

KEY DIFFERENCES BETWEEN JERSEY AND ENGLISH COMMERCIAL PROPERTY TRANSACTIONS

Our UK clients regularly ask us the same question: "What are the main differences between commercial property transactions in the UK 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 briefing aims to provide an overview of these key differences in order to help our UK clients to see their way through a Jersey commercial property transaction.

TITLE

The Land Registry of England and Wales has been guaranteeing title to registered land in the UK since the introduction of the Land Registration Act 1925 (the "LRA 1925") (now repealed and replaced by the Land Registration Act 2002 (the "LRA 2002")). On a property acquisition the relevant land certificate is physically transferred to the purchaser or its lender upon completion of the transaction. These statutes have no equivalent in Jersey and the States of Jersey do not guarantee title to property. The Jersey Public Registry merely records property transactions and maintains contracts for public inspection and therefore there are no title deeds to hold. As a result of this, it is the legal firm acting for the purchaser that certifies title and the process enabling it to do so involves a great deal of careful research by the purchaser's lawyer, often going back to the time when the property was just bare land.

In Jersey, title can be obtained by "possession quadragenaire" (or forty year user), so contracts by which a property has been conveyed must be examined for at least the preceding forty years. The 20 year period of continuous use required to acquire a right by prescription under the Prescription Act 1932 (the "PA 1932") and under the doctrine of "lost modern grant" does not apply in Jersey and, as there is no statutory equivalent to the PA 1932 in Jersey, there is no prima facie right to light or air either. There is no concept of "overriding interests" in Jersey and no ability to enter "agreed notices" or "unilateral notices" of property interests in the Public Registry.

Another key difference between the two jurisdictions is that it is not possible to 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 form of mortgage or charge secured over land, please see below) and "long leases" being for a term of over 9 years. In Jersey, long leases (for a term of over 9 years) are known as "Contract" leases and leases for a term of less than 9 years 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 the UK where exchange of contracts usually predates completion. Mortgages secured over immovable property are registered in the Royal Court also on Friday afternoons only. UK clients should bear these points in mind when timing the completion of any related transactions. The parties to the transaction 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 below) and freehold conveyances and Contract leases require the consent of the Housing Minister of the States of Jersey. A further advantage of Paper leases over Contract leases is that their terms remain private, since they are not publicly registered. It should be noted that the acquisition or disposal of property in Jersey may also be achieved through the transfer of the entire issued share capital of the relevant property holding company and that such transfers may take place at any time during the week, not just on Fridays. Transfers of shares relating to commercial property do not attract Stamp Duty nor Jersey Goods and Services Tax ("GST") (a tax similar to VAT, please see below).

Accordingly clients should take advice at the outset of the transaction in respect of the best way in which to structure the deal. Unlike in the UK, the Royal Court of Jersey cannot order specific performance of a freehold sale and purchase, but it can do in respect of an agreement to acquire shares, in respect of Paper leases and the first 9 years of a Contract lease (the remainder of the term being unenforceable but potentially giving rise to damages). Accordingly all negotiation and correspondence in relation to share sales and leases must be strictly subject to contract.

STAMP DUTY

In Jersey, Stamp Duty is payable on the acquisition of property on an accumulative scale (unlike SDLT) and there is no nil rate band, nor any differential between commercial and residential rates as in the UK. The current rates are 0.5% of the consideration being payable on transactions at a value of £50,000 or less, 1.5% up to £300,000, 2% up to £500,000 and 3% for transactions exceeding £700,000. The Jersey Budget for 2011 introduced a new escalating rate (with effect from 1 June 2011) to be applicable to the upper band (over £700,000) replacing the current 3% flat rate, rising to a maximum rate of 5% for all transactions of a value in excess of £2 million. This will apply to commercial property in Jersey, unlike the new 5% band in the UK, which will only apply to residential property. In contrast to the UK where SDLT is calculated on the price together with any VAT payable thereon, Stamp Duty in Jersey is calculated on the consideration exclusive of GST, so there is no "tax on tax". A flat rate of 0.5% applies to any borrowing secured upon Jersey immovable property, as the charge is registered by the Royal Court.

Stamp Duty on Contract leases is also calculated differently in Jersey, with the Duty payable on Contract leases calculated by multiplying the annual rent (exclusive of GST) by the length of the term (subject to a maximum multiplier of 21) with any premiums or inbuilt rent reviews added in, rather than by reference (as in the UK) to the Net Present Value, together with VAT, where the landlord has opted to tax. The Stamp Duty rates applicable to Jersey Contract leases are 0.5% up to £100,000 and 0.75% over £100,000.

