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REAL ESTATE M&A 2020

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OVERVIEW

Typical transaction structures - public companies

1. What is the typical structure of a business combination involving a publicly traded real-estate owning entity?

The typical structures of such a business combination include:

1. the acquisition by a publicly traded real-estate company of:

- whether the buyer only wishes to acquire certain assets of the target; all or part of the issued share capital of a private company;
- assets (eg, properties) of a public or private company or partnership; and
- interests in other asset-owning vehicles, such as a limited liability partnership (LLP), English limited partnership, a Jersey Property Unit Trust (JPUT), or Guernsey Property Unit Trust (GPUT) etc;

all such transactions being effected by way of a sale-and-purchase agreement; and

2. the acquisition of all or part of the issued share capital of a publicly traded real-estate company, or another real-estate company by a third party by way of a takeover offer or a scheme of arrangement to which the provisions of the City Code on Takeovers and Mergers (the Takeover Code) apply.

If any of the transactions detailed under (i) are classified as a 'reverse takeover' under the listing rules published by the UK Listing Authority (the Listing Rules) or AIM Rules for Companies (the AIM Rules), then shareholder consent and the publication of a prospectus or admission document will also be required, except in cases of companies with standard listings.

If the transaction is classified as a Class 1 transaction under the Listing Rules companies with a premium listing will need to obtain shareholder consent and publish a circular.

In addition, publicly traded real-estate companies may reorganise their group through one of the following structures:

- a demerger, including a direct dividend involving the payment of a dividend in specie by the parent of the shares in the subsidiary to be demerged;
- a three-cornered demerger, whereby the parent declares a dividend in specie of either the shares in the subsidiary or the business to be demerged to a newly incorporated company or another third party, in consideration for which the recipient of the transfer issues shares directly to the parent's shareholders;
- a three-cornered reduction of capital, whereby demerger is affected by reducing the capital of the parent and, in consideration for the reduction of capital, transferring the subsidiary to be demerged to the parent's shareholders (either in the form of assets or shares);
- a scheme of arrangement under Part 26 of the Companies Act 2006, which can be used to effect almost any kind of demerger; or
- a liquidation scheme under section 110 of the Insolvency Act 1986, which involves the liquidation of the parent company and the transfer of its assets to two or more newly formed companies.

The key considerations when looking at the different structures include:

- tax (including stamp duty);
- whether the buyer only wishes to acquire certain assets of the target;
- anywhere there are any key changes of control or third-party consent issues that might, for example, be triggered by the acquisition of all or part of the target's issued share capital;
- whether, in the case of the acquisition of a public company, an independent valuation of the assets being acquired is required; and

- in cases of the acquisition of shares in a public company, how quickly control needs to be obtained and whether it is important to acquire the target's entire issued share capital.

Typical transaction structures - private companies

2. Are there any significant differences if the transaction involves a privately held real estate-owning entity?

There are no significant differences for a transaction involving a privately held real-estate-owning entity, although the legal and regulatory requirements affecting any such structure will often be reduced and the key considerations when choosing a structure will typically be less complex, insofar as the acquisition of share capital or interests in the target are concerned.

The vast majority of such combinations involving privately held real-estate-owning entities, will be affected by the acquisition of shares (or other ownership interests) in the target or the acquisition of real-estate assets (whether alone or as part of a business in which they are operated).

Income-strip deals in which an owner or occupier sells its freehold to an investor and a long lease is granted back to it, giving the investor a long-term rental income (with the lease including an option for the owner or occupier to buy back the freehold for a nominal sum at the end of the lease) are also increasingly common.

Typical transaction process

3. Describe the process by which public and private real-estate business combinations are typically initiated, negotiated and completed.

Once a potential buyer of a publicly traded real-estate company has completed its initial investigations, the acquisition process will be initiated by the buyer sending the board of directors of the target company, or the target company's financial adviser (if conversations between the parties have already started), an indicative offer letter setting out the terms and conditions on which it is prepared to make an offer for the company and the proposed structure of the transaction.

If the offer is likely to be recommended, the letter might also request access to certain confidential information about the target company so that the buyer can undertake more detailed financial, tax and legal due diligence and more detailed property title investigations before proceeding further.

In providing any such additional information the target company must be mindful of Rule 21.3 of the Takeover Code (Equality of Information to Competing Offerors).

The terms of the deal will be negotiated through a series of letters between the respective parties, until an indicative offer letter is received by the target company's board of directors containing terms which the board, following advice and consultation with the company's Rule 3 adviser, is minded to recommend to the shareholders. The structure of the deal suggested by the buyer will depend on a number of factors, including whether the offer is likely to be recommended or unlike hostile, whether any competing offers are likely to emerge, and what form the financing and consideration might take. Once the terms of the deal have been agreed, the parties will work together to agree a timetable for the transaction, including the timing of collecting irrevocable undertakings from certain shareholders of the target company, the date for the release of the announcement of a firm intention to make an offer and the posting of the offer document or scheme document, and to prepare the necessary offer or scheme document and all ancillary documentation.

If the acquisition is structured using a scheme of arrangement, various shareholder meetings will need to be held and an application will need to be made to a court asking it to sanction the scheme. The scheme will become effective and the transaction will complete when the court order has been delivered to the Registrar of Companies.

If the acquisition is structured using a takeover offer, the transaction is completed when the offer is declared unconditional in all respects, which will include a condition that the offer will not become or be declared unconditional as to acceptances, unless the offeror has acquired or agreed to acquire (whether pursuant to the offer or otherwise) shares carrying more than 50 per cent of the voting rights.

It should be noted that complicated and time-intensive regulatory consents can impact on the timetable and precise structure of the scheme of arrangement or takeover offer.

For a private real estate business combination involving an asset purchase, the following is typical:

- agents often initiate the deal and agree non-binding heads of terms;
- solicitors' input is often required in agreeing the heads of terms;
- exclusivity, lock-out or confidentiality agreements are sometimes entered into;
- seller's solicitors disclose title documents;
- buyer's solicitors undertake title due diligence and raise searches;
- buyer engages surveyors and other appropriate consultants (eg, environmental) to undertake physical due diligence of the property;
- if the buyer requires funding, this is usually agreed with a lender prior to exchange;
- the funding documents are agreed by exchange or between exchange and completion;
- seller's and buyer's solicitors negotiate and agree the sale contract and other documents;
- the sale contract is exchanged and a deposit is paid – at this point there are binding obligations to sell and to purchase;
- completion occurs at a later date agreed in the contract; and
- post-completion any stamp duty land tax (SDLT) is paid and Land Registry and other registrations are dealt with, and tenants and other interested parties are notified of the change of ownership.

Where the combination involves an acquisition of shares in a limited company, interests in other property-owning entities, or a business in which a property asset is operated, agents are often the initiators of deals and the process is similar to that of an asset deal. However, there will typically be far more for the seller's solicitors to disclose for the purpose of the buyer's due diligence, since what is being sold is far more complex, as the sale of a company will involve all of the company's assets and liabilities and the sale of a business will include its assets and some of its liabilities. A physical, or more typically an online, data room will often be used for such a disclosure or due diligence process.

Where the transaction is not proceeding by way of a simultaneous exchange and completion, the process follows that set out above for an asset deal. Where a simultaneous exchange and completion occurs, the full price is payable and no deposit is needed.

LAW AND REGULATION

Legislative and regulatory framework

4. What are some of the primary laws and regulations governing or implicated in real-estate business combinations? Are there any specific regulations or laws governing transfers of real estate that would be material in a typical transaction?

The primary laws and regulations governing real-estate business combinations involving public companies will be almost the same as for other business combinations, but also include compliance with:

- the Listing Rules (note LR 13.4.4 for real-estate companies) for Main Market (as defined below) companies with a premium or standard listing on the London Stock Exchange (LSE) main market for listed securities (the Main Market) or the AIM Rules, if the shares trade on the LSE's Alternative Investment Market (AIM);
- the Takeover Code (note Rule 29 on asset valuations) if the real-estate company being acquired is subject to its provisions;
- the Prospectus Rules, if the transaction constitutes a 'reverse takeover' under the Listing Rules or if a prospectus is required;
- the Market Abuse Regulation, which is applicable to all transactions undertaken by a company whose shares are publicly traded; and
- the Financial Services and Markets Act 2000 and the Financial Services Act 2012, if the transaction involves the publication of a circular, prospectus or admission document or an equity fundraising is undertaken in relation to the transaction.

As regards private real estate business combinations, the governing primary laws and regulations will, to a large extent, be the same as those for other business combinations, but (in the case of public and private combinations) specific laws and regulations will include the following:

- licensing requirements for licensed premises;
- operational licences for other uses (e.g, trade waste, discharge etc);
- an environmental regime – 'polluter pays' but almost always the liability is passed to the buyer; and
- energy efficiency regulations – buildings below a specified standard cannot be let to tenants, or, after April 2023, continue to be let.

Cross-border combinations and foreign investment

5. Are there any specific material regulations or structuring considerations relating to cross-border real-estate business combinations or foreign investors acquiring an interest in a real estate business entity?

The same considerations apply as to other cross-border business combinations or acquisitions of interests. In particular that:

- merger notifications to the European Commission are mandatory under the European Union's Merger Regulation where a 'concentration' has an EU dimension, by exceeding the relevant turnover thresholds;
- if the UK target of a merger is involved in the development or production of military items, quantum technology or computing hardware, the UK government has the right to review the merger on national security grounds;
- UK merger control provisions apply, and the Competition and Markets Authority has the jurisdiction to review transactions, where two or more enterprises cease to be distinct and a relevant merger situation is created in the UK. Notifications are voluntary;
- the provisions of the UK Takeover Code apply to the acquisition of shareholding interests in UK companies; and
- where there is a merger in the form of a corporate restructuring (involving the dissolution of one or more companies without going into liquidation) between a company formed and registered under the UK Companies Acts and companies governed by the law of another European Economic Area state, the provisions of EU Directive 2017/1132 relating to certain aspects of company law apply.

There are currently no restrictions on overseas investors acquiring property in England. Real estate in England can be purchased, rented or leased by individuals or companies. Those individuals or entities only need to provide evidence of their identity in accordance with statutory requirements, although there is draft legislation before parliament that establishes that foreign-registered companies owning property in England will be required to disclose their beneficial owners before they can sell or lease the property. Unlimited fines and up to five years in prison are proposed for failing to do this.

