Real Estate Reshuffle: Navigating Real Estate Changes in a Corporate Reorganisation

In its lifecycle, a business may go through corporate reorganisations for various reasons – often, these realignments come at a time of major change in the business. For a business with a sizeable physical presence, the reorganisation of its real estate is not just a technical exercise, but an important aspect that can have significant on the ground implications for the future of the restructured business. In this short note, we explore the legal process and strategic options for separation of real estate during a corporate reorganisation.

Structuring the plan

A corporate reorganisation may be implemented in many ways, often involving a business transfer, share transfer or a combination of both.

> **Business transfer:** A business is transferred as a going concern, which usually requires the transfer of both the assets and liabilities of the business, including the properties currently owned, leased or used by, or in connection with, the business.

> **Share transfer:** The shares of a holding company of the business are transferred, thus indirectly transferring with it the assets and liabilities of the business. If the target already holds all of the assets and liabilities of the business, all well and good – however, it is not uncommon for the target to hold assets or liabilities which do not and/or not hold assets or liabilities which do relate to the business. This requires a transfer of such assets or liabilities (including properties) into, or out of, the target.

Getting organised

The first step in reorganising property holdings is to identify all of the relevant properties and compile key information on these properties – for example, the property address, copies of ownership or lease documents and the identity of the current owner or tenant and landlord. Although this step may seem straightforward, it often presents an initial challenge, particularly for a business with a large or multi-jurisdictional presence. Internal property records are not always up-to-date or easily accessible. Some investigative work may be needed, internally within the business or often with the help of advisers (such as property managers who are familiar with the property, or lawyers with access to public property records).

To stay or to go – and how

Once the property portfolio is clear, the future use of each property must be strategised. Several options are often considered:

> **Status quo:** A property may already be owned or leased by a business which has (and will continue to have) dedicated use of it. Even if no transfer of the property is required, if a share transfer is involved, this may still trigger a **change of control restriction** (for example, if the lease of the property requires the tenant to notify or obtain the consent of the landlord prior to any change of control of the tenant).

> **Wrong pocket assets:** A property may be used solely by a business, but be owned or leased by an entity that is not part of that business. Ideally, the property should **transfer** from the latter to the former, to allow both parties a "clean break" post-reorganisation. This is not always possible, for example if a landlord lawfully refuses its consent to a transfer due to concerns about the transferee's covenant strength. In such cases, alternatives need to be considered – a **sublease** may be more palatable to a landlord, as the current tenant remains on the hook for the lease.

> **Long-term sharing:** More than one business may share occupation of a property on a long-term basis. If the property does not already cater to this, **physical separation works** may be required – this may be subject to landlord consent and practical issues must be considered (for example, ensuring sufficient access and services to enable both parties to meet their operational and regulatory requirements).

Each business’s occupation of the property should be documented. Typically, two options are considered: the parties may each seek a **new lease** from the landlord, which offers each party a “clean break” and a direct relationship with the landlord; or a **sublease** of part of the property may be granted between the parties. The choice here is often guided by the layout of the property and the landlord’s willingness to get involved.

> **Temporary sharing:** Occupation of a property may also be shared on a short-term, temporary basis to support business continuity and a smooth transition post-reorganisation. Similar considerations apply as above, although in this case, occupation is usually documented as a **sublease** or (in certain jurisdictions) **a contractual right/licence to occupy**. Often, the parties may share other services (such as IT services) and document this in a **transitional services agreement** – if so, the sublease or licence should align with the transitional services agreement.

> **Exit and relocate:** A business may decide that it no longer needs to use a property, so it will vacate and relocate to different premises (or, increasingly these days, to remote working). This may require changes to the property holding – if all occupiers are vacating the property, any remaining term of the lease may need to be terminated (for example, by **surrender**). If one business exits a shared property but another business remains in occupation, the latter may wish to downsize to reflect its reduced need for space (for example, **surrendering part** of the space to the landlord, or **subletting part** of the space to a new occupier).

In summary

Ultimately, the reorganisation of property is an intricate balance of the business’ commercial and operational needs, broader legal and regulatory obligations (including employer duties, antitrust law, privacy laws, confidentiality obligations) and the cooperation of relevant third parties (such as landlords). It is a process that, when done thoughtfully, can contribute to a more streamlined and focussed business operation, so it is well worth the upfront investment of time and planning ahead to get it right.

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