

# LawyerIssue



## PROPERTY RIGHTS, AIRSPACE AND DRONES FROM AN IRISH PERSPECTIVE

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The Irish Aviation Authority (IAA) estimated that as at 21 December 2015 there were circa 4,000-5,000 drones in use in Ireland[1]. Since then, the Irish Aviation Authority Small Unmanned Aircraft (Drones) and Rockets Order 2015[2] has made registration for drones over 1kg compulsory. As of 29 June 2016 the IAA confirm there are 5,346 Small Unmanned Aircraft (which includes 'drones' and 'model aircraft') registered with the IAA. Drones are being used commercially[3] in the construction industry for site selection, surveying and real time work inspections, while estate agents are also exploiting the benefits drones have to offer in providing video aerial scapes of properties on their websites. In 2013 Amazon announced its intention to use drones to deliver products to customers and in December 2015 released a video showing a prototype of one of its Prime Air delivery drones. DHL have been the first parcel service provider worldwide to integrate a parcelcopter logistically into its delivery chain. The Irish start up, GolfBirdie uses drone technology to give golfers a free "hole to hole" flyover guide of golfcourses worldwide. Media companies are testing drones for filming reports, news coverage and in the film industry for shots that generally would have been taken from planes and helicopters. Local Authorities could utilise drone technology to monitor traffic conditions and capture planning and environmental breaches. Drones could also be used to provide armchair sports enthusiasts with court and pitch side views of tennis, rugby and football

games. The versatility and use to which drones can be put to is far reaching and has led to U.S government agencies using drones to fight fires, for search and rescue missions, catastrophic events and for monitoring volcanic eruptions and tornadoes.

Along with drones, jet packs are also making an appearance. On 9 March 2016 Nick Macomber (also known as Jet Pack Man) took to the skies of Dublin as he flew along the river Liffey with a jet pack strapped to his back as part of a marketing campaign. While the unusual sight intrigued many and garnered the publicity the public relations campaign anticipated, issues of aerial/property trespass and invasion of privacy may have arisen had he flown over Áras an Uachtaráin (the President of Ireland's official residence), Dáil Éireann (the Irish Parliament) or Mountjoy Prison.

The increase in the number and use of drones and rockets has raised the legal question as to the ownership of airspace, property rights and a landowners right to sue for trespass.

So what is the law in Ireland in relation to the ownership of airspace and property rights? While higher altitude airspace is considered as public "navigable" air space, the ownership of lower altitude airspace over private property is more opaque.

Epochs ago before the Wright brothers conceived of flying, the Latin maxim of "cujus est solum ejus usque ad coelum et ad infernos", literally translated as "he who owns the soil owns everything above and below from heaven to hell", was promoted. However, a landowner will never enjoy such wide ranging rights as the maxim suggests.

Kevin Gray author of "Property in Thin Air"(1991) 50 Cambridge LJ 252-307 notes "fee simple ownership cannot confer on the modern landowner a limitless dominion over the vertical column of airspace grounded within the territorial boundaries of his or her realty".

According to Yehunda Abramovitch[4] the ad coelum maxim has been "grievously misunderstood and misapplied so far as the upward limit of air is concerned". In England the maxim has no authority and is in fact widely criticised in case law. In *Star Energy UK Onshore Ltd. v. Bocardo*, [2009] EWCA Civ 579, Justice Aitkens of the Supreme Court of Judicature, Court of Appeal, Civil Division in England was very outspoken in his criticism of the Latin maxim in so far as it relates to ownership of the subsoil stating:

"The owner can only claim title for so far beneath the surface as is reasonable to enjoy his ownership of the surface land. The 13th century Latin maxim *cuius est solum, eius est usque ad coelum et ad inferos* is not and never has been a rule of English law. It is so sweeping, unscientific and unpractical a doctrine as is unlikely to appeal to the common law mind and it has not done so."

Case law in common law jurisdictions indicates that a landowner can claim ownership only to so much of the airspace above or substratum below the surface as is physically or commercially exploitable. In *Breakfast Investments PTY Ltd v PCH Melbourne PTY Ltd* [2007] VSCA 311 the appellant appealed[5] against the decision of a judge of the trial division to grant a mandatory injunction to remove cladding which encroached 3-6 centimetres into the airspace of the respondent's adjoining property. The Supreme Court of Victoria dismissed the appeal. In a leasehold context the case of *H Waites Ltd v Hambledon Court Ltd* [2014] EWHC 651 CH a block of flats with garages were let on a 999 year lease. The landlord wanted to build

above the garages and the tenants objected claiming their lease included the air space above the garages. The lease did not exclude the air space and the English High Court concluded that the tenants owned the air space. One factor in the tenants favour was the length of their 999 year lease which was seen as equivalent to owning a freehold. In the Australian case of *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464 which involved the construction of a multi storey building, screens were used to protect the works and prevent building material falling from the building. The screens moved upwards as the building was constructed and the plaintiff claimed the screens encroached his building's airspace. The Court granted the injunction and said any hardship caused to the defendant was their own doing due to the construction method they decided to use.