Choice of law and jurisdiction

6. What territory's law typically governs the definitive agreements in the context of real-estate business combinations? Which courts typically have subject-matter jurisdiction over a real-estate-related business combination?

Parties will usually want to ensure consistency between their governing law clause and jurisdiction clause in a written contract. Inconsistencies will likely increase the costs of any litigation and the risk that a court may incorrectly apply the particular foreign law.

If the written contract reflects a commercial agreement in relation to which a property in England is involved, it makes sense to choose English law. This is because the English court will have jurisdiction to hear disputes in relation to a property in England, whether it be leasehold or freehold. Moreover, the English legal system has developed a clear and established framework, certainty of law and title, and prescribed procedures for dealing with and completing upon the acquisition of a property that require compliance with several items of key English legislation.

In the event that there are assets located in different jurisdictions, an English law 'umbrella' clause may apply with a 'carve-out' for specific issues to be governed by separate local law agreements.

Often, English law will be chosen to apply to a business combination relating to real estate in England and Wales, even though the combination involves the sale or purchase of a company or other entity that is located outside England and Wales. In these circumstances, an opinion from local counsel will be sought in relation to the relevant law of the jurisdiction where the target is located (ie, regarding securities and completion deliverables or requirements).

APPROVAL AND WITHDRAWAL

Public disclosure

7. What information must be publicly disclosed in a public company real-estate business combination?

The scope of the information to be disclosed in a public company real estate business combination depends on the size of the transaction, the structure used and the market the company's shares are traded on.

A small acquisition or disposal of shares in a private company, or assets by a public company, will have minimal disclosure requirements; the key one being the need to announce the transaction in accordance with the relevant provisions of the Listing Rules (including LR 10.4.1 in the case of a Class 2 transaction for Main Market companies with a premium listing) or the AIM Rules (AIM Rules 11 and 12). If the transaction is classified as a Class 1 transaction under the Listing Rules, then additional disclosure requirements will apply for Main Market companies with premium listings as set out in LR 10, including the need to send an explanatory circular to shareholders, setting out sufficient information to allow shareholders to make an informed decision as to whether or not to approve the transaction.

If the seller of the shares or assets is an AIM public company and the transaction is classified as a 'fundamental change of business' then shareholder consent is required and a circular to shareholders will need to be prepared, setting out sufficient information to allow shareholders to make an informed decision on the proposed disposal (AIM Rule 15).

The acquisition of shares in a private company or assets by a public company which is classified as a 'reverse takeover' under the Listing Rules (LR 5.6) or the AIM Rules (AM Rule 14) will have greater disclosure requirements, including the need to publish a prospectus or an admission document that complies with the requirements of the Prospectus Rules or AIM Rules (as applicable). A 'reverse takeover' will also require shareholder consent (except in the case of Main Market companies with a standard listing). Care should be taken in the case of an AIM-listed company to ensure that the allotment of consideration shares or any equity fundraising associated with the transaction does not trigger the need for a prospectus rather than an admission document.

For Main Market companies with premium listings, if a Class 1 transaction relates to the acquisition or disposal of property, or the acquisition of a property company that is not listed, the Class 1 circular prepared in connection with the transaction must include a property valuation report prepared by an independent expert (LR 13.4.4).

The acquisition of a public company will also have greater disclosure requirements and, whether the business combination is structured as a takeover offer or scheme of arrangement, the Takeover Code sets out the disclosure requirements in relation to, among other things, any announcement of a firm intention to make an offer (Rule 2.4), the offer document or scheme document (including, for example, the mandatory disclosures in Rule 24 (in relation to offeror documents) and Rule 25 (in relation to the offeree board circulars)), and dealings and positions during an offer period (Rule 8). Additional disclosure requirements apply under the Takeover Code in the case of a securities exchange offer.

In all cases the Market Abuse Regulation (MAR) will need to be considered and complied with, as will, to the extent applicable, the Disclosure Guidance and Transparency Rules.

Duties towards shareholders

8. Give an overview of the material duties, if any, of the directors and officers of a public company towards shareholders in connection with a real-estate business combination. Do controlling shareholders have any similar duties?

The material duties of the directors and officers of an English public company towards shareholders in connection with a real-estate business combination include:

- the duty to comply with the provisions of the Listing Rules or the AIM Rules;
- statutory duties under the Companies Act 2006 (including to act in the way in which he or she considers, in good faith, would be the most likely to promote the success of the company for the benefit of its members as a whole); and
- the duty to comply will all other relevant laws and regulations, including the Takeover Code, the Disclosure Guidance and Transparency Rules, the MAR, the Financial Services and Markets Act 2000, and the Financial Services Act 2012.

If the public company is incorporated outside of England and Wales then the laws and regulations of the country of incorporation will dictate the material duties of the directors, officers and/or controlling shareholders.

It is worth noting that there might be circumstances where the controlling shareholders of the company also have a duty to act in a certain way – for example, under the terms of a relationship agreement entered into between the controlling shareholder, the company and the sponsor, nominated adviser or broker.

Shareholders rights

9. What rights do shareholders have in a public company real-estate business combination? Can parties structure around shareholder dissent or rejection of a real estate business combination, and what structures are available?

Shareholders of a public company have no right to approve or reject a small acquisition or disposal of assets or shares in a private company that only carries an announcement obligation. The same applies to building a stake in a publicly traded company. However, if the acquisition or disposal is classified as a 'reverse takeover' under the Listing Rules or AIM Rules, or as a Class 1 transaction under the Listing Rules then (save in the case of a company with standard listings) the shareholders have the right to a vote to accept or reject the proposed acquisition or disposal. In addition, and as mentioned above, the shareholders of an AIM company have the right to approve any 'fundamental change of business'.

Where a public company is subject to a takeover offer that could result in the company going private or becoming part of a bigger group of companies, then its shareholders have the right to accept or reject the offer being made.

In the case of a takeover offer, it must be a condition of the offer that the offer will not become or be declared unconditional as to acceptances unless the offeror acquires or agrees to acquire (whether pursuant to the offer or otherwise) shares carrying more than 50 per cent of the voting rights. Shareholders therefore have the right to object to the offer by not accepting it, but risk being left as minority holders in the target company or having their shares compulsorily acquired under the provisions of the Companies Act 2006 (sections 979 to 982) if the requisite number of acceptances are received by the offeror. Although the provisions of section 986 of the Companies Act 2006.

allow a shareholder to apply to the court for an order that the offeror is not entitled to, nor is bound to acquire, the shares referred to in a 'squeeze-out' notice served on the shareholder.

A scheme of arrangement must be approved by both the shareholders and the court. Shareholders, therefore, have the right to reject an offer by voting against the scheme at a court meeting of shareholders or to approve the offer by voting in favour of it.

A scheme requires approval by at least 75 per cent in value of each class of shareholders who vote on the scheme, who are at least a majority in number of each class. If approved by the requisite majority and sanctioned by the court, the scheme will bind all shareholders whether or not they voted to approve it.

In addition, shareholders of a publicly traded company have the right to receive a fair price for their shares, which is reinforced by various provisions in the Takeover Code, including the requirement under Rule 3 of the Takeover Code for a board of directors of the target company to obtain competent independent advice as

to whether the financial terms of any offer are fair and reasonable, and Rules 6 and 11 which look at whether the offeror has acquired shares in the target company, and at what price, prior to the commencement of an offer period, during the offer period and before the release of a firm intention to make an offer announcement under Rule 2.7.

Termination fees

10. Are termination fees typical in a real-estate business combination, and what is their typical size?

Termination (or break) fees are not uncommon on public company real-estate business combinations that are not subject to the Takeover Code (e.g., transactions which are classified as reverse takeovers under the Listing Rules or AIM Rules), as each party looks to the other to bear some or all of the professional and other advisory costs if the deal does not complete.

However, one also has to consider whether or not such a break-fee arrangement constitutes unlawful financial assistance under the Companies Act 2006 by the public company or any of its subsidiaries. The prevalent view is so long as the break-fee is drafted properly and does not amount to an indemnity or a gift nor gives rise to a material reduction in the net assets of the company in question, it should not be caught by the relevant provisions of the Companies Act 2006, and that any fees that might be payable under such an arrangement do not constitute a Class 1 transaction under the Listing Rules (which would require shareholder approval and the circulation of a circular).

LR 10 defines what a break-fee arrangement is under the Listing Rules and LR 10.2.7R(1) provides that sums payable pursuant to such an arrangement will be treated as a Class 1 transaction if the total sum exceeds, if the listed company is being acquired, 1 per cent of the value of the listed company calculated by reference to the offer price; and in any other case, 1 per cent of the market capitalisation of the listed company.

In the case of the acquisition of a public real-estate company, inducement (or break) fee arrangements (under which a cash sum is payable by the target to the bidder if specified events occur that prevents the offer from proceeding or causing it to fail) are generally prohibited under Rule 21.2. of the Takeover Code, subject to certain exceptions. For example, the target company may agree an inducement fee with one or more competing bidders, where a bidder has announced a firm intention to make an offer that has not been recommended by the target's directors, although any fee agreed must be de minimis (ie, normally no more than 1 per cent of the target company, calculated by reference to the price of the competition offer or, if there are two or more competing offers, the first competing offer) at the time of the announcement made under Rule 2.7 of the Takeover Code. In addition, the Panel on Takeovers and Mergers (the Panel) might also grant a dispensation from the prohibition in Rule 21.2 on inducement fees where, before a bidder has announced a firm intention to make an offer, the target board announces that it is seeking one or more potential bidders by means of a formal sales process. In these circumstances, the Panel might grant a dispensation allowing the target board to enter into an inducement fee arrangement with a participant bidder at the time of the announcement of its firm intention to make an offer, subject to the same de minimis provisions for competing bidders.

With all break fees there are a number of legal issues to consider such as ensuring that the entering into of such an arrangement and the subsequent payment of the break fee is within the company's express or implied powers, and the directors' duties of good faith and exercise of independent judgment have been complied with when entering into such an arrangement.

Break fees are not typical in a private real-estate business combination. However, within the heads of terms, which are commonly entered into by the buyer and seller prior to the signing of a formal legally binding sale-and-purchase contract, there will typically be legally enforceable provisions relating to a period of exclusivity for the buyer and limited process obligations on a seller during that period.

Notwithstanding that it may be difficult to prove any breach of such process obligations during the exclusivity period, such provisions typically provide that certain costs incurred by a buyer (e.g., legal fees) are recoverable in the event of any such breach. Where a deposit has been paid by the buyer on the exchange of a legally binding contract to acquire real estate or an interest in a real-estate-owning entity, with completion of that contract to follow, the seller may be entitled to retain that deposit, if the buyer fails to complete in accordance with its contractual obligations under the contract.

