

# **RESIDENTIAL DEVELOPMENT: OVERCOMING CHALLENGES & PITFALLS**

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## ALEX O'CONNOR

PARTNER

COMMERCIAL REAL ESTATE

[alex.oconnor@collyerbristow.com](mailto:alex.oconnor@collyerbristow.com)



## AIMEE STEVENS

ASSOCIATE

COMMERCIAL REAL ESTATE

[aimee.stevens@collyerbristow.com](mailto:aimee.stevens@collyerbristow.com)



## JONATHAN PAWLOWSKI

PARTNER

HEAD OF CONSTRUCTION

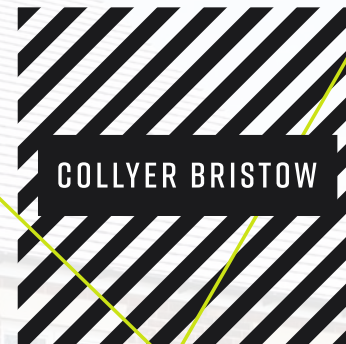
[jonathan.pawlowski@collyerbristow.com](mailto:jonathan.pawlowski@collyerbristow.com)



## DANIEL DOVAR

TANFIELD CHAMBERS





**OVERAGE**

**ALEX O'CONNOR**



# SOME CAUTIONARY TALES

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# **BENEFITS OF OVERAGE**

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**For a seller:**

**Maximise potential return**

**For buyer:**

**Avoid overpayment at the outset**





# SOME METHODS OF SECURING OVERAGE

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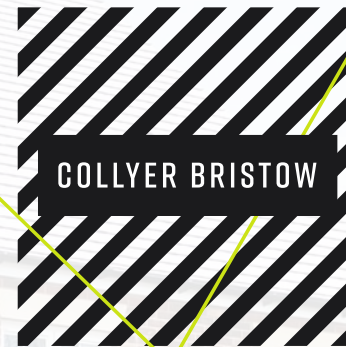
1. Charge
  2. Restriction
  3. Direct deed of covenant
  4. Guarantee
- 



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# THE FUTURE OF GROUND RENTS


**AIMEE STEVENS**





# WHAT ARE GROUND RENTS?

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- Fee charged by a landlord or freeholder of a property
  - Payable by the tenant
  - Set amount and payment date determined by the lease
  - Subject to review over the life of the lease
- 



# WHY ALL THE FUSS ABOUT GROUND RENTS?

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## EXAMPLE: DOUBLING GROUND RENT

- 4.5 million households in England are held on a leasehold basis and so bad practices in leasehold properties affect a significant amount of people
- Flats and houses are being sold with lease provisions which mean that extortionate ground rents become payable over the life of a lease
- Homeowners are being left with properties which are worthless

| Years into Lease | Ground Rent |
|------------------|-------------|
| Years 1 to 10    | £250        |
| Years 11 to 20   | £500        |
| Years 21 to 30   | £1,000      |
| Years 31 to 40   | £2,000      |
| Years 41 to 50   | £4,000      |
| Years 51 to 60   | £8,000      |
| Years 61 to 70   | £16,000     |
| Years 71 to 80   | £32,000     |
| Years 81 to 90   | £64,000     |
| Years 91 to 100  | £128,000    |
| Years 101 to 110 | £256,000    |
| Years 111 to 120 | £512,000    |
| Years 121 to 125 | £1,024,000  |

# WHAT HAS BEEN DONE ABOUT THIS?

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## Leasehold reform (Ground rent) Bill

- The Leasehold Reform (Ground Rent) Bill has been published
- It aims to make homeownership fairer, more transparent, more secure and more affordable
- Ground rents will be limited to a peppercorn per year

## Competition and Markets Authority


- Investigation into unfair leasehold practices and breaches of consumer protection legislation began in 2019
- Numerous bad practices identified within the sector, including unfair ground rent practices
- Enforcement action has been taken against 4 well-known housebuilders and they are taking steps to rectify identified bad practices





# WHAT SHOULD WE DO WITH DOUBLING GROUND RENTS NOW?

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- **Don't panic!** Not all doubling ground rents fall foul of acceptable standards
  - A well publicised 'offender' in the market, but this focuses on ground rents which double every 10 to 15 years
  - However, they are still acceptable
  - Consider whether the frequency of any rent review and doubling periods and whether a cap at a certain point in the lease term would make things fairer
- 

