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GUIDE

Key differences between Jersey and English commercial property transactions

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Our English clients regularly ask us the same question: 'What are the main differences between commercial property transactions in England and Jersey and what can we expect when we transact in Jersey?'

The answer is that whilst there are many similarities, there are also some fundamental differences that go to the heart of the documentation we will produce and to the advice that clients can expect to receive.

This guide aims to provide an overview of these key differences in order to help our clients to see their way through a Jersey commercial property transaction.

Title

The Land Registry of England and Wales guarantees title to registered land, but the States of Jersey do not guarantee title at all.

The Jersey Public Registry records property transactions and ensures that contracts are available for public inspection and to establish an owner's claim to title. It is the responsibility of the lawyer acting for the buyer to certify title, and the process enabling it to do so involves buyer's lawyer careful researching the claim to title using the Public Registry records.

Another key difference is that it is not possible to directly create a trust over Jersey immovable property (except for charitable purposes).

The Royal Court of Jersey

The Jersey distinction between 'immovable' and 'movable' property is relevant to commercial property as each type of estate is treated differently. The distinction can be likened to the English law concepts of 'real' and 'personal' estate. Immovable property comprises the ground and everything attached to it and above and below it, but also includes certain rights over Jersey property. These rights include (without limitation) simple conventional *hypothecs* (a lesser used form of mortgage or charge secured over land) and 'long leases' being for a term of over nine years. In Jersey, long leases are known as 'contract' leases and leases for a term of nine years or less are known as 'paper' leases.

Conveyances of freehold property and contract leases are passed before the Royal Court of Jersey on Friday afternoons only and it is the norm for transactions to proceed directly to completion, unlike in England where exchange of contracts usually predates completion. Mortgages secured over immovable property are registered in the Royal Court of Jersey also on a Friday. Clients should bear these points in mind when timing the completion of any related transactions.

The parties either appear personally before the Royal Court or appoint an attorney or authorised representative to appear on behalf of themselves or their company. There are specific requirements in relation to the execution of a power of attorney and its registration with the Public Registry.

Contracts are then registered in the Public Registry and enter the public domain.

Conveyances of freehold property, contract leases (but not paper leases) and charges over property all attract stamp duty at varying rates (please see our separate guide, Stamp Duty, LTT and EPT in Jersey) and conveyances of commercial property and contract leases (where there is a residential element) to a corporate entity require the Ministerial consent.

Where a property is owned by an SPV, it may be an option for the acquisition to take place through the transfer of the entire issued share capital of the SPV, this being a private transaction that can take place at any time during the week, not just on Fridays. However if security is to be taken over the freehold of the property, this can only be registered on a Friday.

Transfers of shares relating to commercial property do not generally attract Jersey Goods and Services Tax (GST) (a tax similar to VAT, please see below). They are however likely to be subject to Enveloped Property Tax, and any borrowing which is secured as a charge against the company's freehold property will be subject to the payment of stamp duty.

Accordingly, it is important to take advice at the outset of a transaction on the best way in which to structure the deal.

Stamp duty

Details are set out in our guide, Stamp Duty and LTT in Jersey.

Charges over property

The encumbrance or charge over immovable property known to Jersey law is a *hypothec* and is not as such a mortgage. The key difference is that unlike a mortgage, which is a mode of conveyance, assignment or demise of property as security for the repayment of money borrowed, there is no concept of conveyance, assignment or demise in respect of the creation of a *hypothec* and no title to the property is actually transferred to the lender by way of security in Jersey. There are various forms of Jersey *hypothec* but by far the most commonly used is the judicial *hypothec*.

Creation of a judicial *hypothec* is effected by making an application in the form of a simple acknowledgement of debt (known as a *demande* or *billet*) presented to the Royal Court stating that the debtor acknowledges its indebtedness to the creditor by virtue of the terms of a promissory note, a bond, a facility letter or a guarantee. The resulting Act of the Royal Court is enrolled in the Public Registry records and the *hypothec* is duly created. The prevailing rules of Court still enable the acknowledgement of debt to be effected by a lawyer on behalf of the debtor (usually having been so authorised by way of a 'letter of authority').

