

**TRIVERS SMITH**

**GUIDE TO ACQUIRING REAL ESTATE  
IN ENGLAND AND WALES**

This guide identifies some of the issues that buyers of commercial real estate in England need to consider. Should you have any questions on any aspect of it please contact any of the partners in the Real Estate Department:

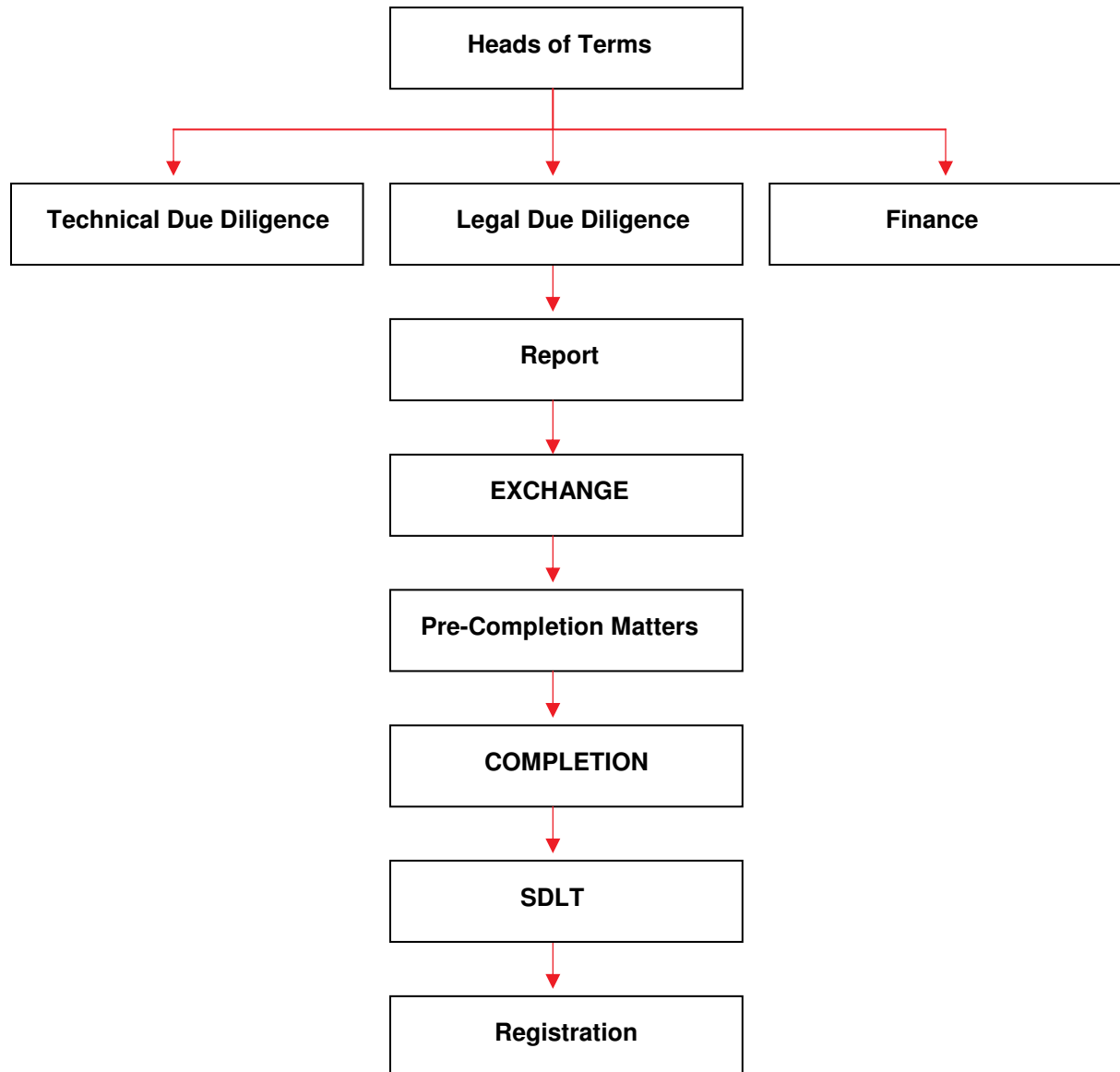
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## UK Property Acquisition Steps – Flow Chart



