

IT'S THE LAW: Drones

Oh look, it's Devonshires, droning on again



Is it a bird? Is it a plane? No, it's a surveyor (or other building professional)!

Landowners, property professionals, developers and contractors are now taking to the skies when it comes to carrying out surveys and inspections.

Checking on the condition of, say, a difficult to access roof, used to involve getting out the ladders. But ladders are all very last century. The modern way is to use an **UAV** (unmanned aerial vehicle) also known as a **RPAS** (remotely piloted air system) also known as a **UAS** (unmanned aircraft system) and, most commonly, known as a **drone**.

Drones are increasingly being used:

- to assist in the preparation of condition surveys, particularly for roofs;
- in health and safety inductions on building sites – to show new joiners high risk areas;
- as a visual tool to demonstrate weekly progress of development projects; and
- by marketing teams to produce promotional videos and take photographs of new homes.

Drones can help undertake these tasks better, more quickly and much more safely. But best of all, there's a whole new area of law that you'll need to get to grips with before you can go 'up, up and away'.

Let's just be civil to each other

The principal regulatory authority for drones in the UK is the Civil Aviation Authority. We'll refer to them as the **CAA**. The principal set of UK rules that need to be adhered to are contained in the Air Navigation Order 2016 (As amended in 2017. And then amended again in 2018. And then again in 2019). We'll refer to that as the **ANO**.

What those rules say about what you can (or, more accurately, can't) do and about what permissions you need will depend on:

The size of drone: In this edition of IT'S THE LAW we are looking at what are classed as small unmanned aircrafts (**SUAs**). That's 'any unmanned aircraft, other than a balloon or kite, having a mass of not more than 20kg without its fuel but including any article or equipment installed in or attached to the aircraft at the commencement of its flight'. The weight of the battery (if that is how it is powered) and the weight of a camera is included in that.

Whether it is capable of undertaking surveillance or collecting data: In this edition we are generally looking at drones equipped with cameras, so they are 'capable of undertaking surveillance'. Note that the test is whether the drone is *capable* of undertaking surveillance. Not whether it is *actually* undertaking surveillance. So just switching off the camera doesn't make a difference.

Whether you are using it for commercial operations: The precise wording of the rules around what is and isn't a 'commercial operation' is surprisingly complex. Surveyors or estate agents using drones to enhance the services they provide to their clients are definitely caught. It's not so clear if, say, an RP uses a drone to survey its own properties. That's because the RP wouldn't be being paid for the services provided by the drone. Our advice is however, if in doubt, assume that you are.

Playing with the big boys and girls

Article 241 of the ANO states "a person must not recklessly or negligently cause or permit an aircraft to endanger any person or property".

It's a sobering thought that that article applies as much to a drone as it does to a double decker Airbus A380. We often think of drones as toys – albeit expensive ones. But, if not operated carefully, they can be extremely dangerous. So, operators need to keep this principle in the forefront of their minds when considering how to organise their work. A breach of the ANO is a criminal offence. It's taken very seriously.



Neil Toner
Partner, Head of Real Estate
020 7065 1823
neil.toner@devonshires.co.uk



Michelle Mullen
Partner, Banking, Governance & Corporate
020 7880 4377
michelle.mullen@devonshires.co.uk



Peter Antoni
Solicitor, Real Estate & Projects
020 7880 4416
peter.antoni@devonshires.co.uk

Don't forget to VLOS

Article 94(3) of the ANO requires that the remote pilot of the SUA maintains direct, unaided visual contact with the drone – or 'visual line of sight' if you want to keep up with the lingo. Whilst the rules allow for the CAA to grant exemptions to this requirement (thus permitting flights with EVLOS (extended visual line of sight) or BVLOS (beyond visual line of sight)) that's unlikely to be applicable in the types of situation we are looking at here.

To infinity and beyond?

Article 94(A)(2) prohibits flying an SUA at a height greater than 400 feet above the ground without the permission of the CAA. Note that this measurement is taken from the ground and not from the top of the building you might be looking to fly over and around. It would get your drone just over a third of the way up the Shard.

