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# REAL NEWS

AUTUMN EDITION 2016

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Welcome to the autumn edition of Real News in which:-

**Rob Shaw** explores **PropTech** and the opportunities for real estate (page 03);

**Peter Fletcher** looks at the case of Ottercroft and the court's willingness to grant **injunctive relief** in a rights of light case (page 05);

**Sophie Stewart** and **Claire Stoneman** consider the **Neighbourhood Planning Bill** and its impact on CPO compensation (page 06); and

**Lucy Hopson** comments on the case of Riverside Park Ltd v NHS and how tenants should resist **vacant possession preconditions** in their break clauses (page 08).

Please do get in touch with any requests for future content.

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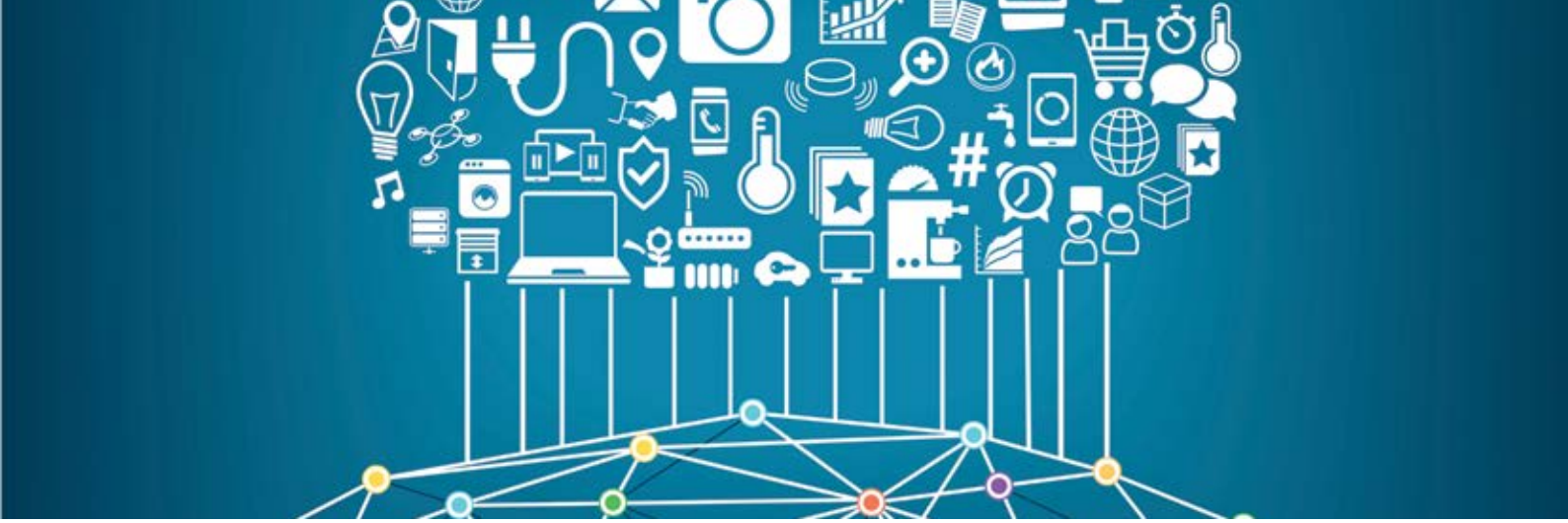

# PROPTECH – OPPORTUNITIES FOR REAL ESTATE

*The internet will fail*[1]……. a solid prediction....

Today the internet could not be more central to everything we do. It is a prime example of the impact of technology on our lives and the best illustration that we ignore technology at our peril. That applies to the old reliable Real Estate sector just as much as any other, which, whether you realise it or not, is beginning to be swamped by a wave of new property technologies or "PropTech".

In fact PropTech has been around longer than you might think, although it is only in the last 2 to 3 years that we are now beginning to see the real impact and disruption that technologies are causing in the real estate industry. That is not to say that real estate has never embraced technology, of course it has, just perhaps not at the rapid pace that things are now starting to happen and which allow us to see and feel technological impacts more tangibly. You may already be aware of some property technology companies, projects, apps, devices and systems but you may not associate them with the "*Prop Tech*" sector (see the box on below for some examples), but do you know what the Internet of Things, AI, augmented reality and blockchain are? Probably not, but you might well need to learn about them and fast as they are some of the key predicted technology trends for the coming year[2].