# WHAT DOES THIS MEAN FOR OTHER TYPES OF GROUND RENT?

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## IDEAS FOR NEXT STEPS

| Proposed action:                | Pros:                                                                                                                                                                                                                                                                     | Cons:                                                                                                                                                                                                                                                                                         |
|---------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Do nothing                      | <ul style="list-style-type: none"><li>• Requires no further action at this stage</li><li>• Acceptable legally and from the perspective of lenders (provided certain requirements are met)</li><li>• Ground rents are still a market norm</li></ul>                        | <ul style="list-style-type: none"><li>• Potential reputational issues</li><li>• Homeowners are aware of this issue and it may scare away a more nervous purchaser</li></ul>                                                                                                                   |
| Get rid of all ground rents now | <ul style="list-style-type: none"><li>• More radical and forward thinking approach</li><li>• Will comply with future legal requirements and caters for current Help to Buy requirements in respect of ground rents</li></ul>                                              | <ul style="list-style-type: none"><li>• Needs to be considered at an early stage of a development; as it will affect matters such as yield and therefore reversionary price</li><li>• Could this lead to higher purchase prices to compensate for other losses later down the line?</li></ul> |
| A hybrid approach               | <ul style="list-style-type: none"><li>• Complies with current legal requirements</li><li>• Acceptable to lenders</li><li>• More palatable to purchasers</li><li>• Can be tailored to be more or less purchaser friendly depending on your attitude to the issue</li></ul> | <ul style="list-style-type: none"><li>• Will still fall foul of future legislation <u>but</u> this will not apply retrospectively</li></ul>                                                                                                                                                   |



# MULTI PHASED DEVELOPMENTS AND HTB SCHEMES

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## WHAT DO THEY LOOK LIKE IN PRACTICE GIVEN THE CURRENT FRAMEWORK?

| Development Phase                             | Ground Rents in lease? | Are they acceptable?                                                                              |
|-----------------------------------------------|------------------------|---------------------------------------------------------------------------------------------------|
| Phase 1<br>Build complete 2020                | Yes                    | ✓                                                                                                 |
| Phase 2<br>Build complete 2021                | Yes                    | ✓ but not for any Help to Buy units                                                               |
| Phase 3<br>Build complete in stages over 2023 | Yes                    | ✓ Leases charging a ground rent entered into prior the new legislation                            |
|                                               | and No                 | ✗ Cannot use for Help to Buy units<br>Cannot use for leases entered into post the new legislation |
| Phase 4<br>Build complete post-legislation    | No                     | ✗ Ground rents are no longer permitted                                                            |

- Multi phased schemes and/or schemes that use Help to Buy will need to give some thought how they will manage collection of ground rents both in practice and reputationally
- Likely to contain complex structures where they straddle the current position, Help to Buy and the future post Leasehold Reform Bill position



# **The Office Copy of the Register of Title (and Plan)- The Title Deeds**

## **How to Read it and What to look out for**

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Daniel Dovar

Barrister

Tanfield Chambers



# The Register of Title

The Property Register

The Proprietorship  
Register

The Charges Register



## Official copy of register of title

Title number WR72492

Edition date 09.01.2019

This official copy shows the entries on the register of title on 11 Jan 2019 at 13:35:16.

This date must be quoted as the "search from date" in any official search application based on this copy.

The date at the beginning of an entry is the date on which the entry was made in the register.

Issued on 11 Jan 2019.

Under s.67 of the Land Registration Act 2002, this copy is admissible in evidence to the same extent as the original.

This title is dealt with by HM Land Registry Coventry Office.

### A: Property Register

This register describes the land and estate comprised in the title.

WORCESTERSHIRE : WORCESTER

- 1 (13.11.2002) The Freehold land shown edged with red on the plan of the above title filed at the Registry and being 5 The Spinney, Worcester (WR2 6HL).
- 2 (13.11.2002) The land has the benefit of the rights granted by but is subject to the rights reserved by the Conveyance dated 10 April 1970 referred to in the Charges Register.

### B: Proprietorship Register

This register specifies the class of title and identifies the owner. It contains any entries that affect the right of disposal.

Title absolute

- 1 (09.01.2019) PROPRIETOR: 365 ASSET MANAGEMENT LIMITED (Co. Regn. No. 09581926) of Apartment 12, Harris Grange, 371 Prescott Road, St. Helens WA10 3AL.
- 2 (09.01.2019) The price stated to have been paid on 4 January 2019 was £80,000.

### C: Charges Register

This register contains any charges and other matters that affect the land.

- 1 (13.11.2002) A Conveyance of the land in this title dated 10 April 1970 made between (1) E. Fletcher Builders (Midlands) Limited and (2) Keith Francis Williams and Margaret Varlen Williams contains restrictive covenants.

~NOTE: Original filed.

End of register

# The Property Register

Nature of Title: Freehold/Leasehold

Class: Absolute/Possessory

Benefits

Adjustments to Plan



# The Proprietorship Register

Who owns it

Price Paid

Restrictions

- Notices
- Consent / trusts

# The Charges Register

Rights over land

Easements

Mortgages / Charges

Leases

# What to look out for

Easements

Charges

Trusts

Restrictions on disposition

Planning covenants – s.106



# The Title Plan

Location of the Property – ref Property Register

Red line

Other lines

OS Map Features

- Scale
- Accuracy

# What to look out for

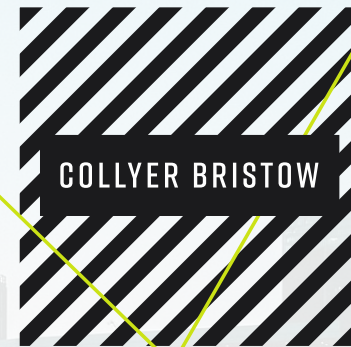
## S.60 LRA 200

- General Boundaries Rule
- Unless shown as determined, is a general boundary
- Does not determine the exact

## Scale

- 1:1250 Urban, 1:2500 Rural, 1:10000 Remote
- OS Map features
  - More than .3m high firm line
  - Where to parallel less than 1m apart (1:1250) or 2m (1:2500) only preferential feature shown





# CLAIMS FOR TIME & MONEY


**JONATHAN  
PAWLOWSKI**






# THE IMPORTANCE OF DELAY CLAIMS

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- Depending on the contract and the applicable law, when the project is in delay:
    - the Employer can claim liquidated damages; and
    - the Contractor can apply for an extension of time (EoT) and/or additional costs
- 

- Additional costs that a Contractor will incur on the project where the programme is prolonged as a result of a delay to the Completion Date.
  - Damages under a costs claim for delay usually involve:
    - extended site overheads,
    - extended head office overheads,
    - additional cost of financing; and
    - other time-related cost items, such as loss of profit/opportunities
- 

# HOW DOES THE CONTRACTOR PROVE ENTITLEMENT?

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## Elements required to be proved for recovery:

- the existence of a critical delay event for which the Employer is responsible and which entitles the Contractor to an EoT;
- the existence of additional costs suffered by the Contractor; and
- a direct link between the delay event or events and the costs which have been incurred.




# CONCURRENT DELAY

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- True concurrent delay is the occurrence at the same time of two or more delay events (Employer Risk Event and Contractor Risk Event), the effects of which are felt at the same time. Rare in practice.
- Concurrent delay often used to describe the situation where two or more delay events arise at different times, but their effects are felt at the same time.


### Relevant Considerations

- Any specific requirements of the contract
  - Prospective vs retrospective delay analysis
  - The nature of the delay events being considered
  - Records available
  - Programme information available
  - Time available
  - Value of the dispute
- 



# Principle Methods Of Delay Analysis

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- As planned impacted
  - Collapsed as built
  - Windows analysis
  - Time impact analysis
- 



= A prospective method where the impact of delay events on planned activities and sequences is identified/assessed and then inserted into the planned logic (i.e. into the baseline programme). The adjusted programme retains the original logic, so that the result shows what the plan might have been at the outset had the programmer known about the delay events which ultimately occurred.

- ✓ An agreed baseline programme is often available and can be agreed
- ✓ Quick and inexpensive to perform
- ✓ Suitable when the project has been built according to the plan
- ✗ If the project has not been built according to the plan, this method cannot be used
- ✗ The plan can be shown to be unachievable
- ✗ Concurrency in the impacted model may not reflect genuine concurrency on the project
- ✗ No account taken of float or criticality when a delay event starts

# Collapsed as Built

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= A retrospective analysis whereby the as-built programme is assessed and impact periods are identified and removed to show how the project would have been performed absent those impacts. The comparison between the as-built and the collapsed model represents the claimed delay.

- ✓ Starting point is based in fact (as built records) and can be agreed
- ✓ Reasonable level of detail – difficult to undermine
- ✓ The collapsed model includes the claimant's own delays and there is no assumption/reliance re the achievability of the plan
- ✗ Hindsight driven
- ✗ Includes inferred logic between as built activities to construct the as built model. This is subjective, but can substantially alter the critical path and the result of the analysis
- ✗ Time consuming and expensive
- ✗ No account taken of float at inception of delay
- ✗ Difficult to apply if delay event has led to acceleration or change in sequencing

# Windows Analysis

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= The project is dissected into discrete periods of time (windows). Each window is bounded by a programme update. Each window is then analysed to assess the shifts in the critical path and completion date during the window, and the reasons for the same. The delay caused is attributed to the relevant party (by reference, for example, to the as-built programme and factual events/records).

- ✓ Based on contemporaneous programme updates – the delays identified therefore reflect the delays actually reported at the time
- ✓ Accounts for changes in the programme logic and critical path. Also accounts for float.
- ✓ All of the delays in each window are allocated to one of the parties
- ✓ Provided that the programmes and records are available the analysis can be significantly narrowed to focus on a particular period if necessary.
- ✗ Completely reliant upon the availability of quality programme updates at regular intervals
- ✗ Unreliable progress reporting or a failure to account for logic changes will reduce the accuracy of the conclusions
- ✗ The expert's ability to assess and allocate the delay caused in each window may be limited by the frequency and granularity of the programme updates

# Time Impact Analysis

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= Requires a programme which has been updated to the point just before the occurrence of a delay event. The critical path and anticipated completion date is then identified. The programme is then altered to model the effect of the delay event (e.g. adding an activity and/or changing sequences or durations). The programme is then again rescheduled to show the new critical path and completion date and any critical impact caused by the delay event.


- ✓ Measures impact at the inception of the delay event (and therefore discount preceding issues/delays)
- ✓ Accounts for contemporaneous float on affected activities
- ✓ Thorough. Difficult to attack in detail quickly
- ✗ Complex and very time consuming and costly
- ✗ Reliant upon a very high level of Project documentation (not often available)
- ✗ Questionable reliability when analysis is done retrospectively (as requires analyst to put himself in position of contract administrator/employer at the time of the event and ignore all subsequent knowledge)
- ✗ If a number of delay events are being assessed, the analysis of the later events is based upon and uses the results of the analysis of the preceding events. Therefore, if the impact of the first event is shown to have been incorrectly analysed the whole analysis will be undermined
- ✗ Assumes that the underlying programme used for the analysis is reasonable and achievable





# COMMON PROBLEMS WITH CONTRACTORS' CLAIMS


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- Contractors lose their right to bring a claim either in part completely because they do not follow the contractual claims procedure
  - Contractors are unable to recover full compensation because they do not prepare their claims with the care and detail required
- 



# NOTICE REQUIREMENTS

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- Notices
    - Read the contract
  - Condition precedent
    - A contractor will lose a right to which it might otherwise be entitled
- 

# NOTICE REQUIREMENTS

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## CONDITION PRECEDENT

### FIDIC Silver Book 1999

#### Clause 20.1 (Contractor's Claims):

*"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Employer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance. If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply..."*

# CONCLUSION

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- Be familiar with the contract and not be scared to issue a Notice
- Maintain accurate contemporary records
  - Progress reports, correspondence and notices, regularly updated programmes, photographs of the progress of works, site diaries, labour records and invoices
- Comply with requirements in contract on content and service
- Follow up with if a party fails to respond to Notices or provide approvals



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