Takeover defences

11. Are there any methods that targets in a real-estate business combination can employ to protect against an unsolicited acquisition? Are there any limitations on these methods?

The reality is that there are limited options open to a target company that is subject to an unwelcome or unsolicited approach or acquisition, if particularly that approach turns into a hostile offer.

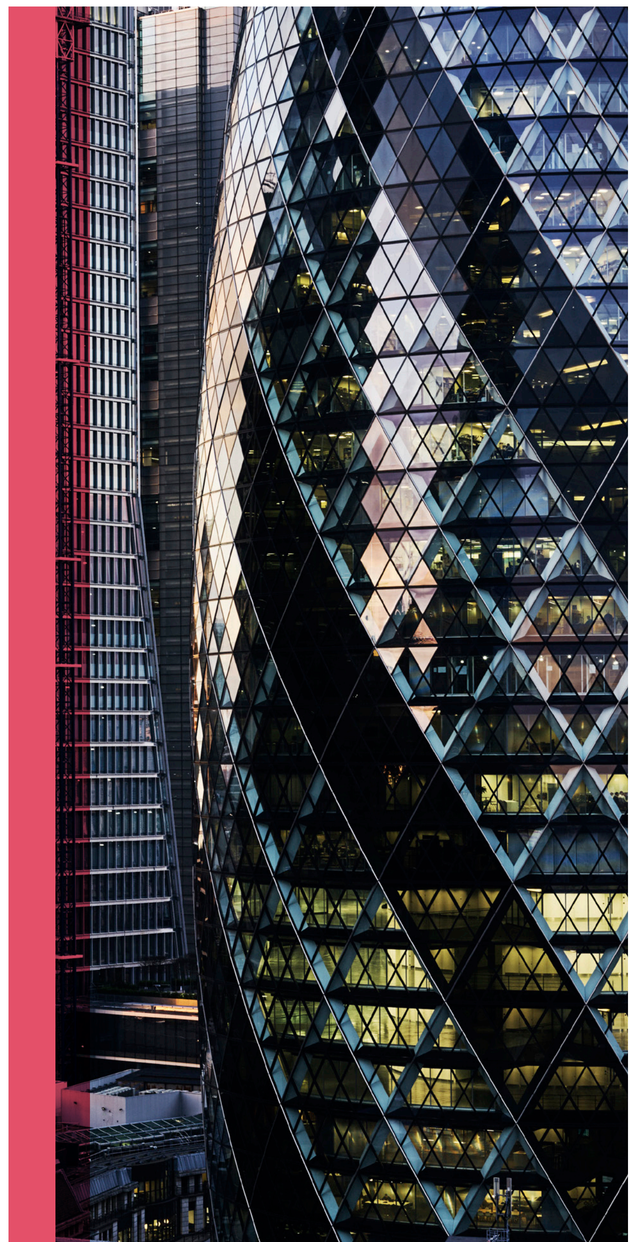
The target board could look to publicise the approach. Publicising the approach would start an offer period and the timetable in Rule 2.6 of the Takeover Code, which gives the unwelcome or unsolicited bidder until 5pm on the 28th day following the date of the announcement in which it was first identified, to either announce a firm intention to make an offer or announce that it does not intend to make an offer. If the possible bidder is unable to announce a firm intention in the required time frame the target can refuse to agree to any extension and the bidder would be forced to put out an announcement that it does not intend to make an offer. The bidder will normally be bound by this statement for a period of six months.

In addition, a target company might be able to protect itself against an unsolicited offer:

- if it is able to show the bidder that its offer does not have the support of the key shareholders, such shareholders having been consulted on the proposed offer within the parameters permitted by the Takeover Code and having signed a contractually binding undertaking to not accept or vote in favour of any such offer; or
- by seeking a 'white knight' (ie, a preferred bidder) or a 'white squire' (ie, a shareholder to buy shares to help block any offer); or
- by publicly criticising the approach or presenting the current management's record of success and future strategy.

In all unwelcome or unsolicited approach or acquisition situations the target's board of directors must be mindful of Rule 21.1 of the Takeover Code, which prevents them from making the company unattractive to a bidder or a potential bidder. Rule 21.1 makes it clear that during the course of an offer, or even before the date of the offer, if the target's board of directors has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of shareholders in a general meeting, take any action that might result in any offer or bona fide possible offer being frustrated or in the shareholders being denied the opportunity to decide on its merits or do any of the things listed in Rule 21.1(a) of the Takeover Code, including granting options, entering into contracts otherwise than in the ordinary course of business or selling or acquiring or agreeing to sell or acquire assets of a material amount.

While there is less likelihood of this question being relevant in the context of a private real-estate combination, the directors of an English company (private as well as public) are required to exercise their powers in the way in which they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. This may restrict the directors from agreeing to any 'frustrating action' that they would otherwise consider appropriate.



Notifying shareholders

12. How much advance notice must a public target give its shareholders in connection with approving a real estate business combination, and what factors inform this analysis? How is shareholder approval typically sought in this context?

The amount of notice given to a public company's shareholders to approve a business combination depends on a number of factors, including the size of the transaction and its structure.

For an acquisition or disposal by a public company (excluding a public company takeover), which requires shareholder approval, shareholders will be given 14 or 21 clear days' notice of the meeting convened to consider and approve the transaction. Unless the articles of association (constitutional by-laws) of the company require a longer period, a public company (which is not a traded company) must give its shareholders a minimum of 14 clear days' notice of a general meeting. A traded company (i.e., a Main Market company) must give 21 clear days' notice of a general meeting, unless certain conditions are met that means the meeting can be held on 14 clear days' notice (see sections 307A(1)(a) and 307A(2) to (5) of the Companies Act 2006).

Notice of the meeting at which shareholder approval will be sought will be set out at the end of the prospectus or admission document where the transaction is classified as a 'reverse takeover' under the Listing Rules or AIM Rules, or the circular to shareholders where the transaction is a Class 1 transaction under the Listing Rules or a fundamental change of business under the AIM Rules. A public company with a premium listing that is required to prepare a circular in connection with the approval of a Class 1 transaction must comply with LR 13 which sets out various disclosure and approval requirements. The content of the prospectus, or the admission document, is governed by the Listing Rules, the Prospectus Rules or the AIM Rules (as applicable). The prospectus must be approved by the Financial Conduct Authority (FCA).

In the context of a public company takeover, shareholder approval is either sought through the acceptance of the takeover offer or, in the case of a scheme of arrangement, through voting to approve the scheme at a court-convened meeting of the shareholders. This is typically convened on 21 clear days' notice.

A takeover offer must normally be open for acceptance for at least 21 days after it is sent (Rule 31.1 of the Takeover Code), remain open for acceptance for a further 14 days after it has become unconditional as to acceptances (Rule 31.4 of the Takeover Code), and may not be extended beyond the 60th day after it was sent, unless it has, by then, become or been declared unconditional as to acceptances (Rule 31.6 of the Takeover Code).

Announcements will be made by the target public company at key stages of the transaction to advise shareholders of key dates in the approval process (which will also be set out clearly in any documents published and sent to shareholders) and keep shareholders updated as to how the approval process is progressing.

TAXATION AND ACQUISITION VEHICLES

Typical tax issures and structuring

13. What are some of the typical tax issues involved in real estate business combinations and to what extent do these typically drive structuring

When looking at the potential acquisition of a company which owns UK real estate the first thing to identify is the latent gain in the company. If this is significant it can make a share deal uneconomical or require a very significant price chip, depending on the nature and intentions of the buyer. The latent gain is the difference between the original acquisition cost (increased for any subsequent enhancement costs) and the price the property would be expected to be sold for on the open market. In the event the buyer procures and the target company disposes of the property, it might expect tax to be payable on the difference between the buyer's cash outlay and the disposal proceeds. Instead, this concept of the latent gain requires looking back to the earlier acquisition by the target company. This is not a problem if the buyer intends, through its ownership of the target company, to hold the property indefinitely but if it intends to sell the property in the future, this latent gain must be taken into account in the price.

Although unlikely to be of relevance on the type of real-estate business combination under discussion, it is necessary to consider whether the property will be the buyer's main residence or if it is a commercial building. As a result of the availability of principal private residence relief it would be extremely rare for a buyer to want to hold its main residence through a corporate wrap and one should consider the costs (tax and otherwise) of extracting the residence into the individual buyer's hands. Historically, there was a balancing exercise with there being inheritance tax and SDLT advantages of holding property in this manner, but given the relatively recent annual charge on a person holding their own home through a property wrap and changes to the inheritance tax rules, this is becoming less common. (The annual charge is known as the Annual Tax on Enveloped Dwellings and can give rise to an annual charge of up to £226,950.)

The main advantage of buying a company rather than the property itself is often the differential stamp duties charges applying to properties and companies. Stamp duty on shares is payable at 0.5 per cent of the consideration, but does not apply to overseas companies if certain key formalities are kept offshore. By contrast, the SDLT on UK commercial premises is up to 5 per cent (which can be 6 per cent, if VAT is payable) and up to 15 per cent on UK residential properties. If a company purchase is undertaken it is not uncommon for the seller to insist the buyer's savings in stamp duties is shared with the seller.

There is no point acquiring the property just to minimise the stamp duties charges and then have to claw back previously exempt transactions. It is therefore important to understand if a relief from SDLT was claimed when the property was originally acquired by the target company. The two most common such reliefs are the charities exemption and group relief (with a group here being a 75 per cent or more relationship).

Having identified that a corporate acquisition is still potentially advantageous, it is then necessary to identify what the historic tax risks are. In terms of property taxes, the two largest tax risks to look for in due diligence are in relation to historic VAT and SDLT planning. For most businesses, VAT is not a real cost as it can be offset against the ongoing VAT it charges its customers. Such businesses would rarely undertake overly complicated VAT planning (see 'Asset deals' below regarding the constantly evolving topic of the 'transfer of businesses as a going concern' (TOGC)).

However, VAT is a real cost to businesses in certain sectors – principally banks, insurance companies and those in the health sector. If the underlying property is not a principal residence, but still caters for people to sleep in it (e.g., student accommodation or care homes),there are a large number of traps to look out for;some are real and will give rise to a tax cost whereas others are theoretical and HM Revenue & Customs (HMRC) is prone to not take the point, but risk lies in both areas).

