be able to assist. The development plan is like a blueprint for planning in each area and sets out future plans and improvements to the area. The development plan in each area will have been developed in line with the National Spatial Strategy which is a national planning framework for Ireland from 2002 until 2020.

There are different types of planning permission with the most common being full permission. However, you may only submit the plans and necessary particulars to the local authority should you wish to check if they will agree in principle to the permission sought. This is called outline permission and usually lasts for a period of three years if granted.
Full planning permission will usually be valid for a period of five years, if the planning permission granted has expired, you will have to re-apply to the local authority.

If the planning department of the local authority decides to grant the permission sought they will first notify you of the decision to grant the permission and if the decision is not appealed to An Bord Plenála within four weeks of the date of the decision then a final grant of permission will be granted.

If the planning permission you have sought has been refused, you may have the right of appeal and you should make the necessary enquiries.

Further information on all planning permission matters will be available from your local authority.

The building contract

The parties involved

Having bought a piece of land and being satisfied that it is capable of being developed, the owner may then want to construct a building on the site. The relationships between the different parties in a construction project are complex and not easy to comprehend.

To simplify things, here is an example looking at the parties involved in a construction project. Generally, five different groups of people are involved: the owner (as employer), building contractor, architect, quantity surveyor, and engineers.

The owner

The owner of the site will employ various professionals to design and construct a building on their land. For the purposes of this example, assume that the owner is not a member of the construction industry and that they need to employ other people to do the design and construction work.

The building contractor

In a traditional building contract, the building contractor is employed by the owner to construct a building according to the plans and specifications prepared by the owner's architect.

The contractor has a direct contractual relationship with the owner and will then enter into sub-contracts with other builders who will carry out the work. If the employer is allowed to choose who will be the sub-contractors, these sub-contractors are called 'nominated sub-contractors'. In other building contracts, the main contractor will be responsible to select the sub-contractors, who are called 'domestic sub-contractors'.

Under the building contract, the main building contractor agrees to complete the work set out in the contract in the form of the architect's plans and specifications. Whether the work is satisfactorily completed is a matter to be judged by the architect who, if satisfied, will issue interim certificates certifying the amount due for the work done to date. This will end with a certificate of practical completion which will entitle the main contractor to receive the balance of the contract price.

Design-and-build contracts are more modern forms of building contracts that operate differently from the traditional building contracts. All the design work is carried out by the main contractor's architect. Thus, the owner does not have to engage an architect themselves. In practice this means that after indicating to the main contractor their requirements, all the owner has to do is to wait for the building to be finished.

The architect

In a traditional contract, the architect will be engaged by the owner to prepare plans and specifications of the building work. The architect will also supervise the execution of work by the building contractor (and sub-contractors). When the architect is satisfied with the work done by the building contract, they will issue a certificate of practical completion.

The quantity surveyor

The quantity surveyor is engaged by the owner (or by the architect on behalf of the owner) to estimate the quantities of the materials to be used and to set them into bills of quantities. On the basis of these bills of quantities, the building contractor is able to work out the cost of their tender.

The engineers

In large construction projects, there may be a team of consulting engineers engaged by the owner to give advice on matters relating to structural design, ventilation, heating, etc.

Action by owner in contract

If the project results in the owner obtaining a completed building which turns out to be defective due to faulty design, faulty construction, or the materials used, the employer may be able to sue for breach of contract against those members of the construction team who caused the defects.

Claims by third parties

In the case of a defective building, the position of a buyer, a lender or a tenant is more difficult than that of the owner. Whilst the owner can sue for breach of contract (see above) a third party cannot because no contract existed between them and the members of the construction team. They would however still have the chance to claim for having lost money. This would be a claim in tort law, rather than contract law, and would be for 'pure economic loss'. Success in these claims is very difficult, because it has to be proven that there was the necessary legal degree of closeness between the parties for a claim to even be possible. This can be very difficult to establish.

Alternative remedies - collateral warranties

In the context of building contracts, a collateral warranty is an agreement entered into between the owner and the contracted party involved in the construction or design of a building (such as a builder and/or architect). Within this agreement, the builder and/or architect has a duty to ensure that the building has no defects. This duty is for the benefit of someone who has an interest in the building, which includes those who subsequently purchase the building from the owner who engaged the builder and/or architect.

When a collateral warranty is established, the person with the interest in the building only needs to show that the type of loss suffered as a result of a breach of the warranty could

reasonably be said to have been contemplated by the parties at the time the warranty was entered into.

In practice, the terms of collateral warranties are usually dictated by the insurance industry which is naturally concerned to limit its own potential liability.

Most warranties will contain a basic warranty by the granter that they have exercised and will continue to exercise reasonable skill and care in the performance of their duties under their contract with the owner, and that their insurer will maintain professional indemnity cover up to a stated amount.

