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The Real Deal

12 questions on real estate in Dubai



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1. Ownership

What types of ownership are there?

Pursuant to the UAE Civil Code, legal ownership of property in Dubai is classed as either freehold, musataha or usufruct; whereas, long and short term leases are subject to separate Dubai tenancy laws. We discuss each interest in more detail below.

Freehold

Freehold is a real right (a right in rem) and is the most superior property right, granted in perpetuity. The fee for Dubai Land Department (DLD) registration is 4% of the total value of the sale contract or the property value, whichever is higher. The law states that the parties shall split the registration fees equally unless the parties agree otherwise.

Musataha

A musataha right is a right in rem conferring upon the owner thereof the right to build a building or plant on the land of another. The maximum term of a musataha is 50 years (with the right to extend for a further 50 years) and **each party has the right to terminate the musataha by 2 years prior notice**. The fee for DLD registration is 1% of the total musataha contract value (payable by the musataha beneficiary).

Usufruct

A usufruct right exists where an owner enters into a usufruct agreement with a tenant, allowing the tenant to use the property,

provided that the property remains in its original condition (subject to wear and tear). The usufruct usually terminates upon expiry of 50 years (unless otherwise agreed between the parties). The fee for DLD registration is 2% of the 'lease' value.

Long leases

Long term leases may be entered into by UAE and GCC nationals (and companies wholly owned by them) in all areas of Dubai. Pursuant to Dubai Law No. 7 of 2006, a foreign national is permitted to acquire a long lease in a designated area for a maximum of 99 years. The fee for DLD registration is 4% of the total rent value (i.e. the total value of rent payable throughout the term of the lease, including any premium payable).

Short leases

Short term leases must not exceed 10 years, creating a right 'in personam' and are registered with the Real Estate Regulatory Authority (RERA) pursuant to Dubai Law No. 26 of 2007 (as amended by Law No. 33 of 2008). This law provides for a mandatory renewal of all leases (except in limited circumstances). Any rent disputes are heard by the Rent Dispute Settlement Centre, with the option for parties to refer their disputes to arbitration. The RERA registration fee is currently AED 210 and an Ejari certificate is issued as proof of registration, which allows the tenant to then set up its DEWA (Dubai Electricity and Water Authority) account for the property.



2. Parties

Who can own real estate?

Ownership is largely governed by Article 4 of Law No. 7 of 2006 concerning real estate property registration in Dubai.

The law provides that only UAE and GCC nationals can purchase real estate in the UAE, however, there are exceptions.

There are certain restrictions preventing foreign nationals or companies from owning real estate in Dubai. UAE and GCC nationals and companies incorporated in the UAE (excluding free zones) wholly owned by UAE/GCC nationals may own any property interest in any area of Dubai (with the exception of public joint stock companies that are listed in Dubai that may not be 100% GCC/UAE owned and are allowed to own properties anywhere in Dubai).

Non-UAE/GCC nationals may own property interests (freehold, musataha, usufruct and leasehold) in Designated Areas, which include, amongst others, The Palm, Downtown Dubai, Jumeirah Beach Residence, Dubai Marina, Emirates Hills, Sports City and Business Bay. The only offshore companies granted this right are those incorporated in Jebel Ali free zone (most common) or DMCC free zone. Companies incorporated in free zones e.g. Dubai Media City and Healthcare City may also own property in the free zone where registered, and in some circumstances, in Designated Areas.

Direct property ownership of Dubai International Financial Centre (DIFC) registered companies is only permitted within the DIFC, as it has its own property laws and maintains a separate property register for real estate located in the DIFC.

3. Employees

What employment issues affect real estate acquisitions?

Typical employment issues which may be relevant to real estate transactions where whole buildings are being sold, include the transfer of undertakings, redundancies and changing terms and conditions of employment.

It is possible to apportion liabilities by agreement between the seller and the buyer (or outgoing and incoming service provider). Normally the seller (or outgoing service provider) will agree to be responsible for all claims and liabilities relating to employees up to the date of transfer, and the buyer (or incoming service provider) will take on all post-transfer employment liabilities. There are no automatic transfer mechanisms in the UAE, unless the trade licence of the entity employing the relevant employees is transferred as part of the transaction.

Termination of employment

Termination of employment may arise on the closure of a business, or part of a business, or where there is a reduction in the number of employees required. The concept of redundancy does not exist under the current laws of the UAE. Therefore, legal advice should be sought to ensure that any terminations are carried out in a manner that reduces the risks of any employment claims being brought (which would be brought against the seller).

Terms and conditions of employment

An employer may decide to change or harmonise terms and conditions of employment on the acquisition of a new business. The consent of the employee (through a signed, updated employment contract or side letter) would be required for such changes, unless the changes are purely beneficial to the employee.



4. Procedure

What are the steps in a sale and purchase transaction?

Transactions formally start when proposed heads of terms are drafted, negotiated and agreed by the brokers for the seller and the buyer. The heads of terms (or memorandum of understanding) set out the principal terms agreed between the parties and are generally expressed to be 'subject to contract' and not legally binding. They form the basis of the documents to be drafted by the lawyers.

Once the heads of terms have been finalised, they are sent to the parties' lawyers (if not already done so). The seller's lawyers will usually collate all information relating to the property and send it to the buyer's lawyers, together with a draft sale and purchase agreement (contract). The form of the sale agreement will vary according to whether the property being sold is under construction or already built, and the extent to which leases to tenants have already been granted.

The buyer's lawyers consider and suggest amendments to the draft sale agreement in the normal course and at the same time will undertake general due diligence investigations.

Following completion, the parties' lawyers need to deal with registration of the transfer documents (as described in Question 1) and registration of any security with the DLD at a rate of 0.25% of the value of the loan and payment of any additional fees.

5. Contract terms

What provisions does a real estate contract contain?

Unified real estate contract – Form F

The DLD have a standard unified sale and purchase contract (Form F) that all sellers, buyers and brokers are required to enter into and lodge with the DLD to effect registration. The parties are able to enter into their own sale and purchase contract addendum to agree any additional details and terms that are not covered in Form F.

Provisions of the contract

An agreement for the sale and purchase of land must be in writing, must contain or clearly refer to all main terms and conditions, and must be in a form in which either one part is signed by both the seller and the buyer or, and this is the usual case, must be in two identical parts, each signed by one party.

Where timing is crucial to the agreement, there may be a provision stating expressly that 'time is of the essence'. This means that any breach of the time limits in the agreement will be deemed to be a repudiatory breach, subject to a claim for damages. Normally, time is not of the essence and may only be made so by one party to the agreement serving notice on the others to make time of the essence.

Where there are matters affecting the property, the seller may require reciprocal obligations from the buyer and an indemnity in respect of any liability the seller may still have following completion of the transaction.

Provisions relating to value added tax (currently at a rate of 5% in the UAE) will be included where relevant to ensure that the agreed tax position is preserved between the parties. We have prepared a separate [advice note](#) in respect of the tax liabilities for different real estate asset classes.

Contracts for sale of property subject to occupational interests such as leases will include clauses to cover ongoing management matters, and provide for apportionment of occupational income and outgoings on completion of the transfer of ownership in the property.

If the property being sold is in the course of construction, the contract for sale will incorporate provisions dealing with the obligations of the seller to construct in accordance with an agreed specification, and to provide to the buyer separate deeds of warranty from the building contractor and persons such as the architect in order to safeguard the buyer against defective design or workmanship.

6. Due Diligence

What investigations does the buyer normally make?

The prudent buyer is likely to commission a survey of the building and in appropriate cases, soil and geological investigations, plant and machinery tests, and (in some cases) environmental investigations. There are three limbs to the pre-signing due diligence by the buyer's lawyers.

Firstly, title to the property will be investigated. The buyer's lawyers will consider the entries on the DLD title deed and, where relevant, historic title documents. By attending the DLD with the seller (or its attorney), it is possible to obtain a copy of the latest title deed and confirmation of any encumbrances.

Where the property is subject to leasehold or other occupational interests, the terms of the relevant occupational documents need to be considered carefully to ensure they are not contrary to the buyer's intentions for the property. The buyer's lawyers will also need to check whether these documents require the consent of any third party to be given to the transaction.

Secondly, the buyer's lawyers will commence their own due diligence, which will include the conducting of various searches to check the position regarding utilities serving the property, financial encumbrances etc. Where the search result refers to security, the buyer's lawyers will ask for confirmation that such matters do not encumber the property and that no third party consents are required for the transaction to proceed.

Thirdly, the buyer's lawyers will raise enquiries of the seller's lawyers to obtain information regarding a large number of practical matters which may affect the property and ask any relevant questions in relation to the title to

the property. Whilst a seller must not knowingly or negligently mislead a buyer, the general rule is 'caveat emptor' (buyer beware). The seller generally gives replies, which may be actionable if wrong or misleading.

7. Registration and Notarisation of real estate

What are the basic requirements?

Dubai has a central land register and all real estate transactions (save for short term leases and DIFC property transactions) must be registered with the DLD within 60 days of completion (or else a fine becomes payable). It is the definitive record of who owns what land, the nature of the interest and any matters affecting that land, such as a jointly owned property declaration which governs the rights and obligations of owners of units in jointly owned properties, such as towers, pursuant to Law No. 27 of 2007 on the ownership of jointly owned properties in Dubai.

When a party acquires a registrable interest in land, it must apply for registration of that interest at the DLD through a licenced trustee's office. Only when the registration is complete (usually on the same day) can the party properly prove its right of legal ownership. Often the buyer will carry out a 'dry run' transfer with the registered agent to ensure they have all the correct documents for registration, including validly attested/notarised copies of documentation where required. Where companies are buying/selling, proof of authorised persons acting on behalf of the company must be submitted, including duly attested corporate documents, power of attorney and shareholders' resolution. Foreign documents must be attested and submitted with certified translations into Arabic.

8. Permits

What permits are required for off-plan real estate development?

Off-plan real estate requires developers to obtain approvals from the relevant competent authorities (including registration with the Dubai Department of Economic Development (DED) and RERA) prior to launching a project and selling off-plan units. Pursuant to Executive Council No. 6 of 2010 issuing the implementing Regulations of Law No. 13 of 2008 regulating the Interim Real Estate Register, all off-plan sales must be recorded in the Interim Real Estate Register, with an Oqood certificate issued as proof of off-plan registration. Project funds from off-plan sales must also be placed in an escrow account that is registered and regulated by RERA.

Applications to obtain planning permission to 'develop' land must be made to Dubai Municipality, which has the responsibility for controlling the use and development of land in Dubai.

In addition to a planning permission, the building must also have approvals confirming that construction has taken place in accordance with applicable building regulations and health and safety legislation, including Dubai Civil Defence. Certain types of building may also have other kinds of certificate issued by independent bodies in relation to building or construction matters generally, such as BREEAM certification.

9. Insurance and Risk

What insurance will the parties effect and when does the insurance risk pass at the time of sale?

Before a sale is contemplated, insurance is generally the responsibility of the owner of the freehold interest in a property. However,

where such property is the subject of a lease or the property is a leasehold interest, the terms of the lease will prescribe which party has responsibility to insure. It is common for owners of musataha, usufruct and long lease interests to insure rather than the landlord/freehold owner. Whatever the length of the lease, the tenant will generally insure the contents of the property belonging to the tenant.

The insuring party should have a fully comprehensive buildings insurance policy to protect the structure and fixtures and fittings of the property in the event of damage or destruction by any of a comprehensive list of insured risks, such as storm, lightning, fire and water damage. The policy may also cover additional special heads of cover such as subsidence, heave, earthquake and, if available, terrorism.

Insurance policies (the insurance contracts containing the contractual terms between the insurance company and the insured) may either comprise a single policy for one particular property or a block policy designed to cover a portfolio of properties.

Occupying owners generally have separate policies to cover the contents of the property, especially if the property includes costly plant and machinery. They will ordinarily have public liability insurance to cover liability to third parties arising from the property. These public liability policies will exclude most pollution and contamination risks (except those caused by a sudden and accidental event).

Insurance policies are personal and not transferable on sale. Where a sale is taking place, timing of the transfer of risk is normally prescribed by the sale agreement. It is common market practice for the parties to agree that the seller will continue to insure occupied property until completion.



10. Environmental

What are the common environmental issues?

Environment related sustainability issues are gradually rising up the agenda in the UAE.

Traditionally, the prime environment consideration has been potential soil and groundwater contamination as a result of current and former uses. Strictly, it is not unlawful for land to be contaminated and there is no absolute obligation to remediate contamination.

Acquisition due diligence may involve the appointment of environment consultants to consider documentary information and to carry out a site visit (Phase I). If considered necessary, further, intrusive investigations (Phase II) may then be undertaken. It is important to identify potential problems early so that there can be negotiation on terms and/or price and the need for any remediation. Negotiation of terms may take many forms, including contractual allocation of risks, obligations to remediate (contamination discovered pre or post-acquisition), indemnities in respect of first party loss or third party claims.

11. Pricing/Valuation

What sets the price/valuation of real estate?

Pricing of real estate investments is a combination of the aggregate rent being paid by occupational tenants of the property and the value that investment buyers consider that a property and/or of the specific type and location is worth at the time of valuation, taking that income into account.

The rent for a particular property is likely to be assessed by multiplying the area of the property by the market rental value per square metre (although in the UAE (and UK) square feet are still used as an alternative measurement). The market rental value will take into account factors such as the location of the property, its type and condition, and the length of the lease term. One method of calculating the area of the property in Dubai is by reference to the RICS Code of Measuring Practice, which uses generally accepted methods of calculation by reference to several core definitions, the most common of which are Gross Internal Area (used, for example, in relation to warehouses and industrial buildings) and Net Internal Area (used, for example, in relation to offices and shops).

The value of the property for investment purposes will generally be assessed by reference to the methodology laid down in the RICS Appraisal and Valuation Standards manual, universally known as the 'Red Book' as a result of the colour of its cover. This governs the way in which a valuer will calculate the value, on the basis of a list of accepted assumptions according to the statements of practice. These apply to the specific use for which the valuation is made, and in the case of investment property, the valuation will be of 'Market Value', as defined.

Investment properties are commonly referred to as being sold on a particular yield, meaning the investment return that will be gained from the capital sum which it is necessary to pay to buy the property. For example, where a property with an aggregate rent of USD 100,000 is sold for USD 2m, it will have a yield of 5%. Conversely, the interest can be said to have been sold at a YP (years' purchase) of 20.



12. Taxes and Costs

What are they and who pays them?

The main cost on acquisition is the DLD fee at a top rate of 4% of the purchase price, which must be paid to the DLD by the purchaser (or split with the seller if otherwise agreed) at the time of transfer.

Value added tax (VAT) will also be payable on commercial leases and sale, whereas residential transactions are exempt; contracts must specifically state whether the purchase price is inclusive/exclusive of VAT, otherwise the price will be deemed as VAT inclusive. The exception to the rule that VAT is payable on the sale of a commercial property is where the transaction constitutes a 'transfer as a going concern', where the property is let and operated as a business unit. Subject to satisfying certain conditions, this will usually mean that no VAT is paid on the sale of a property which is subject to leases granted to occupiers.

It is the buyer's responsibility to pay VAT to the Federal Tax Authority (FTA), therefore any VAT element should be carved out of the purchase price for the buyer to pay the same directly to the FTA prior to transfer.

During the due diligence for the acquisition, the buyer will also pay the costs of conducting any valuations and surveys of the physical state of the property and any environmental audits.

Payment of commission for any land agent or broker employed to find a purchaser is determined on a deal by deal basis; sometimes the amount is split between the parties.

Occasionally, the negotiated heads of terms for a transaction will provide for one or other party to pay the other's costs. Generally each party pays its own expenses.

If any no objection certificates are required from the developer prior to transfer, the seller is usually responsible for paying the costs of obtaining any consent required as this confirms the seller has paid all the service charges relating to the property and there are no offences under applicable regulations concerning jointly owned properties.

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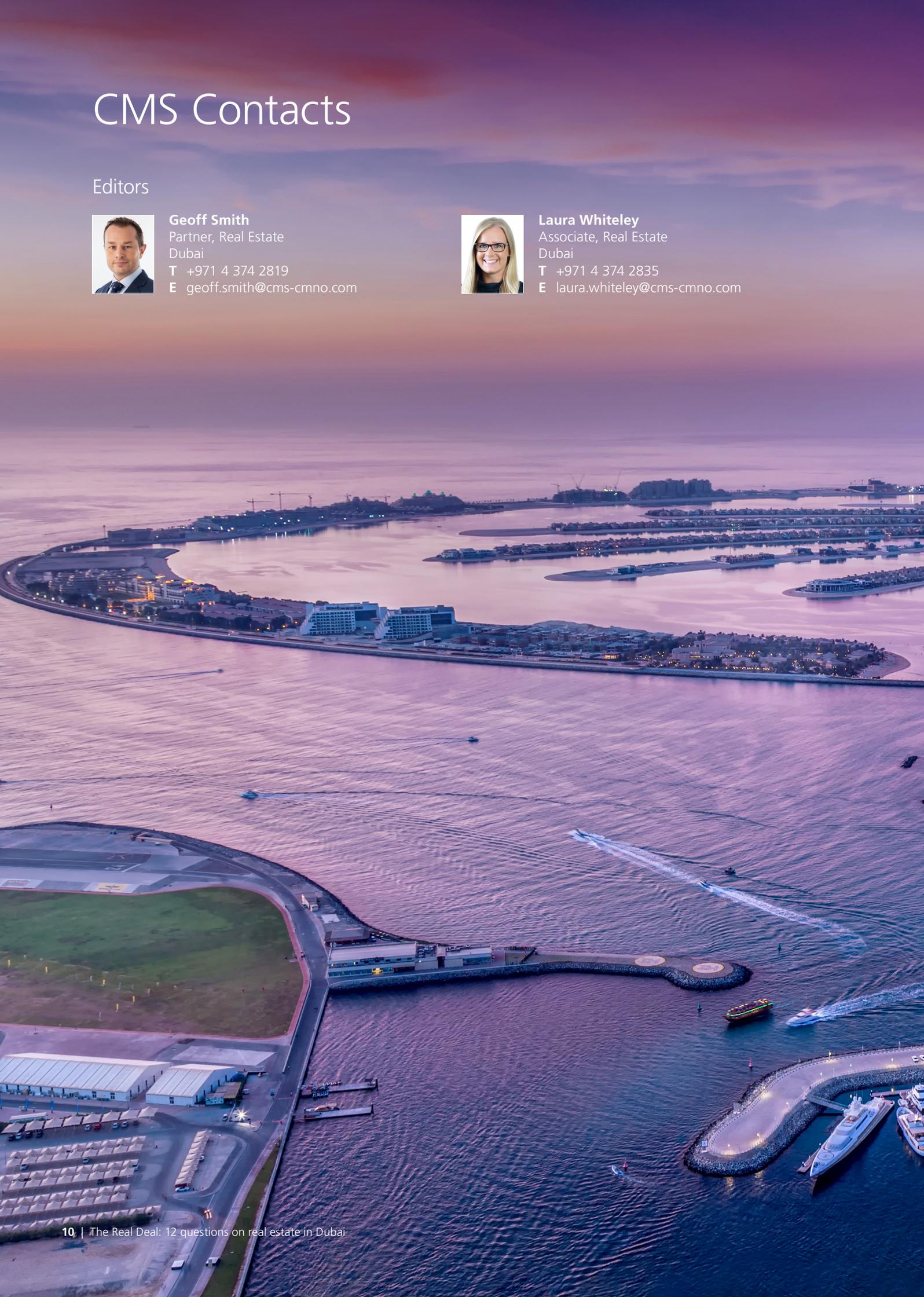
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