There was a tendency to consider stamp duty or SDLT as an optional taxes and a large number of tax avoidance schemes sprang up to reinforce this belief. Generally, it would be extremely rare for the target company's property acquisition to have been structured via such a scheme and HMRC still be in time to challenge these, given the change in the law and attitude in the last six years, but this is always worth checking.

It is extremely rare to see a target company undertake aggressive tax planning in connection with the Construction Industry Scheme, but it is possible to fall foul of this if the vendors were unaware of it. Generally HMRC does not have a high regard for the compliance capabilities of those in the construction industry and expects those specialising in the area to hold back up to 30 per cent of payments to workers and businesses in their supply chain. It is possible to get approval from HMRC to not deduct, but this is predicated on the assumption that the business being paid has been tax-compliant. Ignoring it can give rise to large penalties and if the business being paid turns out to have been non-compliant HMRC will look to the paying entity.

The availability of capital allowances going forward can minimise the corporation tax costs of the target company which is similar to depreciation, but in the tax field.

Ideally, the target company will not have had officers or employees, but if it did payroll compliance will be another key issue.

Further issues arise if the target company had an unusual status, such as being resident offshore. Recent changes have made it harder to keep the whole profit of a construction project outside the UK tax net but in any event, even with the best laid plans, if there was a large construction cost, there is a significant risk that HMRC may try to argue that the target company was within the UK tax net. This could be, for example, on the basis that it was resident in the UK, it had a long-standing building operation in the UK or other permanent establishment. HMRC has been known to drill down into immigration records and mobile phone bills, and will want to know where the 'deciding mind' of the target was located.

The overarching message given by sellers is often that the target company is clean but it is imperative to check this quickly. A buyer will decide whether the target company is clean from a quick look at its tax history. If it is not clean, it can proceed to an asset deal without the wasted time and costs of detailed tax and other due diligence.

ASSET DEAL

From a tax point of view, the direct purchase of the land will almost always be simpler than the acquisition of a company or other special purpose vehicle (SPV). However, it will come with a charge to SDLT, which, as noted above, is up to 5 per cent on UK commercial premises (which, in practice, can be 6 per cent if VAT is payable) and can be up to 15 per cent on UK residential property.

The two main tax challenges on a property acquisition are in connection with capital allowances and VAT.

If the seller incurs significant amount of plant and machinery costs it can 'write this down' for tax purposes over time and if the whole write down has not yet taken place there is often a debate as to how much of this should remain with the seller and how much should be passed to the buyer. Ideally this would be recorded in the heads of terms by reference to the mechanism for passing this to the buyer (known as a '198 election' after the section in the relevant piece of legislation). More often than not, the quantum of that election would be at what is known as the 'tax written down' value, in the seller's tax computations. This is the cost of the qualifying plant and machinery written down for tax purposes as at the seller's last financial year end.

As regards to VAT, the first point to make is that if a buyer pays VAT this increases the SDLT cost, because SDLT is payable on the actual price, which is the sum including VAT. While this may seem unfair, there is no getting round it.

However, if the purchase of the property is essentially the property of a business (most commonly in these scenarios, the acquisition of a property letting business) then the acquisition is known as a TOGC and the transaction is outside the scope of VAT. This has the effect of reducing the SDLT cost. However, this has the effect of passing a significant element of the seller's VAT history to the buyer for a period of up to 10 years following the acquisition, which gives rise to due diligence issues. Moreover, the buyer can easily breach the conditions for a TOGC without the seller's knowledge and so a seller will be (rightly) cautious if the buyer is a new company or heavily leveraged. It is possible to structure deals so they are not a TOGC, but given the SDLT advantages of TOGCs this is rare. In any event the risks of a TOGC are usually minor compared to a share purchase and it is important to remember this is against the backdrop that a direct freehold property purchase does not come with the burden of taking on the baggage of acquiring a company (eg, tax compliance and otherwise). However, while not a tax point, employment advice should be taken if there are staff working in the business in case these transfer across to the buyer automatically as a result of a TOGC, on the basis that this becomes a TUPE transfer (see response to 23 below).

Mitigating tax risk

14. What measures are normally taken to mitigate typical tax risks in a real-estate business combination?

The first key way to mitigate risk is to understand it and therefore, however the deal is to be structured, some tax due diligence needs to be undertaken. This will be more extensive for a share purchase than a direct property purchase, but is necessary in both.

Even if risks are not identified in this due diligence process, it is common to have contractual protections in the documentation.

In the property context, this will start with what is known as Replies to Enquiries, which are in an industry-standard form. Only some of these relate to tax. Furthermore, the agreement itself will contain tax warranties and a VAT clause that, together with the provisions dealing with capital allowances, routinely run to four pages.

By contrast, in a share acquisition the tax warranties will run to somewhere between five and 10 pages and will often be caveated by the disclosure letter. These warranties will be given on the basis that if there is no loss to the buyer as a result of inaccurate warranties no claim can be made. It is therefore routine for a tax covenant to be given by the seller to the buyer essentially promising to pay any unexpected tax liability of the target company to the extent it arose before completion. This is given on an indemnity basis and therefore allows a pound-for-pound recompense.

The risks of taking on the tax history (and other compliance matters) of a target may not be acceptable to the buyer, and should issues arise the deal will sometimes move from a share purchase to a property purchase. Making this choice early on will save wasted fees.

The alternative is insurance. The UK market for warranty and indemnity (W&I) insurance has significantly increased in the last five to 10 years, with almost all types of tax risk in the property world being insurable so long at the insurers feel it is a risk rather than a more likely event or if it relies on HMRC not spotting the issue. This type of insurance is normally taken out by the buyer, but is often funded by the seller (at least in part).

Types of acquisition vehicles

15. What form of acquisition vehicle is typically used in connection with a real-estate business combination, and does the form vary depending on structuring alternatives or structure of the target company?

Typically, acquisition vehicles have been offshore limited liability companies or unit trusts, in the latter case particularly JPUTs and GPUTs. Where tax considerations permit or dictate otherwise (e.g., where trading business combinations are involved) on-shore limited liability companies, LLPs or English limited partnerships are typically used. All of the above vehicles will commonly be SPVs for a specific property asset or project and will sometimes be used to facilitate joint-venture arrangements between funders and developers or developer to developer.

The use of an SPV theoretically allows the buyer to ring fence its liabilities, whether relating to funding or otherwise, within the specific vehicle – provided always that no additional security (eg, a guarantee) is required by funders or third-party contractors.

TAKE-PRIVATE TRANSACTIONS

Board considerations in take-private transactions

16. What issues typically face boards of real-estate public companies considering a take-private transaction? Do these considerations vary according to the structure of the target?

A common issue faced by boards of public real-estate companies considering a take-private transaction is ensuring that the company has sufficient independent directors who are not conflicted by the transaction to form a quorum for the necessary board meetings to consider and recommend the proposed transaction.

Given the potential conflicts which arise on a take-private transaction involving management it is likely that an independent valuation of the real-estate assets will be obtained. Where a valuation of assets is given in connection with an offer, the provisions of Rule 29 of the Takeover Code need to be considered and followed.

In addition, it is likely that the board of the new company (newco) incorporated to effect the transaction, as well as the board of the target company, will need to appoint a Rule 3 adviser under the Takeover Code. This will definitely be the case if the directors are faced with conflicts of interest.

Time frame for take-private transactions

17. How long do take-private transactions typically take in the context of a public real-estate business? What are the major milestones in this process? What factors could expedite or extend the process?

A take-private transaction usually takes a couple of months longer than for example, the acquisition of a public company by another group of companies because of the additional issues to be considered, such as financing the transaction, conflicts (if management of the target company are involved) and whether the target company will be de-listed. Resolving each of these are major milestones in the process, the length of which is specific to each individual transaction and the number of issues to be considered and resolved.

In a take-private situation, the transaction is led by a private equity fund (or other financial investor) and will often involve a complicated funding structure including equity finance provided by the equity provider, which takes the form of a subscription for ordinary shares in the newco; and debt finance arranged by one (or more) banks or other financial institutions, which can involve multiples tiers of debt including senior debt, mezzanine finance and high-yield bonds. In addition, the private equity provider may also invest funds through loan notes and preference shares. These financing arrangements can take time to negotiate and agree. In addition, the bank or other financial institutions will be looking for full security over the real-estate assets and any other assets of the target company to secure the newco's debt, which takes the form of a subscription for ordinary shares in the newco; and debt finance arranged by one (or more) banks or other financial institutions, which can involve multiple tiers of debt including senior debt, mezzanine finance and high-yield bonds. In addition, the private equity provider may also invest funds through loan notes and preference shares. These financing arrangements can take time to negotiate and agree. In addition,the bank or other financial institutions will be looking for full security over the real-estate assets and any other assets of the target company to secure the newco's debt, which will take time to put in place and will also probably

involve the repayment of the target company's existing debt facilities and the release of all associated security.

If management of the target company are involved in the take-private deal it will also be necessary to consider and deal with any conflicts that arise (see above). If the offeror's board of directors are faced with a conflict, which might well be the case, it will also be necessary for the offeror's board to obtain competent independent advice on any offer under Rule 3 of the Takeover Code. Another independent adviser giving advice and reviewing documentation can also increase the time it takes to complete the transaction.

The time to complete a take-private transaction is also likely to be influenced by any requirements of the private equity fund (or other financial investor) to acquire a certain percentage of the voting rights in the target company. If it wishes to de-list the company, and possibility look to re-register the target company as a private company post-completion, it will need to ensure that it obtains control of at least 75 per cent of the voting rights in the target company. This might be achieved more quickly by a recommended takeover offer than a scheme of arrangement, if the offer is supported by shareholders and irrevocable undertakings from directors and key shareholders are obtained. If however, the private equity fund (or other financial investor) requires 100 per cent of the voting rights of the target company, or certainty on acquiring at least 75 per cent of such voting rights, then a scheme of arrangement is likely to be the chosen structure, which involves an application to the court and hence an extended timetable – that said, it could still be quicker than the takeover offer route if that route is going to involve a 'squeeze-out' procedure at the end to acquire the desired 100 per cent voting rights (see response to question 9 above).

Other factors that could extend the process include the transaction being, or becoming, a hostile takeover and objections being received from shareholders to any compulsory acquisition procedures implemented by the bidder under section 979 of the Companies Act 2006.

NEGOTIATION

Non-binding agreements

18. Are non-binding preliminary agreements before the execution of a definitive agreement typical in real estate business combinations, and does this depend on the ownership structure of the target? Can such non-binding agreements be judicially enforced?