Security over shares in property holding companies is ordinarily taken by way of the creation of a security interest over the shares under the provisions of the Security Interests (Jersey) Law 2012 (the **SIJL 2012**). A valid security interest affords the lender a statutory power of sale over the security.

Security over the shares in a property holding company may be taken either by taking 'possessory' title (in which the bank takes possession of the share certificates) or by taking 'title' to the security whereby the shares are assigned to the lender or its nominee.

Leaving the shares in the name of the borrower is generally the option favoured by banks in Jersey, since by taking title to the shares, the lender may be exposed to liabilities and obligations imposed by the articles of association upon the shareholders.

Commercial leases

Institutional leases in Jersey look fairly familiar to our English clients as many of their terms along with their format are similar to English leases.

There are some fundamental differences though, largely due to the lack of a statutory framework akin to the English Landlord and Tenant legislation governing leases in Jersey.

Privity of contract

There is no legislation akin to the Landlord and Tenant (Covenants) Act 1995 (the **LTCA 1995**) in Jersey and accordingly Jersey law knows no distinction between pre 1996 'old leases' and post 1996 'new leases'.

In practice, Jersey leases are drafted with fairly straightforward alienation provisions whereupon the assignor is released from its obligations under the lease and the assignee takes on these obligations in its place.

Guarantors are replaced in much the same way on assignment.

English clients will note that as a result of this fundamental difference in the law, there is no obligation upon a Jersey assignor to enter into an Authorised Guarantee Agreement (an AGA) guaranteeing the incoming assignee's performance of the tenant's obligations under the lease.

Assignment

The presumption under English law that a tenant may assign the lease without the consent of the landlord unless the lease expressly provides otherwise is reversed in Jersey. Moreover there is no statutory equivalent to Section 19 of the Landlord and Tenant Act 1927 (the LTA 1927) which implies into any qualified covenant against assignment the obligation of the landlord not to unreasonably withhold its consent. This means that leases in Jersey are to be interpreted strictly contractually and that the obligations of the parties are only those expressly drafted into the lease.

Section 19(1A) of the LTA 1927 (as inserted by the LTCA 1995) has no equivalent in Jersey either so the alienation provisions clients can expect to see in Jersey do not usually contain a list of predetermined conditions or circumstances in which a landlord's refusal to consent to assignment will be deemed reasonable. The norm is for Jersey landlords simply to require an assignee to be of sufficient financial standing to undertake the lease obligations and to provide suitable accounts and financial references.

Termination

In Jersey there is no statutory security of tenure and no equivalent to the Landlord and Tenant Act 1954 (the 1954 Act) so a commercial tenant has no right to remain after the expiry of its business lease.

Thus, there is no need to contract out of the 1954 Act and English landlords will notice that Jersey institutional leases do not contain the familiar clause referring to the requisite notice having been served by the landlord on the tenant to contract out of the 1954 Act.

In order for a lease to terminate in Jersey, there are no procedures akin to the Section 25 notice to be served on the tenant, nor any rights of the tenant to oppose termination pursuant to the equivalent of a Section 26 notice.

Termination of Jersey leases occurs automatically upon expiry of the lease or, if earlier, by agreement between the parties to cancel the lease, or following action being taken due to tenant default.

If the tenant continues to occupy the premises following the expiry of the lease, and the landlord suffers him to do so, a presumption that the parties have entered into a new lease (or have renewed the existing lease) on identical terms (save any guarantor provisions) can arise. This is called *tacite reconduction* and is based on the presumed consent of the landlord. The length of time required for such a presumption to arise depends upon the circumstances of each case but authority suggests that a few days of occupation would not be sufficient, whilst one month or more may be.

