

Heads of Terms



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What are they?

Are they legally binding?

What should be in them?

Don't lose your head

There's nothing technical about Heads of Terms, or HoTs as we like to call them. Their purpose is to record the main points of principle on a deal – before the fine details and small print get drafted and negotiated. The benefits of a good set of Heads of Terms are:-

- They provide focus and clear up confusion. You'd be amazed at the number of times two people leave a conversation with two quite different views as to what was agreed. Writing down the basic bones of a transaction means that those misunderstandings get spotted (and can be resolved) before lots of time has been spent drafting detailed contracts.
- We're all human. Memory fades over time. Forgetting what you agreed in a meeting 3 weeks ago is a real possibility. A set of HoTs is an aide memoir.
- They act as instructions. In drafting a contract a solicitor is just setting out, in legally binding words, what you have agreed. Although we may add in lots of 'legal stuff' - at the end of the day our main goal is to produce a contract that reflects what you have agreed. A good set of HoTs lets us know what that is. We can then get on with 'doing our bit' without having to come back to you with a whole host of irritating questions.

Getting the HoTs

Heads of Terms are rarely legally binding – even if you sign them. They set out what has been agreed in principle – but if one party changes their mind there is usually little the other party can do about it. That has its advantages – it might be that what has been 'agreed' has unintended legal consequences that neither party knows about until they consult solicitors – the fact that they are not legally binding means there is time to re-visit the 'deal' and find a way round those consequences. It is always safest to specifically include a statement saying that they are not legally binding.

If there are pre-contract matters which the parties do wish to be legally binding, such as confidentiality, exclusivity or break-fee arrangements, it is better to ask your solicitor to draft a separate legally binding agreement just covering these issues.

Heads up

Each deal is different – but here are some pointers as to what you might want to put into a set of Heads of Terms relating to a property transaction. You might want to use these as a checklist the next time you are putting a deal together.

Property details

- What property is being sold? A plan is often helpful.
- Is this a sale of part? Is the Seller retaining adjoining land? What rights will the Seller retain over the property to be sold? What rights will the Buyer require over the Seller's retained land?
- Is it a Freehold or Leasehold interest being sold?

Parties' details

- Who is the Buyer and who is the Seller? Give the Company or Industrial & Provident Society Number. If they are part of groups – make sure you get the right member of the group.
- Details of the Buyer and Seller. Include addresses, phone numbers, the name of the main contact and his/her email address. Do the same for the Buyer's and Seller's solicitors as well.

Money & timing

- What is the Purchase Price? Is there a deposit? If so, how much? Is there to be any overage? If so, on what basis?
- What are the target dates for exchange and completion? Why have those dates been chosen?
- Is the contract conditional upon anything – like planning? Who has to do what to try and get those conditions satisfied – and by when?
- Is each party responsible for its own legal costs? If not, who pays what?

VAT & SDLT

- Has the Seller opted to tax? Generally a property transaction is exempt from VAT unless the seller has 'opted to tax'.
- Will the Buyer disapply a Seller's option to tax? Some

- buyer's have the power to cancel a seller's option.
- Will you delay transfer until Golden Brick? If a seller has opted to tax you would expect VAT to be applied at 20%. But sometimes if you delay the purchase until building works are part way through, the VAT rate will reduce to 0%.
- Is the Buyer a Registered Provider and/or a charity?
- Will the acquisition be partly funded with grant?
- Does the Buyer intend to use the Property for 100% affordable/social housing?
- Does the Buyer intend to use more than 50% (in value) of the Property for affordable/social housing?

The answers to the above questions will determine what VAT and SDLT is payable. You might want to agree that you will both take tax advice before finalising these details.

Construction

It's a whole other ball game—but we've done a note on it! If you are putting together a deal involving building obligations, ask one of our construction team for their note on Heads of Terms. Try clare.reddy@lewissilkin.com.

Planning

- What is the description of the proposed scheme?
- Is a s.106 or s278 Agreement anticipated? What affordable housing obligations are anticipated? What other obligations are anticipated?
- What stage has been reached in relation to planning?
- Does the Buyer intend to implement an existing planning permission? If so, what is its reference number?
- What arrangements will be made as to copyright and duty of care?

If a new lease is being granted

- What is the term? i.e. how long is it?
- What is the annual rent? Is that subject to review in future years? If so, on what basis?
- Are there restrictions on what the Buyer can use the property for? If so what are they?

- Is security of tenure excluded?
- Are assignments and underletting allowed? If so, on what terms?
- Who is responsible for repairs and maintenance?
- Who is to insure?
- Are alterations permitted? It would be unusual to allow external or structural alterations.

Anything else

The above may be an exhausting list – but it is not an exhaustive one. Set out any other matters which are important to you in the transaction.

Irrelevant fact

France's preferred method of separating criminals from their heads was the guillotine. This remained the official method of execution in France until the abolition of the death penalty in 1981. Hopefully you will find agreeing your next set of Heads of Terms less painful.

...little bits of law

This is one in a series of leaflets published by Lewis Silkin LLP, providing information on a range of legal issues that face our developer clients. Other topics discussed range from boundaries to wildlife.

Professional advice should be obtained before applying the information in this client guide to particular circumstances.

For a full list of available leaflets please visit our website or contact patrick.brown@lewisilkin.com.

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