Non-binding preliminary agreements are unusual in the context of the acquisition of a public company, as the equivalent document is the indicative offer letter submitted by the bidder to the target's board of directors of the target company.

Under Rule 21.2 of the Takeover Code, offer-related arrangements such as inducement (or break) fee arrangements between the target company and bidders are prohibited during an offer period or when an offer is reasonably in contemplation, except in limited circumstances. The parties are, however, permitted to enter into, among other things, a commitment to maintain confidentiality of information, and a commitment not to solicit employees, customers or suppliers and irrevocable commitments and letters of intent if such commitments do not contain any other provisions prohibited by the Takeover Code. Such confidentiality and solicitation commitments are usually binding.

Where a leak occurs in the context of an acquisition or disposal being made by or of a public company, the listed entity or entities will be required under the Listing Rules, the AIM Rules and, if applicable, the Takeover Code to put out an announcement of the possible transaction, although such an announcement will not be binding on the parties. It should, however, be noted that if the Takeover Code applies, any such announcement will trigger the commencement of an offer period and the requirement for the identified bidder to announce a firm intention to make an offer or announce that it does not intend to make an offer by 5pm on the 28th day following the date of the announcement in which it is first identified unless the Panel consents to an extension of the deadline.

Letters of intent in private real-estate combinations are normally expressed to be non-binding and the English courts will typically respect the parties' stated intention that such a document cannot be enforced.

Heads of terms are also generally expressed to be non-binding, save for specific provisions which are declared to be binding and capable of enforcement. Once more, the English courts will respect the intentions of the parties and will only enforce those particular provisions that the parties have agreed to be binding. Typically, the binding provisions are those relating to a period of exclusivity for the buyer (where the seller agrees not to deal with any third party), limited process obligations during the exclusivity period and confidentiality obligations.

Typical provisions

19. Describe some of the provisions contained in a purchase agreement that are specific to real-estate business combinations? Describe any standard provisions that are contained in such agreements.

The deal could be the purchase of a property (an asset deal) or the purchase of shares in a corporate vehicle that owns a property (a share deal).

In a property deal, a seller will invariably give no W&Is in the contract at all, other than a standard form of title guarantee. The usual guarantee effectively warrants that the seller's title is not subject to any charges or rights, etc (other than any that the seller does not know about) and that the seller has the right to sell the property. However, this is qualified in the contract by setting out a generic list of matters that the buyer has to agree it is buying subject to. In other words, the risk is with the buyer, who must undertake title due diligence and searches to ascertain what the title may be subject to.

Also, in a property deal, the seller will usually provide replies to standard form pre-contract enquiries and to specific enquiries raised by the buyer's solicitor. There may be a ground for action by the buyer if those replies are found to be wrong, fraudulent or negligent. Again, however, liability for such replies is often qualified in the contract, so that the seller is only liable for deliberate or fraudulent misrepresentations. If a seller is liable, then the claim post-completion would usually be for damages, but if a claim is made pre-completion it may be possible to rescind the contract.

In a share deal a seller will again try to avoid giving any warranties relating to the property, usually on the basis that the buyer is undertaking its own due diligence.

Some basic warranties are nevertheless given in these circumstances, such as:

- the company has title to the property;
- the company has not granted charges over or otherwise encumbered the property;
- the company does not own and has not previously held any interests in other property; and
- the company uses the property only for the purposes of the business, and does not use any other property for that purpose.

In some share deals the buyer does not undertake full title due diligence and instead relies upon a title certificate or a report issued by the seller's solicitors. Occasionally a seller will give a full suite of property warranties, covering all the matters that would otherwise be covered by a title report and searches, but this is rare.

In all cases a seller will seek to avoid giving warranties as to the environmental condition of the property and require the buyer to satisfy itself by undertaking an environmental survey and or search. Similarly with planning issues, a seller will seek to pass the risk to the buyer but it is not unusual for a seller to warrant certain planning matters, such as payment of monies pursuant to planning consent obligations or that it has not received notice of any planning enforcement action.

Stakebuilding

20. Are there any limitations on a buyer's ability to gradually acquire an interest in a public company in the context of a real-estate business combination? Are these limitations typically built into organisational documents or inherent in applicable state or regulatory related regimes?

The limitations on a bidder's ability to gradually acquire an interest in a public company in the context of a real-estate business combination are, in England, generally set out in applicable laws and regulation.

The key consideration is the Takeover Code, which permits a bidder (together with any persons acting in concert with him or her) to build a stake in a public company up to 29.9 per cent, without triggering the mandatory offer provisions in Rule 9 of the Takeover Code. Except with the consent of the Panel, there is an absolute bar on the acquisition of further shares in a company where a shareholder (together with persons acting in concert with it) holds between 30 and 50 per cent of the voting rights.

If a buyer wishes to keep its interest in a publicly traded company secret then the limitation on acquiring shares in such company is less than 3 per cent of the issued share capital. This is because under Rule 5 of the Disclosure Guidance and Transparency Rules (DTR5), which apply to both Main Market (LR 9.2.6A and 9.2.6B) and AIM companies, subject to certain limited exceptions, a person must notify the company (and the FCA) as soon as possible, and in any event within two trading days, of the percentage of voting rights it holds or is deemed to hold through a direct or indirect holding of financial instruments if the percentage of those voting rights reaches, exceeds or falls below 3 per cent, and each 1 per cent threshold above that as a result of an acquisition or disposal of shares or financial instruments; or reaches, exceeds or falls below one of the applicable thresholds set out above as a result of events changing the breakdown of voting rights and on the basis of the total voting rights notified to the market by the company. Similar requirements are also set out in Rule 17 of the AIM Rules.

In addition, in the context of a public company takeover, there are further dealing and position disclosure requirements during an offer period set out in Rule 8 of the Takeover Code that apply alongside DTR5. Although not strictly limitations on a bidder's ability to build a stake they might be seen as practical limitations if the bidder wishes to try and maintain secrecy around its shareholding, particularly in any competitive offer situation.

It is also worth remembering Part 22 of the Companies Act 2006 grants public companies the right to investigate who has an interest in its issued share capital. Section 793 of the Companies Act 2006 gives a public company the power to send a notice requiring a person it knows, or has reasonable cause to believe, has an interest in its shares (or to have had an interest in the previous three years) to confirm or deny the fact, and, if the former, to disclose certain information about the interest, including information about any other person with an interest in the shares. This limits the ability of a potential buyer to gradually build a stake in a public company through a nominee company thinking that its true identity will not have to be disclosed.

Any bidder who is looking to gradually acquire an interest in a public company with a view to possibly making a formal offer for such company in the future should also be mindful of:

- any standstill provisions that might have been entered into with the target company that would prevent it from acquiring any shares for a certain period (usually until a firm intention to make an offer announcement has been made);
- Rule 6 of the Takeover Code on equality of treatment in relation to price;
- Rule 11 of the Takeover Code on equality of treatment in relation to the form of consideration;
- the risk of being left with an interest in the company if it decides not to make an offer; and
- whether the acquisition of shares could make any 'squeeze-out' more difficult in the case of a takeover offer or impact on the likelihood of any scheme being approved, because in the case of a vote on such an offer or scheme the bidder will not be able to vote using such shares.

Certainty of closing

21. Describe some of the key issues that typically arise between a seller and a buyer when negotiating the purchase agreement for a real estate business combination, with an emphasis on building in certainty of closing? How are these issues typically resolved?

An asset deal will have a fixed completion date in the contract, or if completion is subject to conditions, it will be a fixed period after satisfaction of the conditions. The date for completion will therefore be ascertainable and if completion does not occur on time then, in most cases, that will be due to the default of one party or other, who could then be liable for damages for breach of contract, for an action for specific performance or for any express remedies in the contract such as (in the case of a buyer's default) interest on the purchase price, termination of the contract and the loss of any deposit.

A share deal will often have a simultaneous exchange and completion but if not the above comments will apply. If it is simultaneous then there is a risk that either party decides to pull out of the deal. If that happens then the other party will have no recourse against the withdrawing party, unless they have agreed some form of protection at the beginning of the deal that is incorporated into a separate preliminary contract (often a lock-out agreement or confidentiality agreement) or dealt with by way of a solicitor's undertaking. Such remedies are typically loss of a deposit paid upfront or an obligation to pay towards costs.

If there is a period between exchange and completion the following points should be addressed:

- how the seller manages and deals with the property up to completion (what it can and cannot do, matters where it needs the buyer's prior consent);
- risk in the property (who has the obligation to insure the building and what happens if there is any damage in that period);
- whether the seller is liable to maintain any security in respect of the property; and
- payment of a deposit on exchange (typically 5 per cent or 10 per cent of the price – a higher deposit is at risk of being void, unless there are good reasons for a larger sum to justify it being a fair reflection of the potential loss arising from non-performance).

In the case of the acquisition of a public real-estate company, the key document will not be a sale-and-purchase agreement, but an offer document or a scheme document. Assuming the offer is not hostile, there is limited negotiations regarding these documents as the process of agreeing them is much more collaborative, with all parties ensuing that the necessary disclosure requirements of the Takeover Code have been met and the correct message about the proposed acquisition is delivered to the shareholders.

Environmental liability

22. Who typically bears responsibility for environmental remediation following the closing of a real-estate business combination? What contractual provisions regarding environmental liability do parties usually agree?

It is for the buyer and seller in any transaction to agree where future liability for environmental remediation should lie. In a typical scenario, the seller will wish to divest itself of all liabilities and the buyer is only usually willing to take liability for contamination that is in situ within the land that is being transferred as part of the deal.

The negotiation is usually over liability for contamination that may have historically escaped the land being transferred under the deal. Unless the buyer expressly agrees to take on that liability, it cannot be held liable under the 'Part 2A' contaminated land regime under the Environmental Protection Act 1990. It will only be liable under that regime for contamination that lies within the site, and the original polluter will retain liability for anything that has escaped the site.

In the case of a business or a share sale, liability for contamination that the business has caused or contributed to on sites that have been occupied or developed historically but the business no longer has an interest in will usually continue to lie with the business. The buyer will often obtain warranties and indemnities from the seller against such liabilities, but these will usually be time limited for, say, three to five years, after which the buyer will be fully responsible.