In hilly areas it's not always obvious how you would measure '400 ft above the ground'. But the CAA have a view and, since they're the regulatory authority, you'd be best to adopt the same view if the question arises. It's too difficult to explain in words. So we won't try. Neither did the CAA - they have a helpful diagram on their website:

<https://www.caa.co.uk/Commercial-industry/Aircraft/Unmanned-aircraft/Small-drones/Regulations-relating-to-the-commercial-use-of-small-drones/>

Restricted

Article 95 of the ANO prohibits the operator or pilot of a surveillance SUA (e.g. one with a camera) from undertaking certain activities unless they obtain permission from the CAA. The prohibited activities are flying a drone:

- over or within 150 meters of any congested area (which is defined as being, in a city, town or settlement, any area which is substantially used for residential, commercial, industrial or recreational purposes);
- over or within 150 meters of an organised open air-assembly of more than 1,000 persons;
- within 50 metres of any vessel, vehicle or structure which is not under the control of the SUA's operator or remote pilot; and
- within 50 metres of a person (except when taking off or landing (where the limit is reduced to 30 metres)) and except for people under the control of the pilot.

Realistically the use of a drone to survey occupied buildings is likely to fall foul of one or more of these prohibitions – so a permission would be needed from the CAA.

Is it terminal?

If you are *anywhere* near an airport it's a whole different ball game. Given its complexity (and importance) that ball game is beyond the scope of this edition. So get in touch if this is relevant to you.

Licence and registration please

Article 94(5) of the ANO requires that the permission of the CAA is obtained before a drone is flown for the purposes of a commercial operation.

The permission is referred to as a PFCO or Permission for Commercial Operations. It will include the permission to fly SUAs for commercial operations, requirements or restrictions imposed by the CAA and any exemptions or relaxations authorised by the CAA (e.g. to fly within a congested area). They are valid for only 12 months and so need to be renewed on an annual basis.

As part of the CAA's process for obtaining a PFCO, operators will, amongst other things, have to provide evidence of pilot competence and an operations manual detailing how flights will be conducted.

And the rest

Although the ANO is the principal bit of law that drone operators need to be familiar with, it's not the only one.

Insurance: Insurance is a must. Regulation (EC) 785/2004 requires a minimum amount of third-party liability insurance to be secured. For drones of the type we are looking at in this edition it's about £830,000. In practice, most prudent businesses would be likely to assess that as way too low given the risks involved. Typically, commercial drone insurance policies provide cover of £5 million to £10 million.

GDPR: The use of drones for survey purposes, particularly of occupied buildings, has a high potential for 'collateral intrusion' by recording individuals unnecessarily. The images captured by a drone mounted camera may well include 'personal data' in the context of the General Data Protection Regulations (for example, if they include a photograph from which the identity of a person can be ascertained). That means that the whole GDPR regime comes into play and needs to be considered. Whilst there is no specific legal requirement to undertake one, operators would be well advised to undertake what is known as a Privacy Impact Assessment. This would look to identify and record the potential effects upon privacy and data protection compliance and examine how detrimental effects might be overcome.

Trespass: Very old case law, rather poetically, said that "*whoever owns the soil, it is theirs up to the heaven and down to hell*". That would mean that flying a drone above someone's house at any height would amount to a trespass. More modern case law is less poetic and, frankly, less clear. It says that the rights of a property owner are restricted in relation to the airspace above his land to such a height as is necessary for the ordinary use and enjoyment of his land. What that probably means, in practice, is that a drone straying into the 'airspace' of a neighbour for short period of time, if sufficiently high, is probably not a problem. Hovering at any height for long periods or swooping in at low level would be more problematic.

The future

As can be seen from frequency with which the ANO is amended, the law relating to the use of drones is evolving quickly. That's not unreasonable given the pace of change of the relevant technologies. But it does mean that drone operators and pilots would be well advised to regularly check back with us to find out about the most recent changes. Changes already on the horizon include:

- A requirement to register all drones other than the lightest.
- A requirement for drone pilots to take a safety test.

The tiny print

This is one of a series of leaflets published by Devonshires' Real Estate & Projects Department aimed at our property owning and developing clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

Find out more

Neil Toner
Partner, Head of Real Estate
020 7065 1823
neil.toner@devonshires.co.uk