## 1. Heads of Terms

- *What are they?*

Once you have found a building that fulfils your investment criteria, you in conjunction with your property advisers will negotiate and hopefully agree the key commercial principles. The commercial terms will be summarised in a document known as a set of Heads of Terms.

The Heads of Terms will state the agreed price (or a mechanism to determine the price if appropriate), the timetable for the transaction and any other key commercial terms.

- *Are they binding?*

Heads of Terms will typically be marked "subject to contract" – as such they will be non binding and either party can walk away at any time.

- *How can we help?*

Whilst we would not be at the forefront of the negotiations at the Heads of Terms stage we often find that clients and agents have questions or concerns that we can help with. Advice at this early stage can eliminate problems later.

Steps 2, 3 and 4 below run simultaneously.

## 2. Technical Due Diligence

- *Survey*

An important aspect of the technical due diligence will be commissioning a surveyor and/or a firm of engineers to inspect the property and provide a report in relation to its state and condition. The report should cover mechanical and electrical items within the building as well as the structure.

Your surveyor should be instructed to estimate the cost of rebuilding the property in the event of damage or destruction. This is to ensure that the property is adequately insured. If you are borrowing money to help finance this purchase, your lending bank will normally ask to see a copy of this report.

- *Valuation Report*

Buyers usually commission a valuation report for the property. If the buyer is obtaining bank finance, the lending bank will require this. In such circumstances, the valuation report will need to be addressed to both the buyer and also the lending bank.

We will liaise directly with the surveyor to check that he is aware of any material legal matters arising from the legal due diligence (see 3 below) that affect the property and which might affect the valuation.

- *Credit Checks*

It is not normal practice in the UK for your lawyers to carry out credit checks in relation to the seller, the occupiers of the property or anyone who is providing you with a report or guarantee of any type.

Some valuers will consider the underlying credit worthiness of the occupiers as part of their valuation report. If this is something that the buyer requires them to do, then it should instruct them specifically.

If the buyer is receiving material guarantees or warranties, or is assuming a credit risk in relation to the seller, then it would be good practice for the buyer to carry out credit checks in relation to the people who are providing these.

- *Environmental Reports*

It is normal practice in the UK for a buyer to commission a phase I or desktop environment report. To the extent to which this reveals any material matters, further investigations will then be carried out.

- *Measurement*

Unless the seller is able to provide the buyer with a measured survey which the buyer is able to rely on, some buyers like to commission a measured survey of the property prior to exchange. It is unusual for these to be specified in the leases to the property.

- *Inspection*

There are various matters which affect an owner and any buyer of a property, even though they do not appear on the registered title. It is therefore important that the buyer or the buyer's surveyors inspect the property prior to entering into a contract to ascertain whether there are any indications of what are known as overriding interests other than those which the buyer is already aware.

### **3. Legal Due Diligence**

There are 3 aspects to this:

- the contract
- investigating title
- raising enquiries

- *Contract*

The contract is a formal and binding legal document setting out the terms that the parties have agreed and which govern the acquisition of the property. The first draft of the sale contract will be produced by the seller's lawyers. Although there is not a standard form of contract in the UK, many of the contract clauses should be uncontroversial and may be agreed quickly and easily. There will also be a number of clauses that will deal with specific issues relating to the property where negotiation will be required. We will explain any material points to you and give you clear advice as to their importance and effect.