Where contamination is suspected the buyer will usually commission intrusive investigations to establish the extent of the contamination and any remediation that is required – and the purchase price will reflect the cost of any remediation that is found to be required. On the basis that the cost of remediation has been taken into account in agreeing the price, the buyer will assume liability for that remediation. There are instances though where a buyer will require the seller to remediate the site before the sale completes. liability for that remediation. There are instances though where a buyer will require

the seller to remediate the site before the sale completes.

Where contamination or the escape of contamination is an unknown, then whoever assumes liability may obtain environmental insurance to indemnify against the risk of remediation works needing to be carried out. Usually, the better the information (ie, reports and surveys) there is to enable the insurer to assess the risk, the lower the premium.

The contractual provisions in any land deal will usually recite the fact that the buyer has been given the opportunity to investigate the site and that the state and condition of the land has been taken into account in the purchase price. This allows the seller to benefit from the 'sold with information' exclusion from liability under the Part 2A regime, which applies where the seller and the buyer are both within the Class A liability group (ie, both have caused or knowingly permitted the presence of a significant contaminant in, on, or under the land).

Where a site is due to be (re)developed, ground investigations and remediation will usually be required under the planning regime. Again, the buyer in this instance is likely to carry out its own investigations to ascertain the degree of contamination before buying the site, and liability for that remediation will generally lie with the party that is carrying out the development.

Other typical liability issues

23. What other liability issues are typically major points of negotiation in the context of a real-estate business combination?

When acquiring a real-estate business a purchaser will wish to evaluate whether the asset or assets within the business being acquired also bring with them potential liabilities. These could include the following.

PHYSICAL STATE OF THE PROPERTY

Liabilities arising because of the poor physical condition of the property. Market practice is for no warranties to be given by the seller as to the state and condition of the property. The buyer is expected to carry out its physical due diligence prior to purchase and is expected to acquire with full knowledge of any physical defects.

If the pre-transaction surveys and investigations reveal defects in the physical condition of the property, the buyer should negotiate a price reduction or walk away from the deal as there is unlikely to be redress against the seller for anything relating to the state and condition of the property after completion.

Liability for physical defects may be mitigated by the purchaser having the ability to claim against a building contractor or other professional adviser under a collateral warranty or third-party right. The sale-and-purchase agreement can be drafted so that the benefit of these is passed to the buyer on completion.

FINANCIAL OBLIGATIONS

The property may be subject to financial obligations, such as an obligation to pay overage to a third party on the occurrence of certain events or an obligation to pay a rent charge. Details of these should be revealed in the legal due diligence phase and if they are of concern, the buyer may negotiate a price reduction or require that the seller procures their release as a pre-condition to sale.

INSUFFICIENT RENTAL INCOME

If the property assets are not fully let or fully income producing, it is common for the buyer to insist on the purchase agreement including a rent top-up or a rent guarantee so that the seller is obliged to make additional income payments (either over time after completion or as a lump sum on completion) to compensate for the reduced rent or vacant units.

EMPLOYER LIABILITIES

The Transfer of Undertakings (Protection Of Employment) Regulations 2006 (TUPE) may operate to transfer the employment of employees who principally provide their services in relation to, or who are wholly or mainly assigned to, the property assets from their current employer to the buyer or its managing agents.

The buyer could inherit liabilities to these employees, such as payment of their wages and pension obligations. Specialist employment law advice should be sought.

PRIOR TENANCIES

It is important to establish whether the corporate entity being acquired has any liability under leases of property where it is no longer the tenant. If the lease is granted before 1995, this could be liability as original tenant. For leases granted after 1995, this could be liability under an authorised guarantee agreement.

Sellers' representations regarding leases

24. In the context of a real-estate business combination, what are the typical representations and covenants made by a seller regarding existing and new leases?

Since the reason for a real-estate business combination is the acquisition of the real-estate assets, this type of transaction invariably involves:

- the seller populating a data room with all the information about a property, including leases to which it is subject, that would be made available to a buyer on an asset acquisition;
- the buyer undertaking full due diligence of the materials in the data room;
- the buyer undertaking a full suite of the usual conveyancing searches in order to obtain information about the property available from public sources; and
- the buyer raising enquiries about any matters relating to the property which are of interest to it and receiving replies to those enquiries which are warranted in the sale-and-purchase agreement.

As a consequence, the typical representations and covenants made by a seller in respect of leases in the sale-and-purchase agreement are very limited. The sale-and-purchase agreement would usually include brief details of the occupational interests to which the property or properties are subject (eg, date, parties, document type). The seller may warrant that the information in the schedule is true, complete and accurate, and that the leases detailed in the schedule are the only leases which exist at the property.

Other general warranties in the sale-and-purchase agreement may apply to the leases. For example, warranties as to the capacity of the seller to enter into contracts generally, the absence of any breach of contract, the absence of litigation and default under contracts and that no termination events having occurred. However, warranties specifically relating to the occupational leases at the assets (other than those mentioned above) would be unusual.

DUE DILIGENCE

Legal due diligence

25. Describe the legal due diligence required in the context of a real-estate business combination and any due diligence specific to a real-estate business combination. What specialists are typically involved and at what point in the transaction are the various teams typically brought in?

Legal due diligence in the context of a real-estate business combination must be tailored to match the structure of the proposed transaction (particularly as regards the incorporation of the relevant property holding vehicle). Relevant due diligence matters may include the following.

TITLE INVESTIGATION

If the relevant contributors' solicitors provide certificates of title and title reports, these will need to be reviewed and re-addressed to ensure the necessary parties may rely upon them.

In the absence of certificates or reports the relevant title documents, deeds, occupational leases and associated matters will need to be reviewed by the acquiring parties' solicitors and reported upon.

Irrespective of whether certificates or reports are to be provided commercial property standard enquiries replies will need to prepared by legal advisers, in conjunction with relevant contacts with knowledge of the properties.

ENVIRONMENTAL MATTERS

Environmental reports will need to be commissioned, if the relevant parties are not already holding recent reports. The type of property and its past uses will determine whether a simple desktop search will suffice or whether more detailed investigations are required.

If reports are being provided, reliance letters should be requested to ensure the property holding vehicle will have reliance.

SURVEY

Advisers will need to check the availability of recent building surveys. New surveys will need to be commissioned if none are available.

CONSTRUCTION MATTERS

Diligence of both ongoing development and extant development liabilities will need to be assessed under building contracts, appointments and agreement for leases. The suite of warranties that will need to be assigned or novated across to the property holding vehicle will need to be identified.

PROPERTY SEARCHES

The standard suite of searches will need to be undertaken and reviewed. Care needs to be taken to ensure that all results will be available prior to exchange of the relevant agreement.

PLANNING

The planning history for each property will need to be reviewed and copies of relevant consents, planning and highways agreements obtained. If development sites are being contributed, the terms of any stopping up or diversion orders may need to be reviewed.

CORPORATE

The level of due diligence will depend on whether the relevant property assets are already held in a corporate structure which is being combined into the new business. If corporate property vehicles are being contributed then the due diligence will expand to cover:

- intellectual property;
- information technology;
- contracts, data protection, registration and licences;
- employment (including contracts and TUPE issues);
- constitutional arrangements;
- shareholdings;

- charges;
- subsidiaries;
- insurance;
- litigation (including pending); and
- taxation.

If the associated warranty package is being supplemented with insurance, the relevant policies will also need to be reviewed.

In the context of large-scale business combinations legal advisers should be appointed at the earliest opportunity to ensure that a data site can be established to house all of the necessary due diligence materials. Ideally, this should take place well in advance of heads of term being agreed. Further advisers will need to be brought If the associated warranty package is being supplemented with insurance, the relevant policies will also need to be reviewed.

in as required (surveyors, accountants, environmental consultants) to deal with specific due diligence issues as they are identified.

Searches

26. How are title, lien, bankruptcy, litigation and tax searches typically conducted? On what levels are these searches typically run? What protection from bad title is available to buyers and does this depend on the nature of the underlying asset?

Title searches are split into two categories, namely, pre-contract searches and pre-completion searches. The pre-contract searches are carried out, normally by the purchasing party's solicitor, before the purchaser becomes contractually bound to purchase the property. In certain circumstances, where time is of the essence, the seller may have already carried out the searches and will provide these in a pre-prepared sales pack for the property.

Pre-completion searches are carried out a few days before completion, the aim of these searches is to confirm (where possible) whether any information obtained from the pre-exchange searches has changed and to grant the buyer protection that its purchase can be registered at the Land Registry, hence perfecting its title to the new property.

It is important that a solicitor carries out searches that are appropriate for the particular property bearing in mind its location, current use and proposed use. If the purchaser requires bank funding, the lender may also stipulate the searches that they require.

Some searches should be carried out in all circumstances. These are described below.

LOCAL LAND CHARGES SEARCH

This provides information on any local charges on the land, such as:

- planning matters including planning permissions for the property;
- enforcement notices;
- compulsory purchase orders;
- whether the property is listed or in a conservation area;
- tree preservation orders; and
- whether any local taxes are payable.

ENQUIRIES OF THE LOCAL AUTHORITY

There is a list of standard enquiries and certain optional enquiries where relevant for the property. This search will reveal information about the property and the surrounding area, and the standard enquiries will reveal:

- pending planning applications;
- planning designations;
- public rights of way;
- noise abatement notices; and
- nearby road proposals.

Optional enquiries can provide information on environmental and pollution notices and whether the property or land has been designated as common land etc.

DRAINAGE AND WATER ENQUIRIES

This will reveal if the property is connected to the mains supply and mains drainage.

PRE-CONTRACT ENQUIRIES

These are a list of industry-standard questions that the purchaser raises with the seller. The purchaser is also entitled to raise questions specific to the property. The industry-standard enquiries raise questions such as the extent of boundaries, if there are any party walls, the VAT status of the selling company, if there is asbestos or other environmental issues. The seller may be liable in misrepresentation for inaccurate replies.

LOCATION-SPECIFIC SEARCHES

Depending on the location of the property, additional searches should be carried out. For example, a coal-mining search must be made when the property is located in a coal-mining area to determine if subsidence is a risk or an underground railways search for a central London property for the same reason. If the property is being purchased for development purposes, utilities

searches should be carried out to reveal the location of cables and conduits and to ascertain if their location would sterilise part of the development. In many circumstances, environmental searches are also important so that the buyer can be advised of any potential liabilities if the land is contaminated.

The overall aim of carrying out searches is so that their results can be analysed and the purchaser (and the purchaser's lender, if any) can investigate whether or not there are any defects in the title which would adversely affect the value of the property.