Latent defects

Assignment of rights

The financial backer, buyer or tenant will often demand protection against latent defects. The owner may consider attempting to satisfy such demands by transferring any rights the owner may have against members of the construction team.

Latent defects insurance

Latent defect insurance commonly provides cover against damage caused by defective design or construction works for a period of ten years after completion of the development.

The policy can be taken out to cover the owner and their financial backers. Most policies will automatically insure subsequent owners and occupiers, which will obviously be the desired aim from the owner's point of view.

Sale contracts for commercial premises

The seller's solicitor is responsible for drafting the contract of sale to be approved or revised by the buyer's solicitor. It is common for the seller's solicitor to incorporate the Law Society of Ireland's General Conditions of Sale (Latest Edition) in the contract of sale.

The following are typical terms in a contract of sale:

Deposit

Usually, a 10% deposit is paid on exchange of contracts. The seller is generally unlikely to accept a reduced deposit as they are reserving the site in favour of the buyer. The buyer may insist that the deposit is to be held by the seller's solicitor as stakeholder and that the interest on the deposit is to be paid to the buyer on completion.

Vacant possession

To the buyer it is important that the contract provides for vacant possession of the whole of the site on completion so that there is no one occupying the property when they buy it.

VAT

The buyer may want to ensure that the contract contains an express provision on VAT. For example, a clause to the effect that the seller has not, before exchange, elected to charge VAT on the purchase price and that the seller will not do so thereafter may be included.

Non-assignability

The seller may wish to ensure that they will deal with the buyer but not anyone else whom the buyer may transfer the property to. To achieve this, a clause preventing the buyer from assigning the benefit of the contract to a third party has to be inserted.

Further, the seller may attempt to prevent the buyer from entering into a sub-sale agreement by stipulating that the seller cannot be required by the buyer to execute a conveyance or transfer of the site to someone other than the buyer. This clause does not prevent a sub-sale of the site but makes it less attractive to the buyer since stamp duty might be payable both on the conveyance to the buyer, and on the buyer's conveyance to the sub-buyer.

Insolvency of the buyer

The seller will deal with the possibility of the buyer going bust before completion of the sale by giving themselves the right to cancel the contract. This allows the seller to arrange a sale to another buyer without delay.

Rights and obligations

Express provisions should be made, where appropriate, for the grant and reservation of easements (non-proprietary rights that may exist in a property, e.g. the right to walk on someone's pathway but own nothing of their property) and the imposition of covenants (things that an occupier must promise to do or not to do, e.g. to promise to use the property for business purposes only).

Planning permission

Where the site has planning permission obtained by the seller, such benefits will usually automatically pass to the buyer. The buyer should then ensure that the contract provides for the seller to pass to them a valid licence to use the plans and specifications upon which the planning permission is based.

Commercial property leases

A commercial lease is essentially an agreement between a landlord and tenant that sets out the terms under which a tenant may occupy and use a commercial property. It also creates a legal right for the tenant to occupy the property.

Commercial properties include offices, shops, warehouses, factories and other industrial units.

A commercial lease is often a complicated and lengthy document. It deals with a wide variety of subject matters from basic details such as the names of the parties, a description of the property and the fixed term (length) of the lease to more complex issues such as the rights, obligations and remedies of both landlord and tenant, calculation of service charges and rent reviews.

Generally, the contents and presentation of a lease do not have to follow any prescribed form or structure and therefore how the lease is presented will vary depending on the particular style of its author.

However, generally the contents of a lease will be ordered as follows:

Contents

A well drafted lease should begin with a contents page.

Date and details of the parties

Depending on how the lease has been drafted, the next part would contain the date of the lease and the names and addresses of the parties. The date of the lease will usually be left blank for the parties to fill in manually on the day of completion.

Definitions and interpretation

The majority of leases contain a section defining particular words which are repeatedly used in the document and bear a specific meaning. It is convenient to define these words under a definition section so avoid needless repetition of recurring words and phrases. Words that have been defined will start with a capital letter so that they are easily identified in the lease.

In a commercial lease, it is common to define the following words:

- Premises – being the property which is the subject matter of the lease
- Building – usually required if the lease relates to part of a building
- Common parts – being the parts of the building which are used in common with other tenants in the building (such as lobbies and lifts)
- Plan - being the plans or plans of the property which are usually attached to a lease

- Term – being the fixed term of the lease

Leases also contain a small section to clarify any potential issues regarding its interpretation, such as confirming that any references to a particular gender are also references to the other or that the reference to an Act of Parliament also includes an amendment or modification of it. These are usually standard clauses which appear in most commercial agreements.

