

Developers' Brief

April 2009

These are challenging times for developers. The dearth of development funding and funding for potential purchasers, added to a general lack of confidence in employment, have combined to produce a dramatic slowdown in activity. In this period, however, there have been important legal developments of which developers should be aware and make changes to their practices accordingly so as to reduce the potential for a legal challenge at a later date.

Disclosure of incentives

The initiative for developers to disclose incentives fully to lenders and surveyors is by now well documented and should be incorporated into developers' practices.

However, developers should be aware that the Royal Institution of Chartered Surveyors (RICS) issued a guidance note to surveyors last week, drawing together the various aspects of valuing new build property. The guidance note stresses the need for valuers to differentiate between the new-build premium (which will disappear as soon as a new-build property is occupied) and valued added factors (such as higher specifications, better insulation or more efficient heating) that will endure. The guidance note will take effect from 1 May 2009.

Date of entry triggers

It is widespread industry practice in developers' standard missives to trigger the date of entry a week or two after the Local Authority has 'passed the building as habitable and fit for occupation'. This is because completion certificates are rarely available as soon as a building has been passed. The wording was traditionally understood to refer to the date on which the local authority building inspector (for building warrants issued before 1 May 2005) inspected and passed the building. The developers'

solicitor verbally confirmed with the inspector that the building had passed and the date of entry was set accordingly.

Nevertheless, in the recent case of *FM Finnieston v. Ross*, the Court of Session decided that the statutory process referred to in the missives cannot be ignored and the date of entry trigger in the missives must refer to the date on which the local authority issued either the temporary habitation letter or the completion certificate.

As the issue of the temporary habitation letter is entirely discretionary on the part of the local authority, this interpretation may impact on the timescale for settlement - to the detriment of both the developer and the purchaser, who may have to co-ordinate the purchase with a house sale.

For building warrants issued after 1 May 2005, the verifier can issue temporary occupation permission.

We have reviewed our developers' standard missives not only to reflect the Court's decision but also to allow developers a degree of choice on the inter-dependence of the missives to the statutory process, depending on the circumstances.

'Floating' common areas

The perennial debate between the developers' need for flexibility and the purchaser's need for legal certainty in relation to definition of common areas in a development continues. In the recent case of *PMP Plus Limited v. Keeper of the Registers*, the Lands Tribunal ruled that the current practice of defining the common areas effectively as "the whole development less the bits sold off" meant that the title to the common areas does not pass to the purchasers because the common areas are not capable of being mapped on an OS map for the purposes of the Land Register. It is also doubtful

that a developer would be able to sell the interest to a third party, as the third party would be acting in bad faith, although the Tribunal's decision on this aspect is awaited.

This means that the title to these areas remains with the developer. This will not always be welcome news to developers, as they generally like to exhaust all legal interest in a development once it is completed.

It is crucial that proper advice is taken from the very outset of a development. Working closely with developer clients, we have completely refreshed our approach to the definition of common areas in a way that permits flexibility and yet allows the purchaser certainty.

Reservation of power to grant servitudes doubted

Developments will frequently involve complex interlocking rights and obligations, temporary and permanent, amongst the developer, the purchasers and utility companies in relation to supply and maintenance of services.

Developers have traditionally reserved a right to grant servitudes over common areas, to give effect to the interlocking rights and obligations, after the ownership of the mapped out common areas has been successfully transferred to the purchasers. The recent case of *Holms v. Ashford Estates Limited*, the Court of Session threw the spotlight onto this practice. Although it did not form part of the Court's decision, the Court questioned the validity of this practice on the basis that if the title to the common areas has been transferred, then the developer has no title to grant servitudes over them. Effectively the developer cannot 'have its cake and eat it'.

Conclusions

Drawing all these aspects together, it is clear that developers must now take action to review their practices and processes as regards missives and deeds of conditions.

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:



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