In certain circumstances, title defects can be insured against by way of title indemnity policies or the seller can provide statutory declarations confirming matters relating to the property have been ongoing for many years where this is not clear from the title documents.

One essential pre-completion search is a search to ensure that the seller is not subject to any insolvency proceedings which may adversely affect its right to sell the property. In the case of an individual, the buyer's solicitor will carry out a bankruptcy search at the Land Charges department of the Land Registry. This search will show if the person named in the search was subject to any bankruptcy proceedings in the previous five years.

In respect of companies or LLPs, the buyer's solicitor will carry out a search against the entity at Companies House to determine whether it is subject to any ongoing insolvency proceedings. A search should also be carried out at the High Court to ascertain whether any insolvency petitions have been issued against the entity. Should this be relevant, it is possible to carry out searches at the High Court (but not most district registries and county courts) of any litigation in which a party is involved, and to obtain copies of all publicly available pleadings and orders.

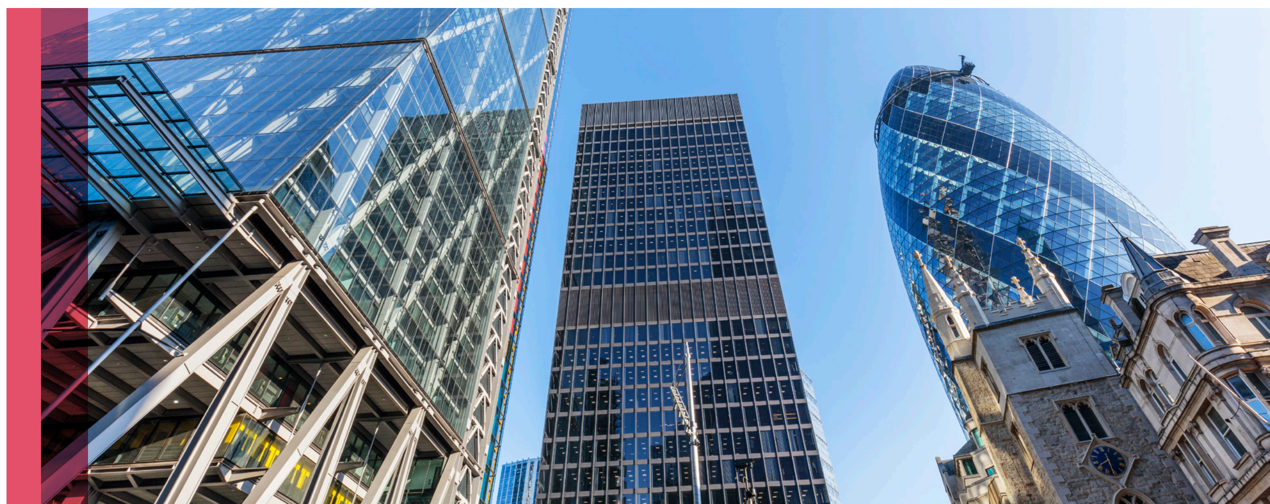
Finally, unlike in some jurisdictions, there are no registers of liens that can be searched by the public.

Representation and warranty insurance

27. Do sellers of non-public real estate businesses typically purchase representation and warranty insurance to cover post-closing liability?

Sellers' side W&I insurance is not common at all as this leaves the seller involved with post-completion matters to a far greater extent than desired (sellers' side insurance involves a claim being made on the seller and the seller claiming on the insurance policy, with the risk of the policy's non-response being on the seller).

By far the most common approach is for the buyer to take out W&I insurance, which has seen premiums ever more competitive and nil attachment points are becoming increasingly common.



Review of business contracts

28. What are some of the primary agreements that the legal teams customarily review in the context of a real-estate business combination, and does the scope vary with the structure of the transaction?

Documents to review in a combines real estate and business transaction often include:

- title documents (those listed in the Land Registry's title registers for registered land or root of title documents for unregistered land) – these provide details of the matters the property has the benefit of and is subject to, including any financial liabilities and title restrictions to be discharged/complied with on or before completion;
- lease documents and documents supplemental to the lease(s) – these provide details of landlord and tenant obligations and liabilities, both of which may apply to a purchaser where title to the property is leasehold and there are also occupational tenants;
- planning and construction documents – these contain details of any outstanding and ongoing liabilities on the part of the property owner and any guarantees or warranties that may still be applicable and benefit the purchaser;
- replies to standard enquiries and all management documents that should be provided with the replies – these provide wider details of the day-to-day use and management of the property and any known issues/ complications, including any service charge disputes and voids and SDLT documents;
- search results – a standard set of search results will provide details of services the property is connected to and the location of conduits and connection points, drainage and water details, information on private/ public highways, environmental concerns and statutory notices;
- documents relating to the property and/or the business that are linked to individuals connected to the business – the individuals may need to be released from their obligations, new individuals may need to enter deeds and guarantees or perhaps obtain W&Is from the outgoing individuals;
- commercial contracts – depending on the plans for the property and business following completion, these may need to be terminated or novated or additional advice may be required in relation to any employment law considerations; and
- certificates of title – where the main asset of the business is an investment property or a portfolio of properties, certificates of title may be provided for review and issues requiring additional warranties, guarantees and insurance may arise as a result of this review.

A review of the above documents will provide details relevant to the negotiation of transaction documents and any additional provisions and documents that need to be covered, for example, details to cover in a disclosure letter and specific warranties or supporting guarantees and insurance policies that may need to be provided.

BREACH OF CONTRACT

Remedies for breach of contract

29. What are the typical remedies for breach of a contract in the context of a real-estate business combination, and do they vary with the ownership of target or the structure of the transaction?

Typical remedies include damages for breach of contract or termination in the event of a breach of contract, with the latter being almost entirely based on specific express rights written into the contract in the event of certain events occurring or failing to occur, rather than any general common law principles allowing such a right to terminate. Additionally, actions based on misrepresentation may be founded whether as a claim for damages (on a different basis from damages for breach of contract) or rescission. Many contracts expressly exclude a right to a claim based on misrepresentation and confine the parties to claims under the contract for damages for breach or, in certain circumstances, termination.

A right to have the contract specifically performed (ie, completed in accordance with its terms) is available at the discretion of the court in the event of a breach of contract where the remedy of damages is inadequate. This may be the case in respect of certain real-estate assets as a particular piece of real estate may be viewed by the court as a 'unique' asset.

Remedies for breach of contract damages are typically curtailed by agreed limitations both in terms of de minimis and maximum liability numbers and also in respect of the period in which such claims may be brought.

FINANCING

Market overview

30. How does a buyer typically finance real-estate business combinations?

Typically, the funding of a real-estate transaction will comprise a combination of debt and equity, the equity taking the form of share capitalisation and/or shareholder loans. The level of each financial component will be driven by factors such as the size of the transaction, the mix of the underlying assets and the structure of the buyer, target or asset.

The debt element usually comprises of senior debt (which may be a single facility or several layers) with, potentially, additional mezzanine debt to bridge any gap between the senior debt and the available equity. The debt would usually be secured on the buyer's or the target's assets. The funder may also require further security over assets or guarantees from elsewhere within the buyer's ownership structure.

The balance of the purchase price (after allowing for any senior and mezzanine debt) would be funded by share capital investment or shareholder loans. In the case of the shareholder loans, these would usually be unsecured, and in any event will be fully subordinated to the secured senior and mezzanine loans. The security and sub-ordination arrangements would usually limit the extent to which the buyer or borrower can repay junior or unsecured debt from surplus cash.

In the case of private real-estate combinations, the usual expectation would be for the debt of the target company to be repaid on completion of the acquisition, from funding made available by the buyer. In public real-estate combinations, the buyer would need to raise the funds to finance the initial acquisition of shares and then seek to refinance – typically using the target and its assets as security once it has obtained ownership of the necessary voting rights to facilitate this.

Settlers obligations

31. What are the typical obligations of the seller in the financing?

On the assumption that the seller is exiting on completion of the transaction, its primary obligations would relate to the repayment of existing debt on the property and procuring the release of any existing security. To the extent that the seller has any continuing contractual obligations after completion (eg, warranties given in connection with the sale of the asset or target) these may be assigned to the funder as part of the security package.

Repayment guarantees

32. What repayment guarantees do lenders typically require in the context of a property-level financing of a real-estate business combination? For what purposes are reserves usually required in the context of property-level indebtedness?

Typically a lender could look for financial or performance guarantees from the sponsor, shareholders or other related parties. Such guarantees could extend to the entire level of the debt, together with any related costs, or may be limited to a fixed sum (usually plus interest and costs), or just to interest, or in the case of real-estate developments to cost overruns. Such guarantees could be called upon a borrower's default and the lender would usually specify that it has no obligation to look to other available security before enforcing a guarantee.

Other tools at the lender's disposal may include:

- amortisation of part of the loan over the term, which may be coupled with a corresponding reduction of the permitted loan-to-value percentage. There may be incentives to the borrower in the form of a reduced margin as agreed reduction milestones are met;
- retention on deposit of an element of any funding to cover interest or amortisation payments;
- a cash lock up or cash sweep (where monies otherwise available are held back from distribution to sponsors or are required to be applied in reduction of debt) where certain financial covenants, such as debt service cover ratios fall below required levels;
- requiring compensation payments to be applied in debt reduction; and
- requiring the proceeds of sale of charged assets to be applied in debt reduction.

Borrower covenants

33. What covenants do lenders usually insist on in the context of a property-level financing of a real-estate business combination?

Lenders usually insist on wide-ranging covenants dealing with matters such as the following:

- negative pledge – prohibiting the borrower from creating further security over its assets and limiting its ability to dispose of assets without the lenders' consent;
- operational covenants – restricting the ability of the borrower to change its current business, to acquire or invest in other businesses;
- property covenants dealing with compliance with title covenants, insurance, maintenance and operation of the real-estate assets. Typically these include extensive reporting on performance;
- in case of development assets, covenants dealing with appointing the contractor and the professional team, obtaining required warranties, monitoring, reporting and signing off on the development and covering drawdown of the facility by means of staged payments;
- information reporting covenants - obligations to provide statutory accounts, management accounts and property specific information usually supported by a certificate from the borrower as to compliance with financial covenants;

Financial covenants would include:

- a loan-to-value covenant;
- an interest cover covenant;
- a debt service cover covenant;
- loan-to-gross development value and/or loan-to-cost covenants, in the case of a property development;
- tax gross-up and indemnities – covenants dealing with the borrower's tax status and obligations to gross-up payments where withholding taxes are applied to sums due to the lender; and
- general covenants as to compliance with laws – provisions dealing specifically with sanction issues are common.

