

# A game of drones

The use of drones in the UK is increasing rapidly. Real estate already benefits from the technology but as their use becomes more prevalent it's important to understand what they are, how they are used and what the risks are. Graham Cutts and Dion Panambalana are on the case.

## What are drones?

Drones are unmanned flying vehicles, which means that they are not piloted in the air but controlled remotely by someone on the ground. The media use drones to produce real-time footage whereas the fire services use them to provide an aerial perspective on operations and in agriculture, they are used for crop dusting. While Facebook works on an ambitious plan to use drones to provide wireless internet access in remote areas, Amazon is proposing to revolutionise its service through delivery by drone.

Drone technology presents many opportunities for the real estate sector. Already, construction companies use drones to survey sites and local authorities use them to assist with planning applications. A recent report<sup>1</sup> by The Future Laboratory even suggests that drone visits will replace property viewings by 2025.

However, drone operators must be wary when flying drones over land they don't own. Equally, landowners should be aware of their rights when drones pass through their airspace.

Drone use can:

- breach aviation regulations;
- be a trespass and/or a nuisance;
- cause property damage; and
- infringe privacy and data protection laws when drones are equipped with photographic equipment.

## What's the law on this?

Regulations differentiate drones by weight. Drones over 150kg are within the remit of the European Aviation Safety Agency<sup>2</sup>. Drones below 150kg are regulated by national aviation authorities which, in the UK, is the Civil Aviation Authority.

The primary UK legislation is the *Aviation Navigation Order 2009*<sup>3</sup>. The Civil Aviation Authority has usefully explained how this legislation applies to drones in its publication: *Unmanned Aircraft System Operations in UK Airspace*<sup>4</sup>.

Under the legislation<sup>5</sup> small drones weighing not more than 20kg are the operator's responsibility. The operator must maintain direct, unaided visual contact with the drone. The Civil Aviation Authority explains that this usually means 500m horizontally or 400ft vertically unless an approved anti-collision system is fitted.

You need air traffic control permission to fly a drone weighing more than 7kg in controlled airspace. A useful website called [www.noflydrones.co.uk](http://www.noflydrones.co.uk) has an interactive map feature showing UK no fly zones, which shows that most of London is a no-fly zone.

The operator doesn't need a licence. However, the operator does need CAA permission to fly a drone for "aerial work" which broadly means flying a drone commercially. If flying for the purposes of surveillance or data gathering you'll also need permission to fly:

- over or within 150m of a "congested area" which is widely defined as an area substantially used for residential, industrial, commercial or recreational purposes;
- over or within 150 metres of an organised open-air assembly of more than 1,000 persons;
- within 50 metres of any vessel, vehicle or structure not under your control; or
- within 50 metres of any person.

<sup>1</sup>8 March 2016

<sup>2</sup>Regulation 216/2008

<sup>3</sup>SI 2009/3015

<sup>4</sup>CAP 772: Unmanned Aircraft System Operations in UK Airspace

<sup>5</sup>Articles 166 and 167, Aviation Navigation Order 2009

More onerous regulations apply to drones over 20kg up to 150kg. Airworthiness approval and registration with the CAA are required.

Violation of the legislation incurs criminal liability. The CAA has successfully brought prosecutions. For example, an individual was prosecuted last year for nine offences having flown his drone over iconic London sites and live football matches.

It's crucial that drone operators understand these regulations before flying a drone.

#### Drones in your airspace? Trespass and nuisance

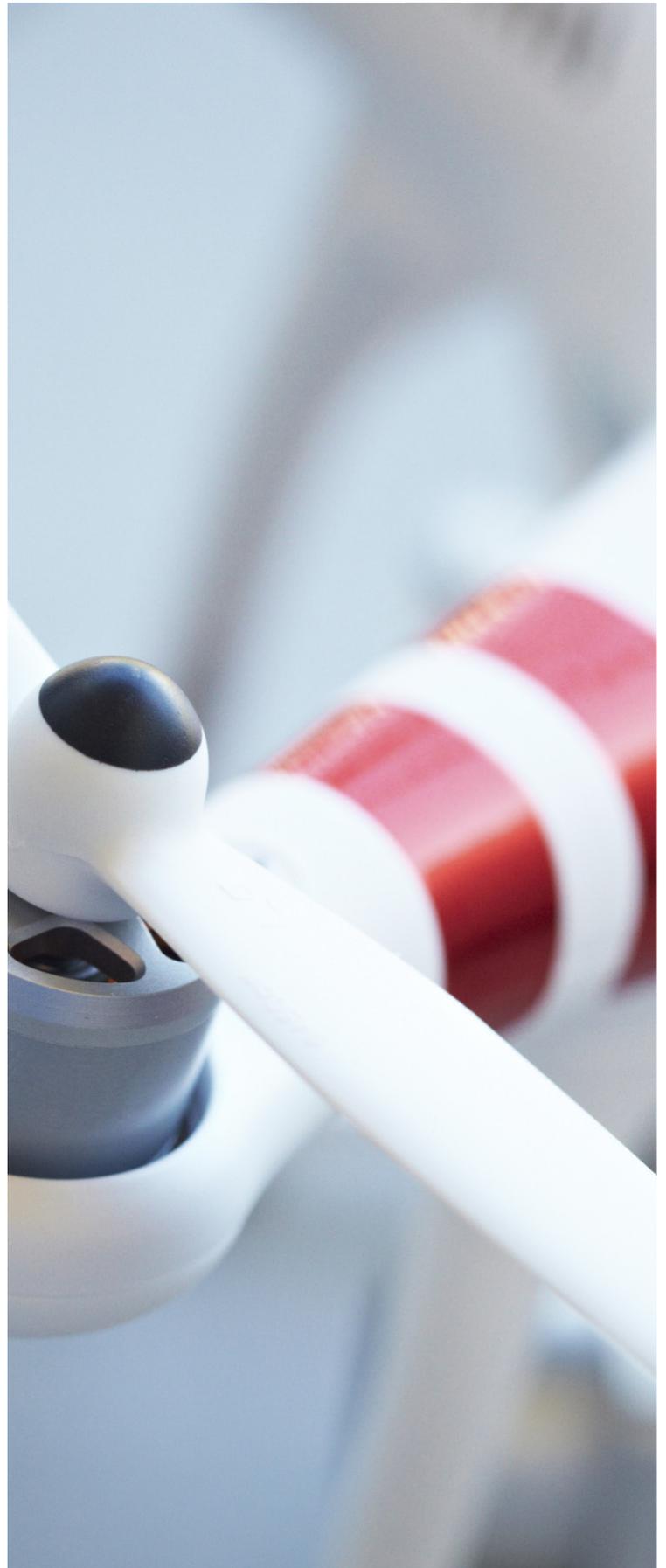
The case of *Bernstein of Leigh v Skyviews & General Ltd*<sup>6</sup> established that a landowner's airspace extends to such height as is necessary for the ordinary use and enjoyment of the land. Skyviews took a photograph of Bernstein's house using an aeroplane then tried to sell it to him. The court decided that Skyviews had not infringed Bernstein's airspace and therefore there was no trespass.