- *Title investigation – what is it?*

Reviewing title involves us analysing both the "title" (i.e. the ownership documents relating to the property) and the lease or leases of the property to the tenant or tenants, through which you will derive your investment income. The review of the title identifies matters which both benefit the property (for example rights of way) and matters to which the property is subject (for example, restrictions on use or obligations to make payments). The lease review will include a detailed analysis of the terms of the lease and any related documents and will identify any material issues and any matters that are not institutionally acceptable. In general terms we will be looking to confirm that the lease is an "FRI lease". This acronym stands for "full repairing and insuring" and means that the tenant is obliged either to repair and insure or meet all the costs of repair and insurance so that the rent you obtain is an undiluted income stream referred to as a "clear rent".

We would also review the planning consents for the property and (where relevant) building contract as part of the investigation of title. The plans that accompanied any planning application and any plans and specifications that formed part of a building contract are technical documents and will not form part of our review. Your surveyors or engineers should advise on these.

- *Enquiries*

*Enquiries of the seller.* In the UK there is no general obligation on sellers to disclose problems with a property, so part of the due diligence process involves asking sellers a number of questions to flush out any issues or concerns. The majority of the questions that we would raise would be in an industry standard form but questions are also raised on any matters arising from the title investigation. These enquiries are designed to establish whether there are any important issues relating to the property of which the seller is aware and any buyer would want to know about, for example a material dispute with one of the tenants.

*Enquiries of public bodies.* As well as enquiries of the seller, we also raise enquiries of a number of public bodies. The precise searches required depend on the nature and location of the property but the most important searches, being the local authority search and the land registry search, are carried out in every case. The search of the local authority gives a strong indication of whether there are any breaches of planning legislation and whether any notable changes to the infrastructure in the

immediate vicinity of the property are planned. The land registry search will allow us to identify if any third party is claiming a major interest in respect of the property.

#### **4. Finance**

- *When does the finance need to be in place?*

Assuming finance is required, early discussions with banks to identify the likely lenders will speed up the acquisition process, particularly as banks are taking a cautious approach in the current climate. Whilst you will probably want to delay formally appointing a bank for as long as possible (so as to avoid having to pay a commitment fee in case the due diligence throws up any unexpected problems) having a bank "ready to go" is likely to be important if tight timetables are to be met. The bank will need to be formally appointed several weeks before exchange to give the bank and their lawyers time to review our reports and to allow sufficient time to negotiate the relevant loan and security documents.

#### **5. Report**

- *How will we report?*

Throughout the due diligence process we will be in regular contact with you to keep you up to date with our findings and to let you know if any material issues are discovered.

At the end of the due diligence process we will produce a formal report to you. For most of our clients we report by producing what is known as a "Certificate of Title" ("Certificate") together with an overview report ("Overview"). Certificates are in an industry standard form and for that reason are liked by lending banks who take comfort from the fact that they are comprehensive documents which cover all of their key points of concern. That said, Certificates are not easy to read as they essentially comprise a series of statements (running to about 40 pages) followed by a series of disclosures. For this reason the Overview will be of much more help to you. In that document we will summarise the key points relating to the property and identify any matters of material concern. The Overview is a "user friendly" document and we pride ourselves on making sure that the Overview reports that we produce contain a clear explanation of all material matters relating to the property together with comprehensive commercial advice.

- *What are the alternatives?*

Some clients prefer us not to produce Certificates at all but instead to produce a full "report on title" in a format that is easier to follow and we are happy to do this. That said, the vast majority of clients that require bank funding prefer us to report by way of Certificate and Overview, because the bank will usually require a Certificate in any event and so this avoids any duplication of work.

- *How will the other professionals report?*

The surveyors will report by producing a formal written survey and valuation. Similarly, any other professional advisers that you have appointed can also be required to produce formal written reports.

## **6. Exchange**

- *When does exchange take place?*

Assuming that you and the lending bank are ultimately happy with all of the reports and the terms of the contract (and that you are able to agree the finance terms with the lending bank) the next step is to progress to exchange of contracts (i.e. formally entering into the sale agreement).

