



## ISSUES RELATING TO COMMERCIAL LEASING

### IRELAND Arthur Cox

#### CONTACT INFORMATION

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**1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.**

Stamp Duty.

Capital Gains Tax - Any premium received on the creation of a lease may incur a charge although it does not usually arise on the granting of a lease where there is no consideration other than rent.

Capital Acquisitions Tax - A liability to capital acquisitions tax may arise where a lease is granted at an undervalue.

Value Added Tax - The right for a landlord to charge VAT on the rents payable under a lease may arise in certain circumstances.

**2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).**

None.

**3. Describe any laws requiring landlords to allow a tenant to renew its lease.**

Where Part II of the Landlord and Tenant (Amendment) Act 1980 a right of renewal may arise. One of three "equities" must be proved for the right to renewal to arise: business equity

(a commercial premises occupied by the same party continuously for a period of 5 years or more, and the right to renew has not been renounced); long possession equity (the property was continuously in the occupation of the same party for 20 years or more); or, improvements equity (improvements made by the tenant account for not less than one half of the letting value of the property).

**4. Describe any restrictions on rent that may be charged for to a tenant.**

None - matter to be negotiated between landlord and tenant. Most commercial leases incorporate rent review clauses which provide that rent payable is to be reviewed typically on a five yearly basis.

**5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.**

Where the demised premises are “destroyed, become ruinous and uninhabitable, or incapable of beneficial occupation or enjoyment” as a result of an “accidental fire, or other inevitable accident” (Section 40 of the Landlord and Tenant Law Amendment (Ireland) Act 1860) - this provision is typically specifically excluded from modern commercial leases.

Where the tenant acquires the landlord's interest in the property.

Where a tenant company is being wound up the liquidator may apply to the court to disclaim the lease. (Section 290 Companies Act, 1963).

**6. Describe any laws allowing tenants to assign or sublease without landlord’s consent.**

No laws specifically. However, devolution of a tenant’s leasehold interest can occur:

- 1) on death - under the succession acts, the tenants estate becomes vested in his personal representatives.
- 2) on bankruptcy - the tenancy vests in the official assignee for the benefit of bankrupt's creditors.
- 3) on winding up - the liquidator may take control of the company's property.

**7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.**

Landlords are permitted to place restrictions on tenants’ ability to assign or sub-let within the covenants of the lease but any absolute bar on alienation (to include both assignment and sub-letting) is effectively prohibited as such a provision has the effect of being a restriction on alienation without the licence or consent of the landlord, which licence or consent shall not be unreasonably withheld notwithstanding any express provision to the contrary.

There is no statutory definition of the term “unreasonable”. The reasonableness or otherwise of the landlord’s refusal to grant consent is therefore a question of fact, not of law, and depends entirely on the particular facts and circumstances of each case.

The remedy for a tenant who believes that a landlord has unreasonably refused consent is to apply to court for a declaration that consent has been unreasonably withheld and for an Order

permitting the tenant to proceed with the assignment or sub-letting without consent. Onus of proof falling on the tenant.

**8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?**

Notice to quit - used to recover possession of premises following the conclusion of the term of a given tenancy where the tenant is overholding.

Forfeiture is appropriate where the term granted by the lease is still running. A landlord has no right to forfeit the lease unless the tenant has been in breach of its terms. Furthermore, a landlord loses the right to forfeit the lease by failing to follow certain statutory procedures intended to provide the tenant with a reasonable opportunity to remedy the breach. Forfeiture is an equitable remedy and the court has a wide discretion to grant relief to the tenant on such terms as it thinks just. With certain exceptions (non-payment of rent being the most notable), before forfeiture can take place, a notice must be served by the landlord on the tenant.

**9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?**

No, however, the landlord may include a clause prohibiting it in the lease or at least requiring the tenant to obtain his consent prior to the creation of any charge over the leasehold interest.

**10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.**

None.

**11. Describe any required statutory or other legal disclosures to be made to all tenants.**

None.

**12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.**

Rental income may result in an income tax payable by a landlord who is an individual or in the case of a company, to corporation tax.

**13. Describe any limitations on the ability of landlords to exercise self-help.**

The term "self help" is not one commonly used in this jurisdiction, but forfeiture (see question 8 above) would be the typical remedy used for breach of a lease covenant by a tenant which is not remedied in accordance with the terms of the lease.

**14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.**

Again, this is a concept not practised in this jurisdiction. Any provision for an acceleration of rent would require to be expressly stated and extreme care taken in the drafting of such a clause such that it does not constitute a penalty clause designed to deter a tenant from breach of contract by stipulating that breach will result in the payment of an extravagant and

unconscionable amount as such a clause would be unenforceable in court.

**15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.**

The courts tend to lean against sanctioning forfeiture of a vested property interest. There are also some statutory restrictions on forfeiture even in the event of tenant default. However, it is possible to insert a proviso for re-entry into the terms of the lease if the rent is outstanding for a certain period most other breaches require the tenant to be given an opportunity to remedy the breach.

**16. Describe any formal requirements for the execution of a lease.**

Any lease for a term of more than one year must be in writing signed by the landlord or his authorised agent or it will not be a valid agreement enforceable by either party. Typically the signatures of landlord and tenant will be witnessed by a third party on the face of the lease.

Where either party to the lease is a company, typically there will be a requirement for the lease to be executed under seal (i.e. the company's seal is affixed to the lease and witnessed by two directors or a director and secretary of the company).

The executed lease should then be submitted to the Revenue Commissioners for stamping and depending on the length of the term, registered in the Registry of Deeds or Land Registry.

**17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.**

Contracts for the future creation of the relationship of landlord and tenant and involving an interest in land must be evidenced by a note or memorandum in writing signed by the party against whom it is sought to enforce the contract. This note or memorandum is not required to be a contract in the formal sense provided that it sets out the essential terms of the lease/tenancy and there is sufficient evidence of an unconditional and complete agreement between the parties as to the terms.

**18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?**

A leasehold interest is regarded as being entirely distinct from a freehold interest in the same property. The freehold interest will generally be transferred subject to the lease. Provided that the parties to and terms contained in the lease are unchanged, the tenant's rights and obligations will not be affected by a transfer of the freehold.