

Flying/Creeping Freehold

Ordinarily with freehold property, it is said that you own all the way up to the sky and all the way down to the centre of the earth subject to rights relating to mining of minerals and over-flying aeroplanes.

Where something prevents you from owning to this extent and the property is not leasehold, then it is a flying freehold. Typically, this might involve the bedroom of one house being above the kitchen of another house. If the area subject to a flying freehold is a relatively small area in comparison to the rest of the house or building then this is often referred to as a creeping freehold. The legislation relating to leasehold properties includes satisfactory obligations on all property owners and includes satisfactory rights for entry, maintenance and repair. However, the legislation for freeholds does not include similar rights and obligations in relation to flying freeholds.

For a flying freehold to work properly it is perceived that you need to have the necessary express rights of entry on to the adjoining part of the building for maintenance and repair and an obligation on each owner to maintain and repair their side of the building. In addition, there needs to be an agreement that on every sale the new buyer will enter into exactly the same type of agreement for rights and obligations as the existing owners. The Access to Neighbouring Land Act 1992 may be able to assist in that the court has discretion to permit one party access to a neighbour's property for the purpose of carrying out maintenance and repair. There may also be a claim for nuisance against the adjoining owner in certain circumstances.

One of the main problems with flying freeholds however, is not the legal difficulties but a practical problem. Many mortgage companies do not like to lend against flying freehold properties or will only do so if there is a proper deed regulating the obligations and rights. This will necessarily limit the number buyers who can buy your property or indeed would want to do so. There are however some mortgage companies that will lend, although, of course, there is no guarantee that they will still do so at the time when you want to sell.

An insurance policy can often be obtained relating to flying freeholds. The advantage of such a policy is that it would cover any reduction in the value or costs incurred as a result of maintenance to or loss of the flying freehold. A further benefit would be that the property may be more appealing to buyers if the policy can be assigned to them. One would usually ask the seller to pay for an indemnity policy. There would usually be a one off premium for the current value of property although when you come to sell, you may be asked to pay a further premium to increase the level of cover to the value at the time of sale.

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