Room at the top?

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Ownership of the airspace above a building is a live question when it comes to development, as John Midgley reflects

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With land in short supply and coming at a hefty premium, especially in places such as central London, property owners and developers tend to try to exploit what they have already got.

A flat roof may offer great potential to extend a building upwards and create new flats. Those flats may not even be constructed from scratch on site but prefabricated, and lifted on to the top of the building by a crane before being bolted into place.

This feature does not seek to consider all of the issues that may arise in this process, such as planning consent, Building Regulations compliance, the possible need for a party wall agreement or even whether the proposed development will adversely affect a neighbour?s right to light and air.

Instead, it will concentrate on some of the legal issues that can arise when considering the acquisition of air rights and exploiting them for development. These air rights may be acquired either as a result of owning the freehold of the building or by virtue of what is demised in the terms of a lease.

Ownership

There is a presumption that, in a conveyance of land, 'he who owns the soil owns up to heaven and down to hell', as translated from the Latin maxim 'cuius est solum, eius est usque ad coelum et ad inferos' ? and this can also be inferred with leases, as was shown in Kelsen v Imperial Tobacco Ltd [1957] 2 QB 334 .

Having said that, the presumption can be rebuffed, and there is little conclusive authority on the point ? cases are decided on their own merit and, when subject to leases, depend on the way these are drafted. In Bernstein of Leigh (Baron) v Skyviews & General Ltd [1978] QB 479 , it was held that the right to airspace was limited to the ordinary use and enjoyment of the land.

For example, a roof terrace may be demised with no right to develop on it and the lessee may simply be entitled to use it as a terrace for recreational purposes. The use of the airspace above the terrace therefore would be quite limited in nature ? it would be possible to walk across it, to sit in garden furniture on it and the like, but nothing more.

Yet if the roof space and roof itself forms part of the demise in a top-floor flat lease, it may be argued that the lessee of that flat would be entitled to make alterations involving installation of features such as dormer windows that protrude into the airspace without this constituting a trespass, these windows arguably being claimed to be necessary for the reasonable use and

enjoyment of that flat. This is what happened in the case of Davies v Yadegar [1990] 2 HLR 232 when the top-floor lessee in a converted building containing 2 flats wanted to complete a loft conversion, and the court thought it was logical that he should be able to install the dormers as an improvement to the flat.

Careful handling of relationships with lessees is important

Davies has come to the courts? attention in subsequent cases. In Rosebery v Rocklee [2011] EWHC 2947 , the presumption that the lease of a roof included all the airspace above it was disapplied because the extent of the demise was a matter of construction of the lease. For example, there was no presumption that it applied to the fully available airspace ? arguably preventing aircraft from flying overhead.

In a later case, *H Waites Ltd v Hambledon Court Ltd & others* [2014] EWHC 651, the lessees of a garage block in west London aimed to scupper a developer?s intention to build above the garages, claiming that they themselves owned the airspace. The then landlord of the garage block had granted its associated company, H Waites, a separate lease of the garage roofs and airspace as it intended to create an extra flat above each of the garages. The lessees? individual leases were for the flats and the garages demised to them, and they claimed that the garage roofs and airspace above belonged to them so H Waites was not entitled to build there.

The court looked at the whole of the leases, including the plans and the repairing obligations. While the position was clearer in respect of the flats, the obligations for the garages were more opaque. H Waites argued that, as the repairing obligation for the roof on the block of flats belonged to the landlord, and as there was one common roof over the garage block, it was entitled to claim the roof and airspace. The court, however, thought that such an interpretation would amount to a rewriting of the tenants? leases and held that the roofs of the garages were wholly within these leases. The court also noted that the leases did not have any wording expressly stating that there was a limit to the extent of the garages and so, in this case, the airspace belonged to the garage lessees. If the wording in the lease included a reference to a vertical division of the demise it may be the case that you could argue there is no horizontal limit that could then exclude the entitlement to the airspace above.

One further point to note from H Waites is that the judge commented that cases concerning subdivided properties such as houses converted into flats, in which it had been held that there was no presumption, 'make good sense where one is dealing with a part of a building which has been horizontally divided, where there are often good reasons for the demise to be limited to a stratum and so as not to include airspace (or subsoil)'. The presumption in favour of building 'up to heaven' may fall by the wayside when it is expressly excluded or its exclusion is implied by the terms of the lease, as was decided in Lejonvarn v Cromwell Mansions Management Ltd [2011] EWHC 3838 (Ch) .

So, it can be a trickier proposition to develop upwards into the airspace when the ownership is leasehold rather than freehold, but this does not mean that tenants have neither the right to develop nor the ability to frustrate a development. Each case needs to be considered on its own merits.

Granting a lease

When a freeholder or landlord wishes to grant a lease to another party to develop upwards into the airspace, it also needs to consider the impact on the rights of the lessees.

Under section 1 of the Landlord and Tenant Act 1987 , tenants of certain premises have a right of first refusal in the event that the landlord intends to enter into a 'relevant disposal'. The act applies to premises that comprise the whole or part of a building and contain 2 or more flats, exceeding 50% of the total number, that are held by residential long lessees. The legislation can also be applied to mixed-use buildings.

Tenants should generally be given a right of first refusal to take the airspace lease

The grant of a lease of airspace for development purposes is a 'relevant disposal' and unless an exception applies, the tenants should generally be given a right of first refusal to take the airspace lease in place of the developer, as was shown in Dartmouth Court Blackheath Ltd v Berisworth Ltd [2008] EWHC (Ch) 350 .

A landlord should also take care not to breach a lessee?s right to quiet enjoyment. Rooftop developments can be noisy, disruptive and intrusive and if scaffolding is used, the building is covered up and access potentially impeded, so landlords should be mindful of possible claims. In Timothy Taylor Ltd v Mayfair House Corporation and another [2016] EWHC 1075 (Ch) , the High Court awarded the tenant damages after deciding that putting up scaffolding and the noise nuisance generated by the works impeded the right to quiet enjoyment.

If the building includes other leasehold interests, then the practitioner should also evaluate these leases to ensure they are structured as consistently as possible, that sufficient rights have been reserved to enable development and that there is nothing demised to the top-floor lessee that could prevent the development from taking place.

It goes to show that when developing into airspace, the careful handling of relationships with lessees is important ? discussing the process, minimising nuisances, considering how long the works will last, and when best to schedule them. Open discussion should also be had regarding compensation, to sugar coat the pill that the tenant is being asked to swallow.

Please note that this is only a summary and is not a substitute for taking legal advice on the specific facts of the case.

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Further information

- Related competencies include Leasing/letting , Legal/regulatory compliance
- This feature is taken from the RICS Property journal (October/November 2017)
- Related categories: Oversailing and trespass , Boundary matters