Accepting that land includes a right to a certain portion of the airspace above, it follows that intrusions into an owner's airspace require the agreement of the landowner. In *Anchor Developments Ltd v Berkeley House (Docklands Developments) Ltd* [1987] 38 BLR 82, the court in England granted an injunction to prevent Berkeley's crane from oversailing Anchor Brewhouse's land. The Court reasoned "If an adjoining owner places a structure on his (the adjoining owner's) land that overhangs his neighbour's land, he thereby takes into his possession airspace to which his neighbour is entitled. That, in my judgment, is trespass."<sup>[6]</sup> This case established the need for permission to oversail adjoining property. Oversail agreements for wind turbines placed on the edge of a windfarm where the rotor diameter of the turbine (being, the swept area of the turbine blades) extend beyond the wind farm boundary are an example of a now common place acceptance that landowners have rights in respect of the airspace above their land, which third parties are not entitled to infringe.

Consequently, any unauthorised intrusion into that airspace is therefore a trespass and any owner of land whose airspace rights are infringed, can seek damages and/or an injunction to restrain the trespass.

In the English case of *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978] Q.B 479 at 485 the plaintiff sued the defendant for trespass where the defendant had taken an aerial photo of the plaintiff's property which he then attempted to sell to the plaintiff. The case was influential in clarifying that a landowner does not own all air space above his property and that there was "a need to balance the rights of an owner to enjoy the use of his land against the right of the general public to take advantage with all that science has to offer in the use of air space".

In Ireland the Irish Courts in *Keating & Co Ltd v Jervis Shopping Centre Ltd* [1997] 1 IR 512 also treated an airspace intrusion as trespass and awarded the plaintiff damages. The decision established the principles that an invasion of lower stratum air space is prima facie actionable in trespass and often in nuisance.

## **Conclusion**

Case law therefore indicates that land normally includes such airspace above it as is necessary for the ordinary use and enjoyment of the land and buildings on it and that a landowner can claim ownership only to so much of the airspace above or substratum below the surface as is physically or commercially exploitable.

This is also supported in Ireland by legislation as The Land and Conveyancing Law Reform Act

2009 defines "land" as including "the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such air space whether the division is made horizontally, vertically or in any other way". However the question which the 2009 Act fails to address is the actual extent of airspace rights and ownership over private property. It makes no attempt to frame the "balance" spoken of in *Baron Bernstein of Leigh v Skyviews & General Ltd.*

The borders between the lower and upper strata of airspace has never been quantified due to the hesitancy of the Courts to define the scope of airspace within a landowners domain. In most cases the Courts have held that the lower stratum is unlikely to reach an altitude of more than 200 metres above roof level as otherwise satellites and air crafts could be accused of trespass. Legal immunity has been granted to overflying aircraft engaged in "innocent passage" in the upper stratum of airspace. However, Courts have refused to treat industrial surveillance and invasive photographs of celebrities homes as "innocent passage". The UK Independent Press Standards Organisation upheld a breach of privacy complaint from the Duke of York after a certain tabloid sent a helicopter over the grounds of his property on 19 June 2015 to take pictures of Princess Eugenie's 25th birthday preparations.

In the United States, federal legislation clarified the upper stratum airspace by defining "navigable airspace" as being 500 feet above ground level. In the case of *United States v Causby* (1946) 328 U.S 256 at 260 which involved a low flight path of U.S bombers over Mr. Causby's chicken farm, the intensity of the noise and vibrations led to the death of his chickens and mental distress for Mr. Causby. The Court noted that the *ad coelum maxim* had "no place in the modern world" however a landowner has a claim to low altitude airspace and invasions of it are similar to invasions of the surface. This decision confirmed the existence of landowner rights in the lower stratum of airspace over private property.

As drone ownership becomes more popular, so too will the legal issues surrounding their use and operation and an individuals privacy and property rights. A perfect example of this is a recent Kentucky action taken by John Boggs against William Merideth. Boggs a drone aficionado was using his drone to take aerial landscape photographs when it was shot out of the air by William Merideth. Merideth argued in Court that he believed the drone was taking videos of his daughter and he acted to safeguard his family and property. A Kentucky district court dismissed the criminal charges that were levelled against Merideth and held he had a right to shoot the drone. Boggs has since brought a federal court action seeking clarification around the rights of property owners and aircraft operators. Interestingly, under Kentucky law property owners can "respond" to a trespasser using physical force unfortunately the definition of a trespasser only relates to a "person who enters or goes upon the real estate of another without any right".