PropTech is the "*adoption of hardware or software technologies to solve problems relating to properties*"[3] or as others have put it, a way to streamline processes and improve efficiencies. Examples include: technologies that can gather and provide more information on what buildings contain[3]; smart or connected buildings that are designed and built to be more economic for their owners, more functional for their occupiers[4] and better linked to their surroundings and local infrastructure; and speeding up the transactional process of granting a lease or purchasing a property.

To a sector that is commonly viewed as slow on the uptake of new technologies, PropTech is impacting all areas (from offices to industrial, residential to student accommodation, retail to mining, planning to construction and beyond) and all stakeholders (including owners to tenants, agents to funders, developers to the person simply passing by the front door of the building on the street). As such, as technology becomes more important to everything it is essential that the sector seizes the opportunities that technology presents. Those opportunities will present themselves in many ways and the challenge is to identify them and find ways to deploy that technology as new and alternative ways to do business and generate revenue from real estate assets. At the same time those changes may fundamentally disrupt some or all of the existing ways of working so that all stakeholders (including the lawyers!) will need to adapt and change. The scale and scope of impact is and will be wide and varied.

What changes and challenges will be faced from a legal perspective cannot be known with certainty in advance (other than that the law will most likely lag behind as it waits to see how matters develop and where legal intervention is needed). Some legal issues to keep an eye on may include:

- data will be key in ensuring the growth and success of property technologies and the real estate sector as a whole going forward. The collection and use of data means that real estate stakeholders will need to get to grips with the legal issues surrounding data protection legislation;

[1] Newsweek – "The Internet? Bah!", Clifford Stoll, 1995

[2] Gartner's Top 10 Strategic Technology Trends for 2017 – http://www.gartner.com/smarterwithgartner/gartners-top-10-technology-trends-2017/

[3] Dr Rick Holland, 24 March 2016 – Heralding the next generation of Prop Tech (https://innovateuk.blog.gov.uk/2016/03/24/heralding-the-next-generation-of-proptech/)

[4] Smart Buildings Magazine – http://www.smartbuildingsmagazine.com

- similarly, once a building is "connected", it can become a target for cyber criminals and therefore cybersecurity for property owners and managers becomes a much more relevant consideration;
- the increasing appetite for flexible and co-sharing workspaces brings implications for what the exact legal nature of an entity's occupation is; how alterations are authorised and made to properties; and how the security of tenure legislation will continue to apply;
- tech companies and providers will become or have already become new players in the real estate market. That creates new and additional relationships for existing stakeholders such as owners and occupiers to learn about and manage;
- with more data available the speed at which a deal can happen should be greatly increased. Agents will have a greater volume and detail of data available to use for comparables; viewings may be undertaken remotely or using augmented reality; and how documents are negotiated (or at least what is important in the negotiations) will change.

Put simply some issues that were never thought important (or even considered) in the past could now start to become front and centre and changes will undoubtedly be required as the Prop Tech revolution brings new opportunities for all.

Whilst there are many tech start-ups and some will never make it to fruition and fail, you can guarantee there are some that will (some already have) and they should not be ignored. The possibilities are fascinating and exciting and you should consider now how technology can assist and improve your business.

- **Airbnb** – an online market place that enables people to list and rent out their own residential properties with Airbnb receiving a percentage of fees from each booking. It has been disrupting the holiday lettings market and short term let market for a while (although the recent case of *Nemcova – v – Fairfield Rents Limited* [2016] shows some of the risks faced by those trying to take advantage of this technology).
- **YourWelcome** – provides rental tablets containing software to assist holiday and short term lettings guests, such as information on the property and local areas and links or contact information for external companies such as taxi firms and takeaways. A good example of technology opening up new revenue streams, as every click on one of the links generates a share of the profit delivered back to the host. YourWelcome is now looking to move into serviced apartment and Private Rented Sector opportunities.
- **Kontor** – a niche real estate advisory firm focused on tech start-ups devising technologies for property, that aims to assist with locating and developing spaces that work for these companies instead of the companies having to fit into and adapt to existing spaces. Their focus is on occupier sectors, such as tech companies, rather than the usual local geographic markets.
- **High Tower** – is a leasing management platform for commercial real estate helping landlords and agents by providing real time leasing data and mobile apps to collaborate in real time to streamline deal tracking and analysis and ultimately speed up the deal making process[5].
- **KIRA** – is software that DLA Piper has deployed on real estate projects to assist with the review of documents and from which we have been able to generate up to 20% increases in efficiency compared with work carried out prior to Kira's involvement. The software can be trained to recognise certain information and is already being used to speed up transaction times.
- **Pokémon Go** – not really "*Prop Tech*" but a computer game which demonstrates the potential uses and impact of augmented reality. Essentially the game requires players to move around outside and capture different "Pokémon" which are projected by the app onto the users' view of the real world by the camera on their smartphone. A great illustration of how information can be layered on top of a real world view using a computer, tablet or phone for instance and how that might be relevant for property viewings or development.