In Jersey leases the landlord will also reserve the right to cancel the lease under certain circumstances (see below) and the wording of the grounds for termination are agreed between the parties at the time of drafting and negotiating the lease. Termination provisions will be drafted to take account of the fact that contract leases cannot automatically cease and determine under Jersey law (except upon expiry of the term) but must be cancelled before the Royal Court.

Termination provisions are sometimes loosely referred to in Jersey as forfeiture provisions but forfeiture is not technically a Jersey concept. Jersey landlords do not have the right to forfeit a lease by peaceably re-entering the property but instead need to apply to the Court for an order to cancel the lease.

There is no Jersey equivalent to the Law of Property Act 1925 so landlords are not required to serve tenants with a Section 146 notice (which applies where a tenant is in breach of covenant other than to pay rent) or any Jersey equivalent of such a notice specifying their breach, as a condition precedent to exercising their right to cancel the lease.

Sales tax

Sales tax is applied in Jersey through the Goods and Services Tax (Jersey) Law 2007 (the **GST Law**). There are some similarities between GST and VAT but clients should be aware that the regimes differ fundamentally, particularly in relation to property. The standard rate of GST is significantly lower than the standard rate of VAT, being currently five per cent. The threshold for registration is considerably higher though, with Jersey entities becoming 'taxable persons' once the value of their taxable supplies has exceeded £300,000 in the last 12 months (or will do in the next 12 months), whilst the threshold in England is a turnover of just £83,000. As in the case of VAT, for GST to be payable there must be a taxable supply by a taxable person in the course of a business.

In Jersey, as in England, supplies can be either exempt, zero rated, standard rated or 'outside the scope' of the GST Law and both standard and zero rated supplies can be offset against a supplier's input tax.

Unlike in England though, there is no 'option to tax' capable of converting exempt supplies of property into standard rated supplies. Moreover, there is no distinction drawn between 'old' and 'new' property for the purposes of GST. Supplies of commercial property are prima facie standard rated and supplies of residential property are prima facie zero rated, subject to various exceptions. As in England, transfers of a going concern (e.g. of a property subject to leases) are 'outside the scope' of the GST Law. A peculiarity of the Jersey GST regime is the concept of an 'international services entity' (an **ISE**). ISEs are mainly banks, trust companies and other financial institutions serving mostly international clients and supplies made by them or to them do not incur GST.

Therefore, clients need to consider whether they will be paying GST at the standard rate on the consideration payable upon the acquisition of a building. GST will not be payable if the property is purchased by shares, if the transaction is a transfer of a going concern or if the vendor is not a taxable person or an ISE.

Clients taking Jersey commercial premises on lease may also be required to pay GST at the standard rate on the rental and on any other sums due under their lease. No GST is payable on the rental however, if the landlord is not a taxable person, if either entity is an ISE, or if the tenant is taking an assignment of a lease that predates the GST Law (without varying the lease). GST is also payable by all clients at the standard rate on any legal fees incurred in respect of Jersey property.

Other taxes

There is no capital gains tax in Jersey.

Property income is taxed under the Income Tax (Jersey) Law 1961 (the **Income Tax Law**) at a flat rate of 20 per cent. Deductions and relief can be claimed in respect of normal outgoings, such as maintenance, insurance, repairs and management. Capital allowances can also be claimed in respect of machinery and plant.

Non-resident landlords are taxed on rental income derived from Jersey property. As in England, this is essentially a withholding tax since it is collected from the property agent (or the tenant, if there is no agent) who is obliged to deduct the tax from the rental before paying it net to the landlord.

Non-resident landlords can apply for a good compliance certificate from the Jersey Comptroller of Taxes should they prefer to receive the rental gross and this will be granted if the non-resident landlord can show that it has consistently complied with the requirements of the Income Tax Law in full and without delay or if an exemption applies.

This guide is only a brief overview of the main differences our clients can expect to encounter when transacting in Jersey commercial property. For more information or for advice on any property related matter, please contact Mourant Ozannes.

Contacts

A full list of contacts can be found here.