The position is not any better in Ireland. In principle, on the basis of the case law any unauthorised intrusion into airspace used and enjoyed by the land and buildings on it is capable of being an actionable trespass so that any owner of land whose airspace rights are infringed, can seek damages and/or an injunction to restrain the trespass. Applied to drone use, this should mean that while a landowner does not have an absolute right in the airspace above his property, he does have the right to use his land uninterrupted by flights which could reduce the owner's real enjoyment of his land. Or does it?

Under the Occupier's Liability Act 1995 a "trespasser" is defined as an entrant other than a recreational user or visitor. While an "entrant", in relation to a danger existing on premises,

means a person who enters on the premises and is not the sole occupier. Further, Section 55 of the Air Navigation and Transport Act 1936 provides that no action for trespass or nuisance shall lie by reason of the flight of aircraft (defined as kites, balloons, gliders or airships) over property at a height which is reasonable taking into consideration wind, weather and all reasonable circumstances. The Order mentioned at the outset as introduced in Ireland in 2015 stipulates (among other conditions) that a person who has charge of the operation of a small unmanned aircraft with a mass of less than 25kg shall not allow it to be flown unless otherwise permitted by the IAA at a height of more than 120metres above the ground or water and at a distance of less than 30m from a person, vessel, vehicle or structure not under the direct control of the operator. The Order does not apply to drones and small unmanned aircraft of less than 1kg maximum mass less fuel constructed of wood, paper or frangible plastic operated below 15m above ground or water.

Dr. Kathryn O’Sullivan<sup>[7]</sup> of the University of Limerick is of the view that policing and proving a breach of lower altitude air space will be difficult. To overcome these challenges, Dr. O’Sullivan suggests a requirement for commercial drones to maintain altitude and co-ordinate tracking logs. For recreational users, it may not be practical to maintain such logs. Similarly, identifying the drone owner could also prove problematic unless as Dr. O’Sullivan suggests there is a requirement for all drones to have an exclusive registered number similar to a chassis number printed on the undercarriage of the drone.

People, especially in densely populated urban areas, will seek to prevent or at least minimise drone access to their properties not only from a safety perspective, but also to ensure their property and privacy rights are protected. With the introduction of new drone technology comes the need for legislative reform to clarify the ownership of lower altitude air space. Dr. O’Sullivan advocates adopting a “bright line” approach. Utilising objective factors, would leave little or no scope for varying interpretations as to the extent of property rights over private property. This would give drone users and property owners clear guidance as to potential infringements thus avoiding potential lawsuits.

Finally, it would seem prudent for Irish legislators to review and amend (if necessary) real estate, civil liability, data protection, product liability, health and safety and insurance legislation so that the legal framework is in place to deal with the unique legal issues that widespread use of drones will introduce.

[1] This estimate was based on information provided to the IAA by some retailers ahead of their Christmas sales and would have included drones of all sizes including very small hobby/toy drones.

[2] S.I no 563 of 2015

[3] The IAA confirm the number of Aerial Work Permissions (old) and Specific Operation Permissions (new) issued to organisations and currently active in Ireland is 124.

[4] LL.B, Tel-Aviv University, Israel and second year graduate student in the Institute of Air and Space, McGill University

[5] The appellant appealed only in relation to the trial judge's refusal to award damages in lieu of a mandatory injunction to remove the cladding.

[6] See also *Woolerton and Wilson Ltd v Richard Costain Ltd* [1970] W.L.R 411 where an injunction was awarded against the defendant builder whose crane jib crossed the airspace of the plaintiff's adjoining property albeit the injunction was postponed for 12 months to give the defendant an opportunity to finish the job.

[7] Low flying drones and ownership of airspace in Ireland (2016) 21(1) *Conveyancing and Property Law Journal* Vol 21 No. 1

 **Bio**



**Denise Dockery**

Solicitor at McCann FitzGerald

Email: [denise.dockery@mccannfitzgerald.com](mailto:denise.dockery@mccannfitzgerald.com)

Tel: +353 1 607 1306

Denise works in our Real Estate Group and has several years' of multi-faceted commercial real estate practice. Denise's extensive commercial and residential real estate experience has enabled her to devise bespoke solutions to novel real estate issues, leveraging her legal/commercial acumen in the various high profile transactions she has been involved in. Denise has been a joint contributor to the Irish Chapter of The International Comparative Legal Guide to Real Estate from 2008-2015 (Global Legal Group Ltd, London).