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Flying high

Julian Bass and Sarah Quy provide some practical solutions to flying freeholds

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'Affected owners often take out an insurance policy to compensate the owner for any reduction in the value of the property as a result of any inability to repair the neighbouring property.'

A flying freehold is a quirk of English land law. Here we discuss the practical problems it can lead to, and suggest some possible solutions and damage limitation measures.

Tenures in English land law

There are three forms of tenure in the English land system:

- As a rule of thumb, freehold ownership means non-time-limited ownership of a plot of land descending down to the centre of the earth and ascending up to the sky as far as necessary for the ordinary beneficial use of the land. There are limits to this, for example, ownership of subterranean minerals. The rule is less clear-cut where the surface level of the land fluctuates, such as the foreshore, marshes and quarries.

- Leases, of course, provide a conventional means of creating time-limited tenures for adjoining properties (blocks of flats and offices) where the same footprint belongs to different owners on different horizontal planes.

- The third form of tenure is commonhold, a non-time-limited system designed for multi-occupied schemes in which each unit owner has a freehold estate in the unit and is also a member of a commonhold association, which owns and manages the common parts of the commonhold development. Unlike leasehold units, there are no superior estates or interests. Commonhold is governed by Part 1 of the Commonhold and Leasehold Reform Act 2002 which came into effect in 2004, but this form of land ownership has not been widely adopted. However, among the questions raised by the recent housing white paper is whether or not to reinvigorate this form of tenure and if so, how.

When do freeholds fly (or creep)?

A flying freehold occurs when the freehold of one property is vertically above or below the footprint of another, commonly when balconies and rooms oversail a pavement or a shared drive or passageway, perhaps into a communal courtyard. Flying freeholds can arise in terraced houses on sloping land (where part of one house is higher than parts of another house) or in conversions of buildings where the division between houses does not follow a straight vertical line. They can also occur through adverse possession where, for example, a house owner acquires rights to their neighbour's attic space that traverses both houses.

Similarly, freeholds may creep when vaults or basements intrude under the surface of adjoining land held under another freehold title, typically basements below pavements or a neighbour's land.

Clearly, having a property surveyed carefully and comparing the buildings with the relevant title plans should alert owners and potential buyers to the possibility of a flying freehold.

Why are flying freeholds a problem?

Typically, problems stem from an absence of clarity about responsibility between neighbours for the repair and maintenance of structures that overlap boundaries, and the costs of these repair works. This could lead

to practical difficulties in terms of property management, and also when the owners seek to remortgage or to sell their land the potential buyers and mortgagees will be concerned about the impact on value and marketability, particularly if the 'flying' element of a property exceeds 15% of its total area.

How can these problems be resolved?

Ideally, these issues can be addressed through covenants regulating the relationship between two properties, which we will discuss below. In the absence of agreement, it may be necessary to ask a court to provide the remedy, which might include one or more of the following:

- An access order under the Access to Neighbouring Land Act 1992, which enables a landowner to access adjoining land in order to carry out 'basic preservation works' to its own property after obtaining an access order. The court may make an access order if satisfied that the basic preservation works are:
  - reasonably necessary for the preservation of the relevant land; and
  - cannot be carried out, or would be substantially more difficult to carry out, without entry onto the adjoining land.

  However, it will not do so if it considers that this would be unreasonable either:
  - due to the degree of interference with an occupier's use or enjoyment of the adjoining land; or
  - if the owner of the adjoining land would suffer unreasonable hardship.
- An order obliging the neighbour to keep their property in good repair. An application of this sort might include arguments about the disrepair constituting a nuisance or breach of implied easements of support. Traditionally, the general duty that owners may have in relation to hazards on their land, natural or otherwise, provides limited protection to a neighbour relying on the discharge of that duty; it was described by Stuart-Smith LJ in *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] as 'a measured duty of care'. The calculation of losses arising from this may include diminution in value. In the past this has often been calculated by the cost of repair. This may have been widened by the recent decision in *Williams v Network Rail Infrastructure Ltd* [2017]. Neighbouring landowners sought damages from Network Rail in private nuisance because knotweed growing on an embankment behind their bungalows had spread onto their land. They claimed the costs of repair to the properties and also diminution in the value of and stigma attached to the properties caused by the presence of the knotweed. The court decided that:

  > ... the right to use and dispose of a residential property at a market value is... so important a part of an ordinary householder's enjoyment of his property...

  that an interference with it 'should be regarded as a legal nuisance'. The properties had been blighted

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An example of a flying freehold

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by the presence of knotweed on their land. The landowner's failure in *Williams* to take reasonable steps to avoid the knotweed encroaching on neighbouring land when this was a widely known cause of damage constituted a nuisance. It was an unlawful interference with the quiet enjoyment or amenity of the bungalows and diminished their value. The same measure of damages could be applied when an owner or landlord unreasonably refuses to maintain their property to such an extent that it devalues neighbouring land.

- An order for the recovery of costs spent in repairing property which has been damaged by the disrepair of the neighbour's property. In *Abbahall Ltd v Smee* [2002], the defendant owned a flying freehold of the first and second floors of a building and its roof. She had not maintained the roof, so it had become dangerous and there was a danger of masonry falling onto visitors to the ground floor. In addition, water often leaked into the ground-floor premises which were owned by the claimant. The claimant had obtained a court order enabling it to enter the defendant's property to carry out repairs but the order was silent about who should pay for them. At first instance, the judge held that both parties were responsible for repairing the roof and, on the basis of their respective financial resources, ordered the defendant to contribute one quarter of the cost. On appeal, the court held that an occupier of property was under a duty to act reasonably to prevent or minimise damage to their neighbours or their property. Where the roof protected more than one owner, common sense, common justice and reasonableness suggested that the affected owners should share the repair costs on the basis of the relative floor space belonging to each owner. Therefore the defendant and the claimant should contribute equally to the appropriate works since they would derive equal benefit from it.

It may prove costly to buy a property whose own state of repair relies on the condition of an adjacent property without the certainty of knowing that the owner of that adjacent property is contractually obliged to repair it, or conversely to contribute to repair costs. Mortgagees, particularly of residential property, often will not accept as good security the risks that go with flying freeholds in the absence of appropriate binding arrangements between owners.

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Possible solutions that can be agreed between the affected parties

There are three possible contractual routes to consider in this situation:

- The owner of a flying freehold may seek to purchase some or all of a neighbour's freehold land in exchange for the grant of a lease to that neighbour. Mutual obligations, the grant of rights and easements that might deal with access, repair and support concerns, and provisions dealing with the payment of contributions to the costs of repairs and so on can then be suitably documented.

- Title to a communal structure or area might be effectively merged by co-ownership of the freehold between neighbours, and long-term leases of part then granted back to each neighbour with attendant rights over the other's portion – again, with provisions governing repair and maintenance, and probably insurance. Clearly such a solution would come at some cost and require agreement when the bargaining positions of adjoining neighbours may not necessarily be equal.

- Neighbours may enter into a mutual deed of covenant granting rights of access and support, and repairing covenants. The relative bargaining position of each is likely to dictate the payment of money by one to another. Such a deed of covenant should expressly bind successors in title and impose a restriction on title to the effect that no disposition of the land can be made without an incoming owner entering into a deed of covenant in favour of the neighbour, on the same terms as the original deed – a solution that would satisfy the Council of Mortgage Lenders. In practice, affected owners often also take out an insurance policy to compensate the owner for any reduction in the value of the property as a result of any inability to repair the neighbouring property, having taken reasonable steps to do so, and associated costs and expenses.

In the recent housing white paper, the government suggested that it might take steps to promote commonhold as a form of tenure with benefits that include the ability for neighbours to enforce covenants between themselves. However, as the legislation currently stands, flying freeholds are among the types of land interest that cannot be converted into commonhold status.

Concluding thoughts

The disproportionate complexity, uncertainty and degrees of risk that flying freeholds may present are not new to those in the property industry. Flying freeholds need not necessarily scupper transactions but owners need to take steps to limit their adverse effects, and potential buyers and lenders need to keep their eyes open when inspecting potential acquisitions. ■

Abbahall Ltd v Smee
[2002] EWCA Civ 1831

Holbeck Hall Hotel Ltd & anor v Scarborough Borough Council
[2000] EWCA Civ 51

Williams v Network Rail Infrastructure Ltd
[2017] PLSCS 94