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[5] https://www.gethightower.com


# MISBEHAVE AT YOUR PERIL – A WARNING FOR DEVELOPERS ON CONDUCT

The recent case of *Ottercroft* sent out a clear message from the courts to developers that poor conduct will not be tolerated and could lead to injunctions being granted where previously damages would have been awarded.

***(The facts)***

Scandia Care Limited was a developer carrying out works on a small development of their premises in High Wycombe. Dr Rahimian was a director of Scandia but was for all intents and purposes the controlling influence behind the company.

Part of the mixed use development included the replacement of an existing wooden staircase with a metal staircase on the exterior of the building. The new staircase infringed Ottercroft's right to light.

Ottercroft raised objections to the development, they were a restaurant and the staircase was blocking their kitchen windows. Scandia was aware of the objections and the fact they were infringing Ottercroft's rights, but chose to proceed regardless. This was in spite of Ottercroft threatening legal proceedings.

In the face of threatened legal proceedings and clear objection being raised, both Scandia and Dr Rahimian gave undertakings to Ottercroft that its right to light would not be infringed by the development. In clear breach of their undertakings Scandia then continued to proceed with the works on the site at a time when they knew Ottercroft's premises to be empty.

In light of the behaviour of the developer and Dr Rahimian, the County Court granted a mandatory injunction requiring the removal of the staircase (upheld on appeal). This was despite the fact that the value of the right to light infringement was £886 and the cost of removing the staircase was estimated to be around £6,000.

***(Legal comment)***

This is a right to light case that provides an excellent demonstration of the regard that the court will have for bad conduct when considering whether to grant an injunction. A relatively minor infringement of a neighbour's right to light resulted in an injunction being granted for the benefit of Ottercroft. Although this measure seemed fairly draconian, on closer inspection of the defendants conduct it was clear they had acted in an unconscionable manner.

The key take home point from this case is that the court will place significant weight on the conduct of the parties. In Ottercroft a relatively minor infringement with limited monetary implications was the subject of an injunction due to the defendants breach of undertakings and deceptive behaviour.

*Ottercroft Limited v (1) Scandia Care Limited (2) Dr Mehrdad Rahimian [2016] EWCA Civ 867*

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# NEIGHBOURHOOD PLANNING BILL – ALL CHANGE FOR CPO COMPENSATION

The Neighbourhood Planning Bill was published on 7 September 2016. The Bill has a number of aims:

- it seeks to streamline the procedure for modifying neighbourhood plans, and to speed up the time when plans come into force after they are approved in referendums;
- it seeks to introduce measures to help free up land for, and speed up the delivery of new homes; and
- most controversially the Bill also contains provisions to "simplify" compulsory purchase, in particular by clarifying the compensation process which is currently made up of a number of statutes and case law, to provide "a fairer system" which will not affect the fundamental principles on which it is assessed.

The measures being taken forward in this Bill which will affect landowner or occupier compensation are to:

- Codify and extend the disregard to value reflecting the "no scheme world" to include previously consented "relevant transport projects". This means that any uplift in value of land as a result of early enabling infrastructure works (which is currently captured and claimable) will be disregarded, along with any uplift in value as a result of the scheme that underlies the compulsory purchase. The value of the land will be assessed as if no development at all had taken place.

A "relevant transport project" will be one where the regeneration or redevelopment that triggered the CPO formed part of the justification for the earlier transport scheme and whether the relevant transport project first opened for use more than 5 years after clause twenty two is commenced (mid-2022 based on current predicted commencement of mid-2017). Those who have purchased land after 8 September 2016, after the publication of the Bill, are expected to be aware of this difference and to factor it into the price.

Anyone looking to purchase land which could be affected by a CPO in the future must therefore be careful to factor this change into their negotiations in order to minimise the risk of buying land at a premium only to find that the uplift caused by enabling works cannot be recouped. The Bill also seeks to put in one place the current principles of the "no scheme world" derived from various judicial decisions and pieces of legislation.