However, in *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd*,<sup>7</sup> Berkley's cranes invaded Anchor's airspace by swinging over Anchor's land and that invasion had amounted to a trespass given the regularity and permanence of the infringement.

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<sup>6</sup>[1978] Q.B. 479

<sup>7</sup>38 B.L.R. 82



So, to establish aerial trespass you need to establish some permanence of the infringement, otherwise temporary airspace invasion may at worst only be a nuisance. Based on *Bernstein*, someone flying a drone over your land to take a photograph is probably not committing aerial trespass. But flying over your airspace on a daily basis and remaining in that airspace for a length of time disproportionate to the need to do so may amount to a trespass and making a continuous video recording may amount to a legal nuisance (bearing in mind that nuisance can arise from a single incident). The law is currently untested and each case will turn on its facts. However, bringing an action for trespass is not easily done without significant evidence to demonstrate the infringement and degree of permanence.

### Privacy and data protection

Drones equipped with cameras run the risk of breaching rights to privacy and data protection laws. Article 8 of the European Convention on Human Rights establishes the right to respect for private and family life. Additionally, images of identifiable persons could fall within the definition of “personal data” for the purposes of the *Data Protection Act 1998*.

The Information Commissioners Office has explained that drones are highly likely to invade privacy due to their ability to operate at significant height and their unique vantage point. The ICO has provided some useful guidance on avoiding infringement which includes:

- only activating the drone’s recording equipment when necessary;
- secure storage of any images and destroying these when no longer needed;
- restricting the drone camera’s vision so it can only focus on one place; and
- notifying individuals that they are likely to be recorded, for example, by erecting signs.<sup>8</sup>

<sup>8</sup>For more ICO guidance see <https://ico.org.uk/for-the-public/drones/> and <https://ico.org.uk/media/for-organisations/documents/1542/cctv-code-of-practice.pdf>.

<sup>9</sup>s.76(2) Civil Aviation Act 1982

<sup>10</sup>Data Protection Directive (95/46/EEC)

### Property damage

Drones can cause property damage if flown negligently, or if the drone itself becomes defective or an item is dropped from it. A claim can be brought under the Civil Aviation Act 1982<sup>9</sup>, where aircraft owners are liable for damage caused to any person or property by a person in, or an article falling from, an aircraft unless the injured party have themselves been negligent. Equally, there may be scope to claim under an owner’s buildings insurance given that damage caused from planes or things dropped from them is often an insurable risk. It remains to be seen (and tested by the courts) whether drone damage would be insurable on the terms we’re all used to.

### What future legal developments can we expect?

In March 2015, the government explained that its objective is to integrate drones fully into the aviation system. It acknowledged that the public need reassurance regarding security, privacy and data protection, but also that overregulation risks killing off the industry.

We can therefore expect legal and regulatory development as the drone market expands. Brexit creates an added complication as much of the existing regulatory framework is European. How will the Civil Aviation Authority take on the European Aviation Safety Agency’s responsibilities? The Data Protection Act implemented a European Directive<sup>10</sup> into UK law so how will leaving the EU impact data protection? Questions such as these will need to be answered in a post-Brexit world.

Clearly, the technology and the law are in flux. Nevertheless, as an industry that is open to change, the real estate sector should embrace these developments to harness the unique opportunities drones can provide.



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## Drones: the key facts

- we're likely to see more drones in our skies in the foreseeable future;
- drone operators should be aware of the legal framework around fly zones together with the risk of infringement of a land owner's rights;
- for landowners and occupiers, successfully establishing aerial trespass may be difficult although nuisance may be an easier win;
- drone use can breach aviation regulations which differentiate drones by weight.