

When Property, Technology, Media and Telecommunications Meet

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Technology, media and telecommunications now affect almost every aspect of our lives. For property owners this has created interesting relationships and issues to consider. In this article we set out current issues that are affecting a wide range of property owners and technology, media and telecommunication companies alike. In particular we look at:

- Technology: Airbnb and Dubai 2020 – what you need to know;
- Media: Billboards and Advertising in Community Developments and Jointly Owned Property; and
- Telecommunications: Cell Tower Agreement Essentials.

These areas of law will continue to develop over coming years as the way society uses technology develops and grows. Although the law reputedly struggles to keep up to date with society's development, parties often find creative contractual solutions to deal with any lack of regulation for the use of new technologies. We will continue to watch these developments with interest.

Technology: Airbnb and Dubai 2020 - what you need to know

Disruptive technologies have created major changes worldwide in recent times. Government and legal responses have been varied. The Government of Dubai has taken a progressive approach with its recent Dubai Holiday Home Rental Regulations No. 3 of 2015 issued on 31 December 2015) (the 'Regulation'), which specifically states that the Department of Tourism and Commerce Marketing 'encourages use of reputable online service providers and welcomes specific proposals towards the betterment and enhancement of Holiday Home Rental activity in Dubai.' The forward to the Regulations include within its objectives a target of welcoming 20 million annual visitors to Dubai by 2020 by increasing the supply and broadening the range of available accommodation. With those objectives in mind we consider how the law applies to Airbnb and other disruptive accommodation providers in this period of lead up to the Dubai 2020 Expo.

First we will start with what the Regulation is not. The Regulation does not apply to renting out a single room in your own home. Table 2, number 18 of the Regulation sets out, among other matters, unit conditions and states that 'Holiday Homes must be rented as an entire unit, not on a shared basis, and can be hired on a daily, weekly, monthly, or yearly basis.' This cuts out much of the Airbnb lower end of the market that uses a spare room in their own home for additional income. We do not explore in this article the legalities of that use of Airbnb in Dubai.

What the Regulation covers is the rental for holiday purposes of entire furnished and equipped residential homes which meet the relevant standard anywhere in Dubai, including free zones, development zones and real estate communities.

The Regulation may also limit contractual provisions and/or strata community rules that prevent the use of residential property for short term accommodation. The Regulation states at 2.1.3 B that community rules

that prohibit seeking to licence and rent-out units as “Holiday Homes” lack legal recognition. This permissive approach may open up areas to visitors that have previously been limited to permanent occupants only as well as providing new options for absentee owners. Owners however should act with caution, they may be subject to contractual or other obligations and we recommend that advice is sought before action is taken.

Strata communities may currently be unaware of the permission for short term accommodation granted by the Regulation, and many have rules against short term accommodation uses in the unit sale agreements, strata community rules or jointly owned property declarations.

We expect some challenge to occur on this point particularly as the Dubai Land Department direction for jointly owned property declaration allows restrictions on how units may be used. Restrictions on short term letting would be a common restriction in the “Community Rules” of residential strata communities.

The Regulation does go on to temper its prohibition of short term accommodation restrictions by providing:

- minimum terms and conditions upon which a property is offered, booked and occupied as a Holiday Home; in (table 3); and
- minimum house rules (table 4).

These restrictions include noise and residential amenity rules, particularly between the hours of 10pm to 8am as well as rules against functions and parties.

Until April of this year, when further regulation was brought in, home owners would not have been compliant with the laws of Dubai if they listed property directly onto Airbnb as a Holiday Home. The rules have now changed in line with the stated aims of the Regulation and private home owners and tenants may apply for a holiday home license without the need to appoint a registered agent (refer to our article in the May 2016 edition of Law Update).

Subject to classification of the Holiday Home as standard or deluxe, there are significant requirements relating to the property quality standards, furniture, fittings and equipment requirements, health and safety standards, insurance and operational aspects such as provisions of minimum information. Holiday Homes may be subject to regular inspection by the department and sanctions are likely to apply to private listers in the same way as to registered agents.

The progressive approach taken by the Dubai government with respect to Airbnb and similar accommodation sites aims to provide a balance between the use of technologies and quality of experience for visitors to Dubai. Collaboration was recently announced between the department and Airbnb, we look forward to seeing the results of this approach.

Media: Billboards and Advertising in Community Developments and Jointly Owned Property

One hears so much about social media as the new way of advertising it is easy to forget that many traditional forms of advertising continue to provide important strategies for business. Advertising billboards and signs on buildings continue to be prevalent in most societies. One issue that affects Dubai more than many other locations is the private ownership of road infrastructure and other commonly ‘public’ areas through community developments and jointly owned property.

In many countries all roads are public and the right to place billboards on the edge of roads is negotiated directly with the local authority. Even where billboards are placed on private land at the edge of public areas in many countries, the advertising company is often dealing with a single party.

In locations where advertising is to be placed on community property (for the sake of this article we will refer to this as ‘strata titled land’), some property developers have become quite sophisticated in their pre-planning of this area.

When considering a new development for strata titled land and the individual opportunities that relate to any location, property developers sometimes consider the additional income streams that may be available by using space for advertising. Traditionally the most common form of this was through naming rights on the top of a building. In more recent times we have seen an entire side of a 40 floor building used as a billboard. It has also been common to use placard style billboards on non-productive areas of land that face roads and other public spaces.

When strata titled land developers look at these options they have to consider where the income stream from that advertising should rightfully be channelled. There are three main options, the income stream opportunity may be:

- retained as a unit or plot by the developer as future 'passive income';
- sold as a unit or plot and therefore contribute to the saleable inventory of the developer; or
- held as common property of the strata community to contribute income towards ongoing costs, therefore reducing costs and levies to unit or plot owners.

As to whether any of the above options are achievable in any given situation may require work with their surveyors and lawyers and the Real Estate Regulatory Authority ('RERA') during the planning phase of the development.

In theory it may be possible to define part of the exterior wall of a building as a unit or component, this way it can be held in separate ownership. That owner can then use that unit or component to sell advertising. In practice however the Dubai Land Department and RERA are reluctant to allow such subdivisions and regardless of definition of the wall or structure the Master Developer usually retains rights to use it for advertising. Another alternative may be to use 'Exclusive Use Rights'. Exclusive Use Rights are rights that are linked to the ownership of a particular unit. It is therefore necessary to retain ownership of a unit in order to benefit from the associated Exclusive Use Rights.

Whatever mechanism is chosen, a developer must be careful to:

- define the boundaries of that unit to limit an owner's responsibility for the cost of exterior structural repairs and maintenance to that part of the building;
- allow sufficient scope for the unit owner to access and alter the unit or place advertising as necessary and if necessary, for power and other utilities; and
- place sufficient restriction on the title or in the rules or bylaws to protect the owner from claims by other unit or component owners or any owners association.

Assuming such arrangements are approved, it is also advisable that the arrangements are clearly disclosed to investors in a 'Disclosure Statement' as required under Directions to Law on Jointly Owned Property in the Emirate of Dubai (No.27 of 2007). Such disclosure ensures that all investors are aware of the arrangement and therefore cannot assert, for example, that the relevant area should be common property and therefore the associated income is for the benefit of the owners association.

Defining the advertising space as a separate unit or designating the same as an Exclusive Use Area allows developers to own the unit and receive advertising income and sell the unit to a third party and collect profit.

If the strata community is retaining the proposed advertising space as common property, the rules or by-laws should be sufficiently clear in order the owners have good process to:

- make clear decisions on acceptable advertising; and

- negotiate the contractual terms with advertisers.

In Dