

PROPERTY DEVELOPMENT – GETTING THE STRUCTURE RIGHT

by David Le Brocq

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In recent years, property developments in Jersey have increased in scale and complexity, with a consequent need for sophisticated and often multifaceted legal structuring tailored to meet the individual requirements and characteristics of each. All developments are, of course, physically unique and the way in which each is legally structured will differ from one development to another accordingly. Factors that will influence the structuring include the mix of residential and/or commercial units.

When undertaking a development, one of the essential aspects of which the developer will need to be certain is that prospective tenants and purchasers, of both commercial and residential units in the development, will be acquiring interests which, in legal terms, are both readily saleable – making sure not to unnecessarily restrict the size or composition of the market to which the developer is able to sell - and also readily able to be used as collateral in support of loan finance. At the same time, the structuring must properly reflect the physical nature of the development and accommodate specific matters and constraints such as phased completion, for example, which may mean that the necessary infrastructure will not be in place to service the whole development when the first sales of units in the development complete.

It may be said therefore that the key to success for any developer in Jersey, be it a large multi-jurisdictional developer or a small local developer, is the effective combination of the legal 'building blocks' which are available under Jersey law and which I briefly discuss below.

FREEHOLD

Freehold ownership is often said to be the 'purest' form of property ownership. The owner of a freehold land parcel (a '*corps de bien-fonds*') owns the land in question and everything above it (to the top of the sky) and below it (to the centre of the earth).

It is for this reason that it is not possible under current Jersey property law to own on a 'pure' freehold basis a specific part of a property (such as an apartment) without including those parts above and below it.

Freehold interests can be hypothecated (charged) both individually and with other freehold (and flying freehold) interests in accordance with the requirements of the lender.

FLYING FREEHOLD

The *Loi (1991) sur la copropriété des immeubles bâtis* revolutionised Jersey law by permitting apartments and other horizontally-sliced parts of buildings to form freehold interests, known as *lots*, thereby avoiding the conceptual issue with 'pure' freehold ownership described above. These *lots* comprise the absolute ownership of the apartment or other specific part of the building in question together with an interest with the other co-owners in those parts of the building which are used in common and defined as the common parts.

Like 'pure' freehold interests, flying freehold *lots* can be hypothecated.

LEASEHOLD

Jersey law divides leases into those for terms of nine years or less (often referred to as 'paper leases') and those for terms exceeding nine years (referred to as 'contract leases'). Leases can be used in essentially two ways: (1) for occupational purposes, with the tenant paying a commercial rent in return for the ability to occupy the premises for the stipulated term; and, (2) to create capital interests akin to freehold interests, with the tenant paying a capital premium and a nominal rent in return for a long-term holding.

Since the coming into force of the *Loi (1996) sur l'hypothèque des biens-fonds incorporels*, contract leases have been able to be hypothecated either with the landlord's consent or if expressly stated as permitted in the contract lease.

SHARE TRANSFER

This involves the acquisition of shares in a company which owns property (by way of freehold, flying freehold or leasehold title), the shares conferring the right on the owner of occupation of a specific part of the company's property. Prior to the coming into force of the *Loi (1991) sur la copropriété des immeubles bâtis*, this was the only way it was possible under Jersey law to circumvent the basic principle of 'pure' freehold ownership that ownership of the land in question also includes everything above and below it.

Such shares cannot be hypothecated but they can be made the subject of security interests under the Security Interests (Jersey) Law 2012.

As can be seen from the examples given above, Jersey property law is a distinctive mixture of elements, some of which will be familiar to those versed in the law of other systems and others which will be quite alien and which are unique to Jersey; it is these 'building blocks', whether combined appropriately or used exclusively, that ensure the difficulties and the challenges posed by even the most complex modern developments are fully met.

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