Operative clauses

This part of the lease will specifically refer to the landlord granting a lease of the property to the tenant for the specified term together with certain other rights on the condition that the tenant pays the rent and complies with various covenants (promises to do or not to do certain things). The landlord will also reserve certain rights and easements (a right to use someone else's land for a specific purpose, e.g. to walk on their pathway) for their benefit. A list specifying the rights and covenants for each party would usually be found in separate schedules.

Schedules

Most of the detail of a lease can found in its schedules. The following matters are usually contained in schedules:

- a full description of the property
- the rights granted to the tenant – such as rights of way over common areas of the building
- the tenant's covenants – this would contain an extensive list of obligations generally setting out what the tenant can and cannot do to the property and will include such matters as subletting, making any alterations, repairing and decorating and using the property in accordance with its permitted use as determined by the local authority
- the rights reserved by the landlord – such as the right to enter the property and undertake repairs to it
- the landlord's covenants – this would usually contain provisions relating to repairing obligations and building insurance
- service charges – this would contain provisions identifying the services that the landlord will provide and the related costs to be allocated to the service charges, how service charges are calculated and the process for payment and provision of service charge accounts
- rent review – this would contain provisions relating to the process and calculation of any rent reviews to be undertaken during the term of the lease
- plans – sometimes the lease plan is attached to a separate schedule

Provisos

Grouped together under the heading of provisos are a variety of clauses that cannot be easily dealt with elsewhere in the lease. These clauses are neither in the nature of covenants nor easements nor do they impose obligations upon the parties. Sometimes the provisos are contained in a separate schedule of their own. Examples of provisos include:

- provisions for re-entry by the landlord
- details of where and upon whom notices should be serviced
- transfer of the landlord's liability under the lease if he or she sells the property

Signature

This page will contain the details of the parties and appropriate wording (which differs depending on whether a party is an individual or company) so that the lease can be signed by the parties. If a party is an individual, their signature must be witnessed by an independent adult witness who must also sign the lease and print their full name, address and occupation on it.

Rent reviews

Introduction

One of the most important parts of a commercial lease is the rent reviews provisions.

Commercial leases with a long term contain rent review provisions which set out when each rent review will take place, the method of review, assumptions that are to be made when valuing the premises for the purpose of the rent review, the procedure to be followed and provisions dealing with any disputes.

Traditionally rent reviews are 'upwards only' but the Land and Conveyancing Law Reform Act 2009 brought in provisions that mean rent may decrease as well as increase and have abolished upward only rent reviews in respect of new commercial tenancies.

Different methods of review

There are several different methods of calculating a rent review, which include:

- Indexed-linked: The rent review is linked with an index such as the retail price index.
- Revaluation in the open market: The rent is calculated based on the current market rate at the date of the rent review. This is the most common form of rent review.
- Turnover or profit rents: The amount of the rent review is linked to the tenant's turnover of profit.
- Premium rents: The tenant pays a premium on the current market rent so that the landlord agrees to conduct fewer rent reviews during the term of the lease (or no rent reviews at all if the premium is sufficient).
- Fixed increases: The increase to the rent for each review is fixed at the commencement of the lease.
- Sub-lease rents: The rent increase is linked to the rental income generated by sub-letting the premises.

Assumptions and disregards

When calculating a revaluation in the open market, certain hypothetical assumptions are made about the lease for the purposes of the valuation. Examples include:

- The premises are vacant.
- The premises are fit for their use.
- The lease has a term which is preferred by tenants based on the current market conditions.
- No premium is paid or a rent-free period is granted.
- The tenant has complied with their obligations under the lease.

In addition certain matters are disregarded, such as:

- the tenant's occupation of the premises
- goodwill generated by the tenant's use of the premises
- improvements made to the premises by the tenant

It is recommended that the parties should obtain the expert advice and assistance of a surveyor when conducting a rent review. If negotiations between the parties or their surveyors breaks down then the parties should follow any dispute resolution terms set out in the lease.

Renewing a commercial lease

Under Part II of the Landlord and Tenant Amendment Act 1980 (as amended), a business tenant may enjoy certain protection, including the right to remain in the premises as a tenant after the lease comes to an end. Further to ensure that the tenant does not seek to exercise any potential right, the landlord may request that the tenant execute a deed of renunciation. If the lease is to be executed for a period of at least 5 years then it is highly advisable for the landlord to insist that a deed of renunciation is signed by the tenant. Otherwise the tenant is entitled to demand a new tenancy at the end of the first tenancy.

The parties may agree to mutually renew the lease at the end of the rental period.

It is also worth noting that by virtue of the Civil Law (Miscellaneous Provisions) Act 2008 all business tenants, regardless of user, may contract out of their entitlement to renew their tenancy, after five years. The tenant must renounce his/her right to a new tenancy in writing and must also receive independent legal advice in respect of the implications of the renunciation.