Further specific covenants may be tailored to the particular transaction.

Typical equity financing provisions

34. What equity financing provisions are common in a transaction involving a real-estate business that is being taken private? Does it depend on the structure of the buyer? combination? For what purposes are reserves usually required in the context of property-level indebtedness?

The transaction structure will depend on the buyer's own structure and its tax concerns. Often in an acquisition there will be a mixture of equity and debt financing, with investors providing some funding through subscriptions for ordinary shares in the top company in the structure and the bulk of the funding through preference shares or loan notes. This will be subordinated to the debt financing, which will usually go in at a lower level in the structure. If management are investing, then they will typically invest at the same level as the investors, but their interest may be subordinated to that of the equity and debt finance providers.

The main documents covering the equity investment will be the subscription and shareholders' agreement, the articles of association, the service contracts of the directors, any debt instruments and possibly side letters (particularly common where alternative asset managers are involved).

Typically the investors will be expecting to exit their investment around the five-year point and the documentation will cover the various ways an exit may happen – usually an IPO or secondary sale. Drag-along and tag-along rights are typically seen in the exit scenario. As well as controlling the exit, the investors will also be looking to protect their rights more generally and will want sufficient opportunity to veto the business from doing certain things without their consent. They will also want to be sure that management are incentivised, so that their interests are aligned with those of the equity provider and will want to ensure that they stay in the business if they are performing well, but can be removed if not. The equity provider will often want the right to be able to put their own people on the board, or at least have observation rights.

COLLECTIVE INVESTMENT SCHEMES

REITs

35. Are real estate investment trusts (REITs) that have tax-saving advantages available? Are there particular legal considerations that shape the formation and activities of REITs? Combination? For what purposes are reserves usually required in the context of property-level indebtedness?

REITs are available in the UK and they do have tax-saving advantages. A REIT is a property investment company (or group of companies) that allows participants to invest in a portfolio of real property while taking advantage of certain tax benefits. REITs are exempt from tax on the income profits and capital gains of their qualifying property rental business.

Distributions of such profits and capital gains to investors are treated as UK property income to their shareholders at their normal tax rate on income as profit and gains in the UK property business, rather than as the receipt of a dividend.

In order to become a REIT, a company must satisfy certain qualifying conditions. A group of companies can become a REIT if its principal company satisfies the company's conditions and the group satisfies the business conditions.

THE COMPANY CONDITIONS ARE THAT

- the company must be tax resident solely in the UK;
- the company must not be an open-ended investment company;
- the company's shares must be admitted to trading on a recognised stock exchange and either listed on a recognised stock exchange or traded on a recognised stock exchange in every accounting period (failure to meet this condition in a new REIT's first three accounting periods does not prevent the company from satisfying this condition so long as it is listed before the end of that three-year period);
- the company must not be a close company and if it is, then it must become non-close within three years of becoming a REIT;
- the principal company of a REIT must have only one class of ordinary share capital in issue, although convertible non-voting preference shares may be issued to raise further funds; and
- the REIT must not be party to any non-commercial loan.

BUSINESS CONDITIONS

A company or group of companies must satisfy the following conditions.

The company or group must have a property rental business that qualifies as tax exempt in the UK or overseas.

At least 75 per cent of the company or group's income must be received from its tax-exempt business.

ONGOING CONDITIONS

A REIT must distribute 90 per cent of the net income profits of its tax-exempt business on or before the expiry of 12 months from the end of the accounting period to which the profits relate but in certain circumstances, this can increase to 18 months where there is a market value substitution. Capital gains can be retained within the REIT.

There is a tax charge to the REIT if the income of its tax-exempt business does not cover its interest on loans by a ratio of 1.25:1, but costs for arranging finance are to be ignored. If the principal company makes a distribution to a member that is a corporate entity beneficially entitled to 10 per cent or more of the shares or dividends, or controls 10 per cent or more of its voting rights, the REIT may be subject to a tax charge of around 20 per cent on the profits distributed to that shareholder.

At least 75 per cent of the company or the group's total assets must, at the beginning of an accounting period,

be involved in the tax-exempt property rental business.

This business must consist of at least three properties or separately rented units, none of which will constitute more than 40 per cent of the total value of the properties in the property rental business.

Cash held on deposit and gilts can be added to this pool and will help to achieve this 75 per cent threshold.

Failure to meet this condition in the first accounting period will not generally prevent the company or group gaining REIT status if the condition is ultimately met at the start of the following accounting period, but a tax charge will arise in year one.

Private equity funds

36. Are there particular legal considerations that shape the formation and activities of real-estate-focused private equity funds? Does this vary depending on the target assets or investors? For what purposes are reserves usually required in the context of property-level indebtedness?

Private equity funds may invest in various different kinds of real-estate-focused assets, but regardless of the target assets, setting up a real-estate-focused private equity fund is likely to involve regulated activities. Any person who carries on a regulated activity in the UK must either be an authorised person or exempt from the need for authorisation (see section 19, Financial Services and Markets Act 2000). This is known as the 'general prohibition'.

Breach of the general prohibition is a criminal offence. In addition, an agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party. The other party is entitled to recover any money or other property paid or transferred by him or her under the agreement and compensation for any loss sustained.

The list of regulated activities includes: establishing, operating or winding up a collective investment scheme and managing an alternative investment fund (AIF).

In general, setting up any kind of private equity fund in the UK requires an authorised operator or manager in place, except where all investors have day-to-day control as this may not be the case.

Where the fund is considered to be an AIF, the requirements of the Alternative Investment Fund Managers Directive (AIFMD) will apply, including requirements on authorisation, conduct of business, regulatory capital, appointing a depositary, marketing and the use of leverage.

The AIFMD permits a lighter-touch regime for AIF managers (AIFMs) with a small amount of assets under management. In the UK, there are two different types of small AIFM: a small registered AIFM or a small authorised UK AIFM.

To qualify as a small AIFM, the AIFM must have total assets under management in AIFs not exceeding either €100 million or where the AIFs managed are all unleveraged and all have a lock-in period of at least five years, €500 million.

If certain conditions are met and the thresholds above are not exceeded, there is also the option to register with the FCA as a small property AIFM.

Small AIFMs are subject to less compliance and reporting requirements than a full-scope AIFM. Also they are not required to appoint a depositary to their AIFs.

AIFMD contains restrictions on marketing AIFs in the UK.

Tax considerations will drive the geographical location of entities within the fund structure, which are often offshore. Sometimes it will be necessary to have a management vehicle based in the country of the underlying assets.

The geographical location of investors in a fund as well as the location of assets can also create additional burdens. For example, where there are US investors, consideration will need to be given to US tax consequences, such as obligations under the 1974 Employee Retirement Income Security Act.

UPDATES AND TRENDS

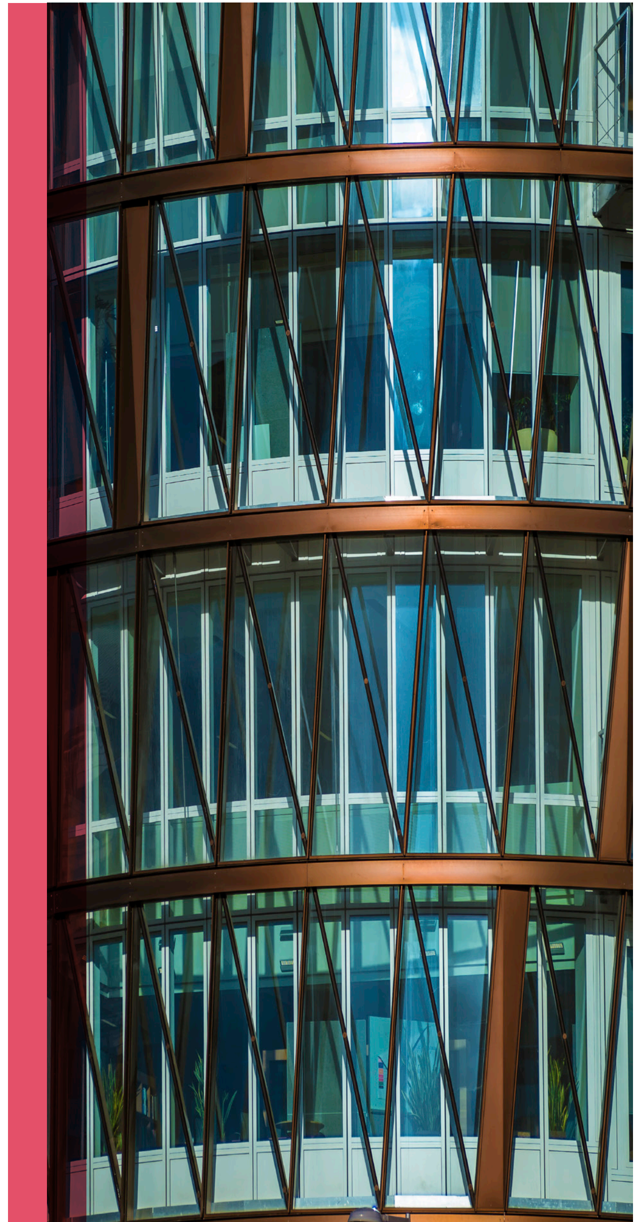
Key developments of the past year

37. Are there any other current developments or emerging trends that should be noticed?

Investors are continuing to move into asset classes that require more active asset management such as student accommodation, private rented accommodation, care homes and assisted living, and serviced work and office space. This requires further due diligence and analysis of the market and demand for the 'product' supplied by that asset. As noted in question 2, income-strip transactions continue to increase, and for transactions involving the acquisition of real estate assets through the acquisition of the corporate vehicle that owns those assets, W&I insurance is increasingly more common, with some lenders not being prepared to advance unless W&I insurance is in place. Known theoretical risks (including tax issues) are increasingly being able to be 'wrapped' in the coverage.

The London Interbank Offered Rate (LIBOR) is being replaced. LIBOR is currently the benchmark for over US$350 trillion in financial contracts worldwide, and the impact of the transition from LIBOR (in 2021) will be far-reaching. The transition is market-driven, not regulator-driven, and institutions and territories are preparing at different rates.

The potential for Brexit ramifications on aspects on the legislation discussed has increased. However, even if Brexit does occur, the potential for Brexit-related changes to legislation is not likely to be immediate, not least because of a proposed transitional period (if a Brexit deal is achieved).



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