- *What is the effect of exchange?*

Exchange is the most significant step in the whole acquisition process as it creates a binding obligation on the buyer to buy the property and a binding obligation on the seller to sell it for the price specified in the contract. Ordinarily a deposit of 10% of the purchase price is paid at exchange (although this figure is often negotiated downwards), effectively to guarantee the buyer's performance.

At exchange a date for completion will be set. This is usually a few weeks after exchange but it can be for a longer or shorter period (and is sometimes simultaneous with exchange depending on what the parties agree).

## **7. Pre-Completion Matters**

- *What needs to be done between exchange and completion?*

*Final Checks.* Before completion we carry out one or two routine final checks and searches but these rarely throw up any problems.

*Contractual Obligations.* We also make sure that any pre-completion obligations set out in the contract (which might, for example, involve producing consents or additional documents) are complied with.

*Banking Obligations.* We work with you and your lending bank to ensure that any 'conditions precedent' to lending are satisfied.

*Insurance.* At completion the seller will cancel its insurance policy so you will need to have insurance arrangements in place. Many clients will also arrange for insurance to be in place for the period between exchange and completion though you are likely to have some protection (depending on the contract) for this period under the seller's insurance policy.

## 8. Completion

- *What happens at completion?*

On the day designated in the contract, completion of the purchase will take place. Completion involves the completion of the formal documents of transfer which will have been executed by the parties several days in advance. No notaries are required in the UK unlike other European jurisdictions.

The completion monies (i.e. the purchase price less the deposit and any rent adjustments) are paid to the seller and the documents effecting the transfer are simultaneously completed so that the buyer becomes the legal owner of the property. At completion any existing bank charges over the property are released and the new bank charge over the property is entered into.

## 9. Registration

- *What registration/filings are required?*

Companies House. The charge over the property must be registered at Companies House within 21 days of completion. This is an entirely routine and straight forward matter.

Land Registry. To perfect the buyer's legal title to the property (and the bank's charge) the transfer of the property itself must also be registered at the central Land Registry. The fees for registration are £920 (for properties over £1,000,000). The application for registration will be made within a few days after completion and ordinarily formal registration at the Land Registry is completed within about four weeks after that date and that concludes the acquisition process.

## 10. Tax

- *How much SDLT must be paid and when?*

Stamp duty land tax ("SDLT") is payable within 30 days of completion of the transaction at the rate of 4% of the purchase price (for properties over £1,000,000). Ordinarily lending banks will require the buyer's solicitor to be holding SDLT monies at completion and the buyer's solicitors will usually arrange for it to be paid to HM Revenue & Customs ("HMRC") on the completion date.

- *Are there any ways to reduce SDLT?*

There are a number of SDLT mitigation schemes that can be used in some circumstances (which depend on the precise details of the transaction). We have extensive experience advising on SDLT schemes (some of which are extremely complex) and we will discuss any mitigation possibilities with you on a case by case basis and advise on the likely costs of implementing any such schemes.

- *Capital Allowances*

Capital allowances are the tax equivalent of depreciation. They are not available on all capital assets and the rate of the allowance varies according to the nature of the asset. If capital allowances are available, the buyer should consider appointing a specialist consultant to advise on the claim.

- *Value Added Tax*

VAT is only payable in addition to the purchase price of a property in the UK if the seller has made what is known as a VAT election. This is a decision by the seller to charge VAT on the property. If such an election is made VAT is also charged on the rent. If, however, you are buying a property which is let to a third party and the buyer is registered for VAT, makes a VAT election and undertakes to continue the same letting business from the property that the seller has, then no VAT is payable in addition to the purchase price.

- *Non-resident landlord scheme*

If the buyer is an overseas company, rental income from it will be subject to what is known as the non-resident landlord scheme. This requires tenants or a UK rent collection agent to deduct 20% tax from rental income before paying it to the landlord. In order to address this, the landlord needs to apply to HMRC under the non-resident landlord scheme. If the application is successful, the overseas landlord is entitled to receive rents with no tax deducted.