- Reform the "Bishopsgate" principle. Under the current rules, compensation for licensees is assessed by reference to how long the land might be available for the licensee's occupation. In contrast, for short term tenants and tenants whose lease is subject to a break clause, the landlord is assumed to terminate the interest at the first opportunity. The reform will put compensation for short term tenants and tenants with a break clause on the same basis as for licensees.

For tenants without security of tenure under the Landlord and Tenant Act 1954, the likely prospect of a renewal tenancy must be taken into account.

- Repeal Part 4 of the Land Compensation Act 1961, which governs compensation where the acquiring authority obtains a more valuable planning permission than expected. The government believes that Part 4 should not be necessary, as the potential for obtaining planning permission in the future already forms part of the statutory assumptions for calculating compensation but at the moment it is an explicit safeguard for affected landowners.
- Provide for temporary possession, to allow bodies with CPO powers the power to temporarily enter and use land to deliver the scheme. The government will build safeguards into the power, for example regarding the reinstatement of the land and protecting the status of tenants. This will bring significant benefits to acquiring authorities and their development partners in terms of the compensation bill for a scheme, as often land and particularly rights over land are only required during construction but payment must be made for a permanent interference. Conversely, however, it may bring about a decline in engagement with landowners by authorities. Currently, where land or rights are only required on a temporary basis, authorities must engage with landowners and occupiers to agree temporary measures, or a relinquishment/sale back in the future to minimise objections and compensation. Often landowners can get a better deal by private treaty so they may need to be more proactive in future!
- Repeal section 15(1) of the Land Compensation Act 1961, which assumes that planning permission would be granted for the acquiring authority's scheme. This is an administrative tidying exercise as the section has already been made redundant by section 232 of the Localism Act 2011.

The Government has also committed to bring forward a package of further measures affecting the calculation of CPO compensation under secondary legislation, as soon as possible. These include:

- Reversing the loss payment share for landlords and occupiers. Presently, owners of land are likely to receive more compensation than occupiers. This is unfair, the occupier suffers the greatest inconvenience by having to close down or relocate. Going forward, occupiers will receive the greater share of loss payments. Current caps on payments will also be reviewed.
- Setting the penalty interest rate for late payment of advance payments at 8% above base rate.
- Statutory blight. At present, owner-occupiers of non-residential and non-agricultural properties may submit a blight notice if the property's rateable value is below £34,800. The Government will set a higher rateable value limit in Greater London and will also consider whether a higher limit is required in other areas of the country.


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# TENANTS' BREAK RIGHTS AND VACANT POSSESSION DO NOT MIX

Tenants should not agree to a break right subject to a condition that requires that they give vacant possession. If you are a tenant wishing to exercise a break right subject to a condition to give vacant possession, make sure you engage with the landlord early on to see if it can agree on an open basis the works which will satisfy that condition.

In the case of *Riverside Park Limited v NHS Property Services Limited* [2016] EWHC 1313 (Ch) the court had to determine whether or not the NHS, which had served a break notice, had complied with a condition on its right to determine its lease to give vacant possession. The property was open plan when it was let to the NHS but the NHS had installed partitions in the property and the court had to decide whether or not those partitions were chattels or tenant fixtures. The judge ruled that:

- the partitions were chattels as they were demountable and had been fitted for the benefit of the tenant rather than to provide a lasting improvement to the premises; and
- the partitions interfered with the landlord's right of possession which meant that the tenant had not given vacant possession.

The judge considered that each case will turn on its own facts. So, his decision here that the partitions were chattels does not mean that it will always follow that, if partitions remain in place, a tenant will fail to have provided vacant possession.

The case was similar to one that DLA Piper recently took to the County Court at Central London, ***The Secretary of State for Communities and Local Government v South Essex College for Further and Higher Education***. We acted for the landlord, the Secretary of State. The college

had served a break notice and one of the break notice conditions was to give vacant possession of the property. We successfully argued that the college had not given vacant possession of the premises as it had:

- failed to return all the keys and electrical fobs to the premises to the Secretary of State before the break date;
- left part of the premises alarmed and not provided the Secretary of State with the alarm code; and
- left a large number of chattels on the premises (a photocopier, a box of student files, cleaning equipment, electrical equipment and internal demountable partitions).

The Secretary of State had not given its consent for the installation of the partitions and the judge agreed with our client's contention that the partitions were chattels and not tenant's fixtures. This resulted in judgment for the Secretary of State for over £360,000 plus costs and interest. In addition, the college had not determined its lease and so it has to continue shouldering its lease liabilities.

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