



Real Estate - Maximising Your Assets Seminar

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Using your Property – legal issues in changes to the use or configuration of existing property

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Introduction

There seems to be increased interest in conversions of existing buildings. I think there might be three reasons for this. Firstly, there is the influence of business premises renovation allowance. This allows a developer of a redundant commercial building in certain postcode areas to obtain full tax relief in respect of conversion costs. This is obviously an attempt by Government to stimulate the re-use of empty buildings in disadvantaged areas. Secondly, the cost of existing buildings has dropped and a client recently posed the rhetorical question to me: why bother building a new building when I can buy an existing one for less? Thirdly, I think there is an increasing realisation of one of the major benefits of listed buildings which is that if they are lying empty - because the tenant has failed – there is no rates for the landlord to pay.

So if you are attracted to developing an existing building, what particular issues do you need to bear in mind?

1. What consents do you need?

(a) Planning Permission

This will be required if you are changing the external appearance of the building, including changing the shop front of it, unless of course the works are sufficiently trivial that they attract permitted development rights.

Even if you are not doing any physical works but are merely changing the use of the building, that in itself will require planning permission unless again it is one of the changes of use which benefit from permitted development rights. I wont give you all of the examples, but amongst the important changes

of use which do not benefit from permitted development rights – and therefore require planning permission – are the following:

- shop to office;
- shop to food and drink
- shop to hot food takeaway
- business/industry to storage in excess of 235m²

(b) Listed Building Consent

LBC will be needed for demolition but I am assuming we are talking about conservation rather than demolition. If you want to alter or extend a listed building in a way which affects its character as a building of special architectural or historic interest, then LBC will be required. You should assume that any alteration to a listed building will require LBC. I have personal experience of very minor changes which to a layman would be regarded as not affecting the historic interest of the building still being regarded by the planning authority as requiring consent. You don't need LBC for change of use – because that is covered by the mainstream planning system.

(c) Conservation Area Consent

If the building is within a conservation area but not listed, you need conservation area consent to demolish it but that consent is required only for demolition not for alterations or change of use.

(d) Building Warrant

A building warrant is required for both building operations as well as changes of use. You might wonder why a building warrant would be required for change of use but an example would be where a building which had originally been built as a warehouse was going to be used for residential purposes. In those circumstances there would undoubtedly be a requirement to improve noise insulation and energy efficiency hence the need for a building warrant to provide a hook on which that requirement can be hung.

(e) Title Consents

There are a variety of ways in which title consents could be required but one worthy of particular mention is where your conversion works mean that you have to change common parts such as a common gable wall. For example, you might need to underpin a common gable. You would not be entitled to do that without the agreement of the other proprietor and, if he does not agree, there is no forum you can go to compel him to act reasonably.

(f) Consent from Scottish Water?

If the building already has a supply of water or as a sewerage connection, you do **not** need any consent from Scottish Water. However, you may find that the existing infrastructure is inadequate for conversion and if it is necessary to introduce or alter the existing connection, that will require Scottish Water's approval.

2. Which consents should my deal be conditional on?

In simple terms, all of the above which you require. There should not be much argument about planning permission and listed building consent but the position might be more complicated in relation to building warrant. Normally contracts for purchase of buildings are not conditional on building warrant on the basis that if you comply with the Building Regulations you have an absolute entitlement to obtain a building warrant. The difficulty with existing buildings is that very often it will not be possible for the scheme to comply with Building Standards. For example, you might not be able to achieve the required energy efficiency; and there could well be a tension between the desire to preserve historical features with achieving other objectives in the Building Standards – which may mean that it may be better to sacrifice an element of compliance with the Building Standards in order to achieve retention of the feature of historical interest. For that reason, it may be necessary to obtain a relaxation from Building Standards and if that is the case you should remember that the relaxation is discretionary and therefore the scheme will not be bankable or fundable until the relaxation has been obtained.

I would also mention another minor compulsion of mine which is that rather than making the deal conditional on obtaining a conditional planning permission, you may want to make it clear that the deal does not go ahead until not only have you got the planning permission but that all or certain conditions have been satisfied. For example, if you have a condition which requires archaeological investigations or contamination investigations or which requires a further application to the planning authority in respect of materials which could have a material effect on the cost of the scheme, you may well want to provide that you will not be committed to proceed until you have satisfied enough conditions so as to be

able on any reasonable basis to estimate what the scheme is going to cost. A technique that you may well be familiar with is where you attach details of the scheme to the contract and provide that the purchaser would be entitled to pull out if the planners increase the cost by more than a specified amount as compared with the cost of the attached scheme.

3. Listed Buildings

There are a few general points worth making:

(a) The good news is that when a listed building – no matter what grade of listing – is empty, there are no rates to pay for an unlimited period of time. With unlisted buildings, empty rates become payable at 50% after 3 months for shops and offices. (Industrial still gets unlimited 100% relief). In a difficult occupation market as we are in at the moment, that is a big advantage.

(b) There is a popular misconception that if a building is listed, the only parts of the building which you need LBC to change are the parts which are referred to in the listing. That is wrong – the whole of the building is listed not just the "listed parts".

(c) You will be familiar with outline planning permission – about to be renamed planning permission in principle. There is no such thing in respect of listed building control – any listed building application needs to be in detail.

(d) Be careful with your due diligence in respect of listed buildings. If there have been historical alterations which did not have listed building consent, then those alterations remain vulnerable to enforcement without limitation of time. This is different from mainstream planning where a breach becomes immune from enforcement action after four years for works and ten years for breach of conditions. To take an example, if the building that you are buying has been painted on the exterior without listed building consent, you may find that on making application for your conversion, the planning officer becomes interested in the building and starts looking at historic breaches which he may want to be made good as part of the conversion scheme.

4. Rights of Light

The good news is that this is not an issue in Scotland. As a developer, you do not need to worry about reducing the amount of light received by other buildings unless of course there is a specific servitude right which will be disclosed by your title examination. (This is unlike the position in England where a window which has been in existence for more than twenty years is entitled to continue receiving its light

without material reduction). Although this sounds good for Scottish developers, it does of course mean that other developers might come along later and diminish your light. The only way to protect against that is the use of objections in the planning system.

5. Services

An existing building will almost invariably have services but it is not simply a question of "job done". You still need to think about whether the existing services are suitable for the new use or intensification of use which the conversion might bring and, in particular, whether they have adequate capacity. As well, you would want to look at the condition of the services. You do not want your new luxury hotel in a listed building to be relying on crumbling Victorian drains. Another point is that you may want to bring in new additional services and you need to check that there are adequate land rights that consent to do that.

6. Construction

Typically an existing building in a built up area will have adequate operational access but construction access may be more difficult. That should be thought about carefully and it may even be necessary to make the deal conditional on obtaining a suitable order from the roads authority to occupy part of the adjoining street for temporary offices or a construction compound. Unlike new build (where there is usually good quality access from modern roads of good geometry and probably the ability to have a construction compound), the tightness of existing building sites will impact on construction costs. In addition, it is more likely that there will be working hours constraints imposed by the planning authority for the protection of the amenity of other buildings.

7. Building Condition

Plainly anybody buying an existing structure will want to carry out a survey. Issues to check when considering changing use of a building include:

(a) Disability Discrimination Act

If you are proposing to change a property's use so that it will be open for access to members of the public (whether as employees or customers or otherwise), you will have to consider requirements for disabled access. Especially if your building is an old one, this may require some crafty design elements.

Although DDA compliance will not necessarily mean that you have to make physical alterations to the structure of the property, you may at least have to provide for disabled access by, for example, ramps, or wheelchair lifts, etc. If needed, you will have to incorporate these elements into your building warrant and/or planning application.

(b) Fire Safety

New fire safety Regulations came into force in October 2006. The new fire safety duties are applicable to anyone who owns commercial property, who leases commercial property, and who is the employer of people within a commercial property, and may even extend to persons who merely manage commercial property. The principal obligation is to carry out regular fire risk assessments and to put in place adequate fire safety measures, including measures: to reduce the risk of fire or reduce the risk of the spread of fire; to ensure that there is always an adequate and usable means of escape; to provide adequate and effective fire detection systems and fire fighting equipment; and to have procedures in place for action to be taken in the event of fire.

The new regime is self-regulating in the sense that there is no longer a mandatory fire inspection and certification process; property owners are simply under a duty to comply. Fire Regulations will be more or less onerous depending on what your proposed use is. For example, fire Regulation requirements for a standard office use are likely to be less onerous than those for use as a residential care home for the elderly.

(c) EPCs

Since 4 January 2009, existing commercial buildings have been subject to the requirement to comply with the non-domestic technical handbook standard in relation to energy performance. Therefore, even if you are not proposing to reconfigure your building, but are proposing to sell or lease it, you will have to obtain an EPC. If you are reconfiguring your building, your building warrant application will have to account for energy performance and you will have to obtain an EPC. The EPC rating need not be a good one; but an EPC which has a poor rating and which contains expensive-looking recommendations in respect of improvement may be harder to shift.

(d) Asbestos

For untenanted property, the principal obligation in relation to the control of asbestos will be on the owner to carry out an asbestos risk assessment, to create and maintain records of the location of the

asbestos, and to create a management plan for managing the risk that the asbestos presents to anyone who might work on the property. In reality, your options will be to remove the asbestos, or to contain it in such a way that it can no longer be a hazard to human health. Asbestos identification and management is a job for specialists, but unless you know for certain that a building contains no asbestos, you should assume that asbestos might be present unless or until you can establish to the contrary. Certainly when you sell or lease the property, expect the purchaser or tenant to be aware of your obligations as regards asbestos.

(e)Bats

Another problem can be bats which may roost in the roof space of the building which might need to be removed, if for example, the roof space was going to be developed. Bats and their roosts cannot be disturbed without special consents.

As with everything in property development, the key is thinking about the problems that lie ahead and, if necessary, sharing and off loading certain costs with the vendor or your contractor.

Adding Value to your Property – "Tesco Turbines" and other micro-renewables

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Introduction

- dealing with the renewable generation of electricity from wind turbines

Why consider it?

- lower-cost electricity
- corporate and social responsibility - green credentials
- income from selling surplus electricity
- add value

Why not consider it?

- insufficient natural resources available
- your neighbours might hate you
- other objectors

Do i need planning permission though?

- yes - extended Permitted Development for domestic properties only

How do i take it forward?

- need planning permission
- need turbines
- need adequate accesses
- possibly need a grid connection

Who will do all this?

- you
- developer

The contract with the developer

- needs care

The Perils of Inaction – problems that arise in relation to vacant Property

By John McQuillan

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In the current depressed development market, it would be very easy to simply put everything "on hold" until the market picks up. If nothing else while development profits are not available the thought of incurring costs by taking positive action for no immediate benefit may seem reckless. However, as always, spending a little time and money in advance to prevent a larger problem arising will pay dividends in the long run.

At the moment many people involved in property development have a little more time on their hands than they are used to so there is capacity there to scrutinise existing assets and prepare them so that their realisable value can be maximised when the market turns. Any issues which exist will have to be dealt with at some point, but if not done now may get worse and will certainly operate as an effective drag on development when the wheels of the market start turning again. In my view it would be better to use available time now to address any issues to maximise an early and efficient completion of the development process.

So if you have ownership or control over a land banked site (or could find yourself having to realise value in such a site following developer insolvency) what are some of the issues you may face?

There is no shortage of plants, animals and people who are going to notice that a site has nothing happening on it and who will try to take advantage of that.

If the site suffers from an infestation of damaging or dangerous plants, our old friend Japanese Knotweed springs most readily to mind, then a failure to address it now is only going to compound the problems that have to be addressed later.

The current legal position is that having Japanese Knotweed on a site does not *per se* result in a breach of the environmental protection legislation [*Part II of the Environmental Protection Act 1990*] requiring immediate action. However the reality is that it will have to be dealt with at some point. When it does the rhizomes will be treated as hazardous waste for the purposes of disposal with the attendant

increase in complexity and cost [*Environmental Protection (Duty of Care) Regulations 1991*]. The sooner it is dealt with the less the cost will be. Equally, if an infestation on your site spreads to adjoining land then the owner of that will look to you in relation to the costs of clearing up their site. Accordingly, failing to address the issue now is simply going to result in a bigger problem later.

And it's not just plants you need to worry about. You may have commissioned a wildlife survey when the site was acquired which was "clear". However, an undisturbed site is likely to prove attractive to wildlife which could move in with the effect that a site which was "clear" when you bought it could be subject to significant development constraints later because of intervening colonisation.

S9 of the Wildlife and Countryside Act 1981 makes it an offence if a person

"intentionally or recklessly damages or destroys, or obstructs access to, any structure or place which any wild animal included in Schedule 5 uses for shelter or protection or disturbs any such animal while it is occupying a structure or place which it uses for that purpose".

Schedule 5 of the Wildlife and Countryside Act 1981 currently lists 104 Animals which are protected. Accordingly if your site is not affected then ensure it is cleared and kept clear of inviting structures or places which could be colonised by protected animals before such colonisation occurs. Afterwards it will be too late.

And while plants and animals represent a realistic concern from the point of view of colonisation, in practice the biggest threat to any land banked development site is people. It's human nature for some people that when they see land which they think could be put to better use they try to appropriate it for their own use.

The list of temporary "alternative" uses of other people's land is extensive and expanding. Unlawful parking, fly tipping, the creation of BMX tracks, the siting of advertising hoardings and remote signage, and the old favourite of travelling people setting up home are all everyday occurrences in relation to unused land. As always prevention is better than cure. If you can secure the perimeter of the site so that these events don't take place then you are going to have fewer problems. If you can't, then you are facing the problems of potential contamination of the site or an inability to resume possession when you want it. Further, the current political view in relation to dealing with these issues that it is very much now the landowner's problem and not something which the local authority or police will become involved with. And while you can take legal action (this is a dispute resolution issue) that is going to result in delay and cost which preventative measures may have avoided.

Also remember that the owner of land has a statutory duty of care to people who enter upon your land whether they were lawfully entitled to be there or not. This is

"the care which...is required in respect of dangers which are due to the state of the premises or anything done or omitted to be done on them...[is] .such care as in all the circumstances of the case is reasonable to see that [a] person will not suffer injury or damage by reason of such danger".

[s2 Occupiers' Liability (Scotland) Act 1960].

Another common problem is people who bound with a site gradually extending their garden ground or parking areas or similar onto the site. The two recently reported cases of *McCoach v Keeper of the Registers of Scotland* and *Mason v Jones* both illustrate this is a current and ongoing problem. In those instances the encroachers did not secure a permanent legal title but it did result in expensive litigation.

If such encroachment only comes to light when development starts and you find you have to remove whatever they've put there, be that greenhouse, garage or whatever you will face the delay and consequent expense of having to go to court to have it removed. While that is clearly going to be irritating at the best of times, it's going to be even more irritating if you have a contractor on site who can't then build what you want to build and presents you with a claim for loss and expense in relation to the time taken to secure possession.

Even worse, you may find that the land grabbers actually have a title to the land which is potentially competing with or, even worse, better than your own. The key issue is that unchallengeable legal ownership rests upon two things. One is a registered title, the other is possession of the land. It's a surprisingly common occurrence (and it can be something that you can't pick up on an examination of a seller's title) that two people both have a legitimate legal title to the same piece of ground. In such circumstances, who has the preferable title to it comes down to who has physically possessed it. If you don't know exactly where the boundary is, and that nobody else has possession within the boundary then you are at risk.

A further potential problem is that if somebody sees something that they think could be used for a community purpose, then they may seek to force you to sell it to them. This could be achieved through the legislation relating to community interests in land [*Part 2 of the Land Reform (Scotland) Act 2003*]. The legislation is complex and a detailed analysis of it is beyond the scope of this paper. The important consideration is that if a Community Interest is registered in relation to a site, or part of a site, then the owner (and any creditor in a standard security over the site) is prohibited from transferring the land or taking any steps to transfer the land without in effect giving the community body first right to acquire the

land. As this could clearly have adverse consequences in relation to a proposed development it is sensible to take protective measures if possible.

Broadly, s40(4)(g)(iv) provides that the restriction does not apply in relation to an Option which existed before the registration of a Community Interest. Accordingly in the correct circumstances it would be sensible to put an Option in place for the forward sale of the site, if only in favour of a related company. As the legislation currently stands – it may be amended in the future to close this loophole – this should provide protection in relation to the future sale of the site.

There are also some very specific legal problems that can arise as a result of the simple passing of time. One of the most dangerous, from the point of view of an owner of land, is the possibility of the creation of servitudes over that land simply through use. The reversal of the recent case of *Neumann v Hutchison* has made it simpler for a person alleging the existence of a servitude to obtain confirmation it exists. S3(2) of the Prescription and Limitation (Scotland) Act 1973 provides that if "*a positive servitude over land has been possessed for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the servitude as so possessed shall be exempt from challenge*". Accordingly, if it appears that a use is being made of your site for which no formal right exists then take action to stop it before it is too late. Even if it is "assumed" that the right does exist then challenge it – it may not have been exercised for the period required to make it exempt from challenge.

Also, remember that you can also lose rights which benefit your land through the passage of time, not just suffer from the creation of rights in favour of others. Positive servitudes which benefit your land – which could be as important as a main right of access – will prescribe and cease to be enforceable if they are not exercised for a period of 20 years [s8 of the *Prescription and Limitation (Scotland) Act 1973*]. Also, the ability to enforce title burdens which protect your site – perhaps in relation to a prohibition on detrimental development of an adjoining site - will potentially stop being enforceable should you fail to take appropriate action timeously. If a burden is breached in such a way that (a) material expenditure is incurred, (b) the benefit of such expenditure would be substantially lost were the burden to be enforced, and (c) the persons entitled to enforce do not object within a reasonable period (which is in any event 12 weeks from substantial completion of the activity) then the burden is extinguished to the extent of the breach [s16 of the *Title Conditions (Scotland) Act 2003*]. From this you will see there is a limited "window" to successfully complain. Shortly (after 28 November 2009) there will also be a general provision that if no steps are taken in relation to a breach of a burden for a period of 5 years then the burden is extinguished to the extent of the breach [s18 of the *Title Conditions (Scotland) Act 2003*].

Lastly, do use the time available to you to your advantage to "clean up" any items which you know you

are going to have to address.

For example, if there are title burdens which restrict the potential development of the site, take action now to remove them. In our experience an unopposed application to the Lands Tribunal to discharge a title burden will usually be dealt with within 8 weeks. If the application is opposed it will take longer and while success cannot be guaranteed the recent reported decisions indicate a favourable outcome from the point of view of facilitating development is far more likely than was previously expected.

Also, if there are investigations or other matters which have to be undertaken on your site, and the cost is minimal, then it makes sense to have those done now as well. For example, if there is or there is a likelihood of an archaeological investigation being required then would it be sensible to have that done now? Remember also that in terms of JCT standard form of contracts the contractor will probably be entitled to an extension of time and a loss and expense claim in the event this interrupts the development process.

In summary then:

- (1) don't allow sites to sit without proper supervision;
- (2) protect your boundaries;
- (3) take action to prevent current problems becoming worse; and
- (4) take steps now to remove problems or impediments to the development process to avoid bigger or more expensive problems later.

Using land you didn't know you owned – the PMP Plus case and other Legal Changes

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The Keeper of the Registers of Scotland v PMP Plus Limited – A case decided in November 2008 by the Lands Tribunal in Edinburgh.

The case involves fairly complicated technical legal issues which have a significant practical impact on commercial and residential developers (and those leasing or buying from them and investors too).

What is PMP Plus about?

The ownership of common parts/common areas.

In a development, it is normal for the developer to sell individual units/plots to buyers and, in each sale, to include a right of common ownership in the areas which the buyers will want to use in common eg. play areas, landscaped areas, car parks and possibly access roads. This is frequently seen in residential developments but the practice applies equally to commercial schemes where the individual units are sold, not leased.

What is the PMP Plus problem?

The established conveyancing practice in relation to the acquisition of rights of common ownership over many years has been held by the Lands Tribunal to be invalid.

Facts of PMP Plus

Persimmon developed the Festival Park residential site near to the Squinty Bridge. They built and sold all of the houses/flats. In each conveyance, they gave to the purchaser a right in common to certain

common areas which were defined as being whatever hadn't been sold on an exclusive basis to anybody else.

They discovered that there was a reasonable sized piece of land which had not been developed and they wished to sell this to PMP Plus for the construction of a medical centre. The Land Register said that there was a problem with this proposal in that Persimmon had granted rights to each of the individual purchasers which included this unbuilt on area.

In short, PMP's title would not be good as it would be subject to the rights in common of the 200 residents.

PMP successfully argued before the Lands Tribunal that the 200 residents did not actually have common rights in this particular area as those rights had not been validly granted. The result is that Persimmon were free to sell the piece of land to PMP.

The significance of the case is that not only was this piece of development land unaffected by the common rights of the residents of Festival Park but the other areas which those residents did actually want to use (eg. play areas) were not the subject of common ownership and therefore ownership still rested in Persimmon.

Invalid - how?

Common parts have customarily been described in the relevant conveyancing deeds by reference to a future act. For example, the common parts in an estate are frequently defined as everything within the estate which has not been sold exclusively to individual buyers. This has been declared to be invalid as the correct procedure is for the common parts to be identified on a map as at the date of the relevant sale. It is not possible for ownership of a house etc to be altered by virtue of the sale of the last house to be built and sold in the estate, possibly years later.

Everything which any particular house or other individual unit is to own in common with other houses or units must be spelled out and shown on a plan when the house or unit is sold.

Effect of PMP Plus?

Where the common parts have been described by reference to some future act and not by reference to a plan, the owners of individual units do not have a right in common to the relevant common parts, notwithstanding what their title deeds might say.

It follows that ownership of the common areas must continue to vest in the developer/builder who sold the unit.

How has this happened?

In practice, developers are often reluctant to fix the layout of a development at an early stage. Developers wish to retain flexibility. This can allow more units to be added or for other changes to be made to suit the developer's preferences.

As a result of PMP Plus, this practice cannot continue.

Buyers will not buy from a developer unless the buyer knows that he will acquire a good title to the relevant share of the common parts.

Are there any solutions?

1. *Fix the layout in small phases:*

The most obvious solution is that developers will have to agree to a fixed layout before the first sale of the first unit is completed or perhaps at an even earlier stage when missives are concluded for the first sale (unless these missives allow the developer to finalise the layout prior to actual completion of the first sale).

The layout will need to show all of the common parts on a map. The developer will not be able to alter the layout once the first sale has been completed.

To make this solution easier to implement, a developer might need to build out in phases so that the

developer can take one area at a time and sell off units only when the layout of that area is fixed (not necessarily fixed on the ground but certainly fixed on a plan).

The difficulty lies with certain common areas which may be common to the whole of the development but cannot readily be dealt with on a phase by phase basis.

2. *A two stage approach:*

Stage one: sell the unit which is to be exclusively owned (eg. flat, house, warehouse, factory unit etc) without, in addition, conveying a specific share of the common property.

Stage two: once the development has been fully built out, the developer draws up a plan of the completed development and conveys to the individual purchasers specific shares in the common parts.

Advantages:

- the developer retains flexibility in layout design as the development progresses;
- the plan correctly reflects the position on the ground as at the date of the transfer to the buyers.

Disadvantages:

- not good from a buyer's perspective – what if the developer becomes insolvent before transferring the shares in the common parts? A buyer might have been able to retain part of the price pending transfer of the share in the common parts but this will not be adequate comfort if the title ends up without important common property forming part of it.

3. *Post-completion plan:*

Upon completion of the development, the developer could submit a plan of the completed layout to the Land Register who would update the individual ownerships sold throughout the development period.

Disadvantages:

- this would require an amendment to the existing land registration laws and therefore is not an immediate fix;
- what if the developer never completes the development?
- what if the developer completes the development but then goes bust before drawing up the actual layout plan?

There is no easy solution for future developments.

What about developments already completed/partially completed?

This is problematic. Where a development has been completed and the developer is off-site, the problem rests with the buyers of the houses/offices etc. As the implications of *PMP Plus* sink in, developers might start receiving approaches from owners of houses etc, asking for the developer to grant a conveyance of a specific share in the common areas. The developer is likely to be asked to prepare a plan of the completed layout unless Ordnance Survey have updated their map to show the completed layout (in which case, the buyer might present this to the developer, coloured up to show the various common areas).

There is no reason why a developer should refuse to co-operate – he has already been paid for the exclusively owned unit plus the share in the common parts.

A developer might/might not want to insist on his expenses being met by the owner.

The developer will need to be consistent and use the same plan for each remedial conveyance.

Note that if the development was funded by a Bank and the Bank's Standard Security has never been discharged, the developer will need to procure that the Bank agrees to release the common parts from its Standard Security as each share is transferred.

Can the developer refuse to co-operate with buyers unless further payments are made?

Yes, although if the person seeking the developer's co-operation is the original buyer and not a subsequent owner, the original purchase contract might provide a basis for the buyer forcing the developer to co-operate. This will depend on the terms of the contract.

Can a developer go further and try to sell or develop the common areas?

Possibly. But possibly not as one aspect of PMP Plus remains to be decided, based on considerations of bad faith.

Note that an insolvency practitioner of a builder might even consider himself obliged to try to extract value out of these situations although reputational issues would need to be considered carefully.

There is a concern that "title raiders" might try to get their hands on the residual ownerships of developers of housing estates to try to ransom the owners of the houses.

There are other legal issues involved but it may be some time before the full implications of PMP Plus are known. In the meantime, the one certain thing is that buyers will not buy from developers unless the common areas are adequately shown on a plan, acceptable to Registers of Scotland.

Disclaimer

The material contained in this handout is of the nature of general comment only and does not give advice on any particular matter. Readers should not act on the basis of the information in this handout without taking appropriate professional advice upon their own particular circumstances.

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