CHARGES OVER PROPERTY

The encumbrance or charge over immovable property known to Jersey law is, as stated, 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 in Jersey. A hypothec is a subsidiary or supporting right available to protect a principal obligation so upon repayment, the hypothec ceases to exist and there is a statutory procedure for enforcing the cancellation of Judicial Hypothecs (or the Acts of Court creating them) in such circumstances. The creditor is provided with certain statutory rights in priority to the debtor's other creditors in respect of the particular land hypothecated. 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 very 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 in a specified sum by virtue of the terms of a Promissory Note, a Bond, a Facility Letter or a Guarantee. The application contains a request by the creditor that the resulting Act of Court be registered in the Public Registry and that the registration will afford the creditor a hypothec over all of the debtor's Jersey property (or over a specific property owned by the debtor) and the debtor for his part, consents to such registration and to the creation of the hypothec. 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 1983 (the "SIJL 1983") (which is due to be repealed and replaced within the next year). 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 any potential liabilities and obligations imposed by the Articles of Association upon the shareholders.

COMMERCIAL LEASES

Institutional leases in Jersey generally appear most familiar to our UK clients and on the face of it their terms and format are similar to English leases. There are some fundamental differences though, largely as a result of the lack of any statutory framework akin to the English Landlord and Tenant legislation governing leases in Jersey.

PRIVITY OF CONTRACT

Privity of contract has never applied to Jersey leases in the same way that it did in the UK prior to 1996 and there has never been any codification of the law regarding the outgoing tenant's obligations following an assignment of its lease. As a result, 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. UK clients will note that as a result of this fundamental historical 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 equivalent financial standing to the assignor or provide suitable accounts and financial references. This is of course not dissimilar to the UK, but Jersey leases do not generally add anything further to these conditions and UK clients will note the absence of provisions requiring an assignee to contract out of the 1954 Act and provide an AGA.

TERMINATION

In Jersey there is no statutory security of tenure and no equivalent to the Landlord and Tenant Act 1954 (the "1954 Act"). Accordingly a tenant has no prima facie statutory right to remain in the demised premises after the expiry of its business lease. Thus there is no need to contract out of the 1954 Act and UK landlords will notice that Jersey institutional leases do not contain the familiar clause referring to the requisite Court Order permitting the parties 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 request.

Termination of Jersey leases occurs automatically upon expiry of the lease or, if earlier, by agreement between the parties to cancel the lease. However, if the tenant has continued to occupy the premises following the expiry date of the lease, and the landlord has suffered 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 presumption 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 certainly would be.

In Jersey leases the landlord will also reserve the right to cancel the lease under certain circumstances (see below). Since any negotiated break option does not need to be drafted in accordance with the grounds for termination contained at Section 30 of the 1954 Act, the wording of the option and the grounds for termination are simply agreed between the parties at the time of drafting and negotiating the lease. Any termination provisions will of course 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 Royal Court for an Order to cancel the lease. There is no Jersey equivalent to the Law of Property Act 1925 (the "LPA 1925") so landlords are not required to serve tenants with a Section 146 notice specifying their breach as a condition precedent to exercising their right to cancel the lease. The actual wording of a standard termination clause in a Jersey lease is usually not dissimilar to the standard English wording, namely that the right to seek a cancellation of the lease will be triggered by non-payment of any of the sums reserved as rent, by the tenant's material breach of any condition or covenant in the lease or by the insolvency of the tenant or any guarantor. It should be noted that Jersey insolvency procedures and terminology differ fundamentally from their UK counterparts so clients should not expect the wording of the termination provisions in Jersey leases to be the same as in English leases.

Another difference that clients may remark upon is that rent review clauses in Jersey are not drafted to include a penultimate day rent review clause, since, in the absence of the 1954 Act, there is no possibility of a continuation tenancy being created by the Court at an interim rent.

Despite being of less concern in Jersey (as the 1954 Act neither applies to leases nor licences), the distinction between leases and licences is largely the same in Jersey as in the UK and follows the criteria set out in *Street v Mountford*

(1985). UK clients will therefore see similar provisions in their leases relating to exclusive possession and quiet enjoyment to those they would see in the UK.

SALES TAX

Sales tax was introduced to Jersey by the Goods and Services Tax (Jersey) Law 2007 (the "GST Law"). There are some similarities between GST and VAT but UK clients should be aware that the respective regimes differ fundamentally, particularly in relation to property. The standard rate of GST is significantly lower than the standard rate of VAT, being currently just 5% as at 1 June 2011. 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 twelve months (or will do in the next 12 months), whilst the UK threshold is a turnover of just £70,000. 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 the UK, 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 the UK 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 the UK, 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. Another exception would be rentals due under leases that predate the GST Law, which are zero rated until the expiry of the transitional period on 16 August 2012 (unless varied at any time).

Therefore, UK 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. UK clients taking 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 in under the Income Tax (Jersey) Law 1961 (the "Income Tax Law") at a rate of 20% and unlike in the UK there is no 40% or higher rate of income tax. Property income includes rental income, lease premiums and, since 2009, property development profits. Deductions and relief can be claimed in respect of normal outgoings, such as maintenance, insurance, repairs and management. Capital allowances can also be claimed at a rate of 25% per annum in respect of machinery and plant. It should be noted that the Jersey legislation relating to capital allowances is contained in the Income Tax Law and is based on the old UK Capital Allowances Act of 1959 and has not been extensively amended and developed as in the UK.

Non-resident landlords are taxed at a rate of 20% on rental income derived from Jersey property. As in the UK, 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. If the lease is for an annual rental of less than £25,000 and there is no agent, the tenant is not obliged to withhold tax from the rental. UK and Guernsey superannuation funds enjoyed an exemption from this tax until 1 January 2010 when funds were required to register with the Comptroller of Taxes by 31 July 2010 to account for income tax for 2010.

ISSUES AT THE TERMINATION OF A LEASE IN JERSEY

The current economic climate has seen an increase in disputes between landlords and tenants upon the termination of their leases. The risk of claims certainly increases when premises are not immediately re-let and landlords are keener than ever to maximise the value of their properties. This briefing examines the issue of dilapidations and how best the parties can protect themselves in this regard.

What is a "Schedule of Dilapidations"? The majority of leases - certainly modern leases - specifically allow a landlord (at or around the termination of the lease) the right to enter and inspect the property to make note of any repairs or redecoration which in its view are the tenant's responsibility under the terms of the lease and which the tenant has failed to carry out.

A Schedule of Dilapidations is normally prepared by a surveyor who also estimates the cost of the repairs or redecoration required. The costs of the preparation and service of the Schedule are usually down to the tenant to meet under the terms of the lease, but it is prudent for a landlord to check this fact prior to incurring the expense. How is the schedule served? It is essential that the lease is reviewed to make certain exactly how notices, schedules, etc, are to be served on the tenant or landlord, as the case may be. It is possible that notices would have to be served at the registered office of the tenant, for example, but more usually it is at the demised premises.

Failure to serve a notice correctly could, at best, cause delay in dealing with the matter and, at worst, negate any right depending on how the lease is worded. Repairing obligations

The surveyor will consider the repairing obligations under the lease in order to determine what works he thinks the tenant should do to bring the premises up to the standard required under the lease. What if the tenant refuses either to carry out the works or to pay for the costs? Again one looks to the terms of the lease.

There may be provision for arbitration or expert determination, in which case the procedure set down in the lease is followed, failing which the only recourse is to sue the tenant for damages. This can sometimes give rise to the argument that damages should not be payable in the event of the landlord's intention to substantially alter or demolish the premises at the end of the term. In England the tenant would have the protection of section 18(1) of the Landlord and Tenant Act 1927. Under that legislation no damages would be payable to the landlord if the tenant could show that the repairs would be valueless because of the nature of the anticipated works of the landlord.

In Jersey and Guernsey there is very little legislation in relation to tenants and a paucity of case law. If the Court were prepared to consider English Law as persuasive authority then it should look to the common law of England prior to the introduction of the Landlord and Tenant Act 1927. Under English common law there is provision for damages for breach of covenant to leave the premises in repair - the damages amounting to the cost of putting the premises into the state in which the tenant should have left them.

There is an argument that the true measure of damages is the difference in value of the premises at the end of the lease, as opposed to their value had they been maintained in accordance with the terms of the lease. However, unlike in England (where s.18 of the Landlord and Tenant Act 1927 expressly limits any such damages to an amount no greater than the diminution in value of the reversion due to the wants of repair), this is a matter for the Court to decide and has no statutory basis in Guernsey or Jersey. There is also the possibility of claiming for loss of rental for the time taken for reinstatement of the premises or for the period of any rent free period granted to an incoming tenant as a result of the state of the premises.

Following English common law no deduction would be made from the damages awarded where, for example, the landlord had decided to demolish the premises or had arranged to lease them out on fully repairing terms. The courts of Guernsey and Jersey are bound to construe a lease according to its terms although, as in the UK, the tenant still tends to be favoured unless it is in outright breach. It follows, then, that there is great potential for dispute at the time of the service of any Schedule of Dilapidations and it would be prudent for both parties to seek legal advice (in the case of the landlord prior to the service of any Schedule of Dilapidations) as to their potential rights, obligations and remedies.

As stated above there is little case law in relation to landlord and tenant in the Islands and the above views are given on the basis that the Jersey and Guernsey courts would take into account English common law principles. However, whilst English common law principles would certainly be taken into account, it should be remembered that they will not necessarily be followed. In the only Jersey case (January 2012) to have examined (but not passed judgment on) the position with regard to limiting a tenant's liability (by reference to the landlord's loss) the judge commented that any decision would turn on the facts and the court "should not necessarily look to English common law let alone English statutory law on this issue" and that "it can be seen from the laws of England and Scotland alone that there are a number of approaches to the issue".

Advice to tenants if the lease is coming to an end, the tenant would be best advised to contact the landlord well in advance of the expiry of the lease to agree what is required to release the tenant from its liabilities under the lease. It is often the case that a financial settlement can be reached as an alternative to the work being carried out by the tenant. Once the position on dilapidations is agreed, the tenant should ensure that a legally binding document is drawn up releasing it from all liabilities under the lease to ensure that the landlord doesn't have the right to sue the tenant in the future for alleged breaches after the tenant has vacated. The tenant should also review the lease carefully and take advice on its liabilities at the end of the term.

This is only a brief overview of the main differences our UK clients can expect to encounter when transacting in Jersey property.