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Whilst recent proposals to simplify the planning process for upward development in London will no doubt be welcomed, this article outlines some of the other issues for property developers and investors to consider when looking to intensify land use in this way.

In response to the London housing crisis the Department for Communities and Local Government and the Greater London Authority have launched a joint consultation on streamlining the planning process for upward development (i.e. the construction of additional storeys on top of existing buildings) in London. Their paper seeks "views on an innovative approach to supporting housing supply by providing greater freedom to 'build up' in London, reducing the pressure to 'build out'". Three proposals are identified for stimulating the delivery of new homes through upward extensions: a permitted development right, local development orders and/or new London Plan policies.

The proposed right is likely to be limited to building up to the roofline of adjoining buildings. It will also be excluded in the case of listed buildings (including their curtilage and, more widely, their setting). Prior approval by the local authority will apply in Conservation Areas, therefore engaging the legal duty to avoid any adverse effects other than in exceptional circumstances. As such, even with a simplified process, there will still be planning issues.

On top of these residual planning concerns there are other matters that prudent developers should consider prior to embarking upon any scheme to extend upwards.

## Do you have the right to build into the airspace?

There is a presumption that ownership of a parcel of land includes the airspace immediately above to the extent that it is necessary for the ordinary use and reasonable enjoyment of that land. However, where a building is tenanted and the landlord wishes to extend upwards, it will be necessary to check that the airspace has not (either deliberately or accidentally) been demised to one of the tenants.

Whilst each case will turn on its own facts and the construction of the relevant letting documents, the Court of Appeal decisions in *Davies v. Yadegar* [1990] 1 EGLR 71 and *Haines v. Florensa* [1990] 1 EGLR 73 will be of interest. In both cases (which concerned tenant alterations and the application of the Landlord and Tenant Act 1927) the Court of Appeal held that, as the relevant letting documents specifically demised the roof, the demise extended to the airspace above. In *Davis v. Yadegar* Lord Justice Woolf acknowledged that it would be more difficult to determine the position where the building was a multi-let block of flats where the roof was not specifically demised to one tenant.

If the airspace has been let to a tenant then a landlord will be prevented from extending upwards during the term of the lease.

# Are you committing a criminal offence?

A critical question for anyone dealing with a building which is either wholly or partially let to residential tenants is whether or not the Landlord and Tenant Act 1987 (1987 Act) applies.

It is a criminal offence to dispose of any premises to which Part I of the 1987 Act applies without first offering them to the qualifying tenants pursuant to the procedure set out in section 5 of the 1987 Act. Further, should a disposal occur in breach of the 1987 Act, the qualifying tenants may have (amongst other things) the right to compel the buyer to convey the premises to a nominated purchaser on the terms, including price, of the offending disposal irrespective of whether the premises have increased in value in the interim.

The relevance of the 1987 Act to upward extensions is starkly illustrated by the case of *Dartmouth Court Blackheath Limited v. Berisworth Limited* [2008] EWHC 350 (Ch).

In *Dartmouth* a landlord granted a lease of (amongst other things) airspace above an existing block of flats. The intention behind the letting was to facilitate upward development to create additional flats. The critical question for the High Court was whether or not the airspace formed part of the premises to which Part I of the 1987 Act applied. Mr Justice Warren concluded that the airspace was appurtenant to the building and the letting was therefore a disposal of premises to which the 1987 Act applied. As such the landlord should have complied with the procedure set out in section 5 of the 1987 Act and the proposed development could not proceed.

Ironically, the judgment in *Dartmouth* notes that the lease, which was granted by the owner to Berisworth (a related entity), was designed to ensure that Berisworth had an interest which would enable it to continue with the upward development in the event that the tenants of the building sought to exercise their statutory rights to enfranchise (i.e. compulsorily buy the freehold). The right of tenants to enfranchise and take control of any development is another pitfall for the unwary and one which also warrants early consideration.

# Will there be interference with any rights to light?

A tricky issue for any development, but particularly for upward development, is rights to light.

A right to light is a form of easement. The right is to natural light through windows on the benefiting property, the light having passed over the neighbouring burdened property. For developers, such rights can turn into something of a "ransom strip" as aggrieved parties (whose rights to light have been or will be infringed by the proposed building works) can seek or threaten injunctions unless they receive large compensation payments for giving up those rights and allowing development to proceed.

There have been a number of recent press reports of high-profile London developments being stalled by disputes over rights to light. In a number of cases the frustrated developer has had to resort to asking the local authority to exercise its statutory powers under section 237 of the Town and Country Planning Act 1990. Whilst those powers can be used to override private rights to light to allow developments to proceed (transforming the aggrieved party's claim into one for compensation alone), a local authority is not obliged to exercise these statutory powers and therefore there is no guarantee that this remedy will be available in all cases.

A prudent developer should therefore consider and take advice on the issue of rights to light early on in the development process.

# Are there sufficient reservations in the tenancy

# documents to allow the works to proceed?

Where a property is tenanted, great care should be taken to review the underlying letting documents to check that sufficient rights are reserved to the landlord to allow the development work to proceed.

Key considerations when looking at reservations include:

- Whether there are any reservations at all relating to development, redevelopment or landlord's works.
- Whether or not a reservation allowing landlord's development works relates to the building of which the premises form part, or just neighbouring land. If the latter, then it will be of no assistance in the case of an extension to the existing building.
- Checking that, where work requires access or alterations to the demised premises, there is a suitable reservation. For example, if strengthening works are required to the existing structure and can only be done with access to the demised premises, is there a reservation allowing this? A reservation allowing works of repair is unlikely to be wide enough.
- The interplay between the reservations and the landlord's covenants for quiet enjoyment and non-derogation from grant. It is highly unlikely that a lease will make the covenants for quiet enjoyment and non-derogation from grant specifically subject to the landlord's reservations therefore the landlord must ensure that in exercising a reservation it doesn't find itself in breach of covenant.

## What construction issues need to be considered during the build?

The key construction risks to be considered by a landlord are:

- Who will take responsibility for the design and construction interface between the existing structure and the new development works? Unless the risk is expressly stated to sit with the building contractor, the building contractor will be entitled to an extension of time and/or loss and expense under the building contract if it transpires that the design of the new works is not compatible with the existing structure and that additional works or a different working methodology has to be adopted in order for the contractor to complete the works. On the assumption the building contractor will have been given sufficient opportunity to inspect the site and carry out any surveys he believes are necessary, it may be more appropriate for the building contractor to take the interface risk. The landlord will need to ensure a specific clause to this effect is inserted in the building contract under which the upward development works are instructed.
- As noted above, the landlord will want to ensure the upward development works are carried out with as little disruption as possible to the existing tenants and neighbouring property owners to minimise the risk of a nuisance claim and to ensure any quiet enjoyment covenants in existing leases are not breached. Aside from taking the practical step of agreeing suitable working methods, a specific clause should be inserted in the building contract obliging the contractor to take all reasonably practicable precautions to prevent any public or private nuisance. In addition, the landlord may wish to consider instructing the contractor to comply with periods of "quiet working", as well as stipulating express noise/vibration level restrictions and specifying how and when the site can be accessed and where materials and goods can be stored.
- The assumption under a JCT building contract is that the landlord will insure both the existing structure and the

works in the joint names of the landlord and the contractor (i.e. Option C insurance). There is an alternative to this, however, whereby the contractor maintains a joint names policy for the works (i.e. all risks insurance) and the landlord insures the existing structure in his sole name (and the contractor has to rely on his third party liability cover should he cause damage to the existing structure). Should the landlord wish for commercial reasons to follow the hybrid insurance approach, specific wording will need to be added into the building contract to this effect.

## What is the impact of the extension on the long-term management of the building?

The impact on the long-term management of the extended building should not be overlooked. There will be a number of practical issues, for example:

- How will any existing service charge regime and/or landlord covenants operate in relation to the extended building? For example, if the landlord retains responsibility for the structure, how, if at all, will it recover the cost of repairing the structure of the newly created floors from all the tenants in the building (both existing and new)?
- Is there sufficient capacity from existing utility connections to service the extended building?
- Whilst landlords will be keen to add value to their portfolio they will not want this to be at the expense of the goodwill of their existing tenants. Properties tend to be harder to manage when populated with disgruntled occupiers. Consequently, landlords should not underestimate the importance of consulting with their tenants and working to minimise the impact of the works upon them.

## What warranties or guarantees can be given to tenants of the completed development?

Structural and/or new build guarantee providers (such as NHBC) generally only grant a guarantee for a new upward development if they also have control of the guarantee for the rest of the building. Indeed, cover for an upward development is provided not on a "new build" basis but by way of an extension to the existing policy for the remainder of the building. Clearly the difficulty here is that, if the remainder of the building is without NHBC cover (or equivalent), no home warranties will be available for residential occupiers of the new upward development.

In cases where the upward development is high value, the developer should consequently consider procuring collateral warranties from the building contractor and professional team to ensure any tenant under a full repairing lease has an appropriate means of recourse should a latent defect occur. The ability to demonstrate the availability of a suite of collateral warranties adds to the property's commercial marketability. Furthermore, giving the tenant direct recourse against the construction team will enable the landlord to be released from his development obligations under any agreement for lease.

## Conclusion

The consultation paper put forward by the Department for Communities and Local Government and the Greater London Authority acknowledges that the proposals made only cover the planning aspects of upward extensions and there may be other barriers to this type of development. Those other barriers include not only the usual development considerations (e.g. funding, construction, party walls and building regulations) but also, as highlighted above, a

possible additional layer of issues corresponding to the additional floors being sought.

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