

With confidence and in confidence

Confidence is not a word which is being banded around too much at the moment. In times of serious economic challenge now is not really the time to boast of confidence in any particular markets. It is however exactly the time to have confidence in your legal advisors. Confidence that they have the breadth and depth of experience to give practical and commercial answers to difficult questions large and small. Confidence that they will see such issues in the round and provide the best and broadest advice possible. Confidence that your lawyers will understand your needs and objectives whether they are business or personal.

Here at Knights we are this year celebrating our 250th anniversary as a firm and although the world has changed immeasurably over these years, the need to provide timely, commercial legal advice of the highest quality remains unchanged.

We are in a position to serve your needs in 2009 just as the firm was in 1759.

Whatever issues face you at the start of this year we can listen in complete confidence and you can continue to have confidence in our abilities as an exceptional department well able to meet your property needs now and in the future.

With best wishes

IAN WHITE head of real estate department

RISKMANAGER™

A reminder about Riskmanager™ a unique product in the legal market devised by our corporate and real estate teams.

What is Riskmanager™?

Riskmanager™ is a legal risk audit for businesses. Looking at everything from succession planning to credit control it aims to give you (as either an owner or a manager) a clear view of where your business is well covered legally and where you may have some risk.

The audit takes the form of an "interview" with one or two key individuals at the business and a review of your key legal commercial and property documents. This is followed up with a "letter-style" report identifying in clear, but informal, language areas of risk and opportunity and suggesting ways of moving forward.

Why do I need Riskmanager™?

Businesses operate in an increasingly complex legal environment and it is ever more difficult for them to mitigate their risks on an ongoing basis. Riskmanager™ enables you to identify areas where the business already has problems or where it may run into them. Addressing these issues will help to protect your business from potential claims and may help to make it more profitable.

Riskmanager™ is also ideal for a business preparing to sell. A crucial part of the sale process is the due diligence conducted by the buyer which places great demands on the time of the sellers. Riskmanager™ can be used to prepare sellers for this process and to address any issues it is likely to unearth before they arise. This not only makes the sale process much smoother but denies a buyer any opportunity to re-negotiate either the price or structure of a deal based on a

problem identified during due diligence.

Is there anyone else offering Riskmanager™?

No. Riskmanager™ is a unique product developed by Knights and is not offered by anyone else.

How much does it cost?

The Riskmanager™ audit and report are undertaken and produced for you entirely free of charge. In addition to this, whilst certain recommendations may be made in the report, you are not under any obligation to have any of the work recommended done.

How do I get a Riskmanager™ audit?

In order to arrange a Riskmanager™ interview please contact Adrian Rushton. Email: adrian.rushton@knightsllp.co.uk



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WHERE ANGELS FEAR TO TREAD...

the perils of rushing to develop

Should you be looking at buying property because you feel there is a possibility of it being developed in the future (whether the current planning climate surrounding it is favourable or not), it is clearly important to look carefully at the title to ensure that there are no obstacles in the title to that future development and if you decide to proceed to buy where covenants are in place, you should take care not to start that development until you have considered fully the implications of any restrictions on the title.



Many people think that if they get past the planning permission stage, the way is cleared for the development to proceed. This is not always the case. In addition to the planning hurdle a person waiting to develop has to consider separately the title restriction hurdle.

A couple of recent cases have demonstrated that it may be dangerous to make assumptions lightly about how “easy” it may be to have restrictions on the title lifted or modified to allow your proposed development to proceed.

Re Hopkins 2008

In our Winter 2008 edition we discussed in a fair amount of detail, the decision in Re Hopkins [2008] where a developer failed to convince the Lands Tribunal to modify or discharge the restrictive covenant which in this case prevented the proposed development of the construction of a block of flats. The objectors to the development had stated, amongst other things, that it would restrict the view of a line of trees, which were otherwise visible. The developer had tried to argue that even a development of a type which the restriction did not prevent (ie the construction of an extension) would have had the same effect as constructing the block of flats.

The developer’s argument did not succeed, but only because the Tribunal did not find

any evidence that the developer intended to construct such an extension or that such a development were feasible. Had there been such evidence, then the decision of the Tribunal may not have favoured the objectors on this particular point because there might have been a good argument available to the developer that the restrictive covenant did not afford the persons with the benefit of the covenant any practical benefit of substantial value or advantage.

Dennis and others v Davies [2008] EWHC B20 (Ch)

This case concerned a private individual (“D”) who owned one of forty seven houses on a small exclusive waterside housing development. D wanted to build a three-storey extension to the side of his house. Here there was no restriction directly on building an extension but the property was subject to a restriction (affecting all the houses on the development) as follows:

- “Not to ... do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the Estate or the neighbourhood”

Five other owners of houses on the estate maintained that D would be in breach of this restriction if D were to build the extension

proposed as it would wholly or partly obscure their views of the river and diminish the value of their properties. Consequently the works which D had already started were stopped.

It was found that the valuation report produced to the Court did not identify any commercial gain in the project for D; neither did the report identify any significant reduction in the market value of the claimants’ properties. Accordingly the Court was left to consider whether the covenant against causing “annoyance” would be breached.

D tried to argue that this anti-nuisance/annoyance restriction only referred to D’s own activities and did not relate to building on the property. The Court did not agree and found that the covenant was “wide enough” to cover D allowing the extension to be built. Furthermore the Court found that the construction of the extension could be regarded as an annoyance.

The test which the Court applied was whether reasonable, sensible people would, having regard to the ordinary use of the claimants’ houses for pleasurable enjoyment, be annoyed and aggrieved by the extension and they confirmed this must be assessed objectively “by robust and common sense standards”.

If you are faced with a restriction on the title to a property and you want to develop the said property in breach of that restriction, then seeking to have the restriction lifted or modified by the Lands Tribunal is only one option available to you. Others may be more suitable to your particular case. For example you may consider whether it is possible to get indemnity insurance (where those likely to object have not been approached for consent and have objected to your planning application). If that is not an option, then, if appropriate and you think you have a fair chance of success, you may want to try to negotiate directly with the person or persons benefiting from the covenant for a modification or lifting of the restriction. Applying to court should probably be a last resort, once you have exhausted all other possibilities, and once you have considered the likelihood of success very carefully - it is an expensive (and time-consuming) course to take.

For further information please contact Zoe Theofilopoulos.
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TROUBLED TIMES FOR TENANTS... a timely reminder

If you are either:

- a landlord with a tenant who has financial difficulties or who may have gone into administration or
- a tenant who is concerned about not being able to meet your lease obligations

you should take advice at an early stage as to the options which may be available to you so you can decide on your best course of action - they may not be as limited as you think.

Early action may well avoid the worst consequences.

For further information please contact Glenda Miller. Email: glenda.miller@knightsllp.co.uk

and another... EPCs -

An Energy Performance Certificate (commonly referred to now as an "EPC") must be provided by a seller or landlord to a buyer or prospective tenant, free of charge, whenever a property is let (whether by the grant of a headlease or by the grant of a sublease) or sold (including by way of assignment of a lease).

The obligation to provide an EPC is governed by the occurrence of certain events with the obligation being triggered by whichever of these occur first. The trigger events are:

- provision of written information to a person who has requested such information about a building.
- viewing of a property by a prospective tenant/buyer.
- entering into a contract to sell or rent out the building.

There is no prescribed form for an EPC but the Department for Communities and Local Government have developed a model form.

EPCs are prepared by energy assessors who must be accredited to produce EPCs for the particular category of building within which the subject property falls. The EPC must show the date upon which it was issued and will generally be valid for ten years from the date of issue unless a material change is made to the property.

For further information please contact Alison McCracken. Email: alison.mccracken@knightsllp.co.uk



CHANCEL REPAIR LIABILITY - the hidden liability? - another timely reminder

The case of Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank, in 2003 caused much consternation amongst property owners when the decision of the House of Lords resulted in Mr and Mrs Wallbank having to pay a sum in excess of £185,000 (which with the costs they were ordered to pay to the other party amounted to about £200,000) to their local Parish Council towards the repair of the chancel of a Church within the tithe district in which their property was situated.

At first this case was viewed by many as a "one-off" and unlikely to be of general concern, but it seems that the issue of chancel repair liability may be increasing in significance as it now known that concerted efforts are being made to register liability for chancel repair against the titles of those properties found to be former glebe land and therefore subject to the liability. It is very difficult in many cases to establish from your own title information whether or not your property (or any part of it) is former glebe land and therefore a potentially onerous liability may be hidden from you.

Once registration is effected against your title, it will be considerably more difficult to insure against chancel repair liability and even if it is possible to insure, it will be considerably (if not prohibitively) more expensive. Prospective buyers and lenders are increasingly requiring such insurance to be taken out by sellers/borrowers. However, any wise owner of property should be looking into the need for insurance regardless of intention to sell or mortgage their property.

For further information please contact Zoe Theofilopoulos. Email: zoe.theofilopoulos@knightsllp.co.uk

yet another... PROPERTY AUDITS

Given the current economic climate and the undeniable buyer's market that prevails, it may be a good time to undertake an audit of your property or any part of it that you may be considering selling at some point in the not so distant future, so that any potential issues can be resolved before marketing takes place. This will help to avoid the risk of losing a buyer if they find less problematical properties to buy instead.

If you wish to consider a property audit, please contact Ian White. Email: ian.white@knightsllp.co.uk

and our final timely reminder... "HIPS"

Home Information Packs ('HIPS') are now a compulsory pre-requisite for marketing all residential properties with certain limited exceptions.

The latest regulations state that a pack must contain the following:

- an index;
- a sale statement;
- evidence of title; if registered this must be official copies of the register and plan; if unregistered an Index Map Search and deduction of title;
- results of local land charges and local authority searches CON29R (either official or personal) and drainage & water CON29DR which are no more than 3 months old;
- (as from April 2009) a completed property information form which will include leasehold information

If the property is leasehold, a new build and/or commonhold certain additional documents must also be included.

For further information please contact Ellen Law. Email: ellen.law@knightsllp.co.uk

So You Want Your Deposit Back...

An increasing number of buyers are finding themselves unable to complete contracts for the sale of land that were exchanged when the property market was less gloomy and whether a defaulting buyer will have his deposit returned to him is for buyers, a burning issue.

The contractual position in relation to a buyer's failure to complete is usually covered by the general conditions of any sale and purchase agreement. They will usually provide that at any time on or after the completion date "a party who is ready able and willing to complete may give the other a notice to complete". If a buyer fails to complete in accordance with a notice to complete, it is likely that the seller will have a contractual right to terminate the contract and if the seller does so then the seller may (i) forfeit and keep any deposit and accrued interest and (ii) re-sell the property to a third party.

Section 49(2) Law of Property Act 1925

In this situation, a defaulting buyer may look to statute law which is over 80 years old. Section 49(2) of the Law of Property Act 1925 gives the Court the power to order re-payment of any deposit "if it thinks fit" in the circumstances of the case in any action for the return of a deposit.

Case law

There have been instances where buyers have used Section 49(2) successfully, for example, where the seller forfeits the deposit but then re-sells the property for more than the original sale price and the buyer has argued that the seller has therefore benefited from the buyer's default and the Court has ordered the deposit to be returned to the buyer.

Omar v El-Wakil

This approach is no longer regarded as good law. Now the leading authority is the case of Omar v El-Wakil [2001] EWCA CIV 1090 where the Court stated that "special circumstances" would be required to justify a deposit being returned. A deposit was described as "an earnest of performance" and was likely to be forfeited if the buyer failed to complete. Moreover it was noted by the Court that it is

common knowledge that a deposit is likely to be forfeited if a buyer fails to complete and the possible inability to complete is precisely the risk that a deposit is intended to guard against.

Midill (97PL) Limited v Park Lane Estates Limited (and Anr)

The most recent reported case on this subject is Midill (97PL) Limited v Park Lane Estates Limited (and Another) [2008] EWCA CIV 1227. Here, the purchase price was £4 million and the buyer paid a £400,000 deposit (that is, the normal 10%). The buyer subsequently failed to complete and the seller re-sold elsewhere for £4.3 million. Although the seller had profited from the buyer's default, the Court ordered that the seller was still entitled to keep the deposit as there were no "special circumstances" justifying a departure from the ordinary contractual expectation that the deposit would be retained by the seller if the buyer defaulted on completion. The Court held that there was no reason why the buyer should obtain the benefit of the increased sale price when it was the seller that had borne the risk and cost of holding the property in the intervening period.

This recent case provides clarification on the interpretation of Section 49(2) and highlights the fact that there is a presumption that a seller will have the right to retain any deposit on a buyer's default and that the burden of proof to show that the presumption should be overridden falls on the buyer. It is very clear that the Court will not exercise its discretion under Section 49(2) in favour of a buyer lightly. Furthermore, the Court has no power to return only part of the deposit - it is a case of "all or nothing".

To conclude, buyers who default on completion can expect to lose their deposit unless there are genuinely "special" or "exceptional" circumstances. A sophisticated buyer who is aware of the risks of failing to complete will be unlikely to get much sympathy from the Court in the absence of such circumstances.

... and a final note for sellers thinking that it may be safer simply to agree in their contract that Section 49(2) should not apply, following the case of Aribisala v St James Homes (Grosvenor Dock) Limited [2007], it is not permitted to do this even with the consent of the buyer.

For more information please contact Kerry Williamson.
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Knights people



Meet Joy Hancock

I completed an Estate Management degree at the University of Central England from which I graduated in 1991. Following what was initially intended only as temporary employment as a legal secretary with Knights while looking for the relevant

training to enable me to become a full blown Chartered Surveyor, I qualified as a Legal Executive in 1996.

Some years later and having enjoyed myself so much in the field of law, it was suggested that it might be a good idea to convert my

existing qualifications over to an equivalent law qualification. Two years later and having completed the Common Professional Exams at Staffordshire University in the summer of 2007, I am now on the "home stretch" to becoming a qualified solicitor, qualifying from the Legal Practice Course at Staffordshire University in, hopefully, the summer of 2009.

During this time, I have undertaken a considerable amount of general commercial property work although my specialism is in the field of commercial landlord and tenant. I have predominantly worked in acquisitions and disposals of a number of portfolios of properties, the latest portfolio involving the acquisition of approximately 120 properties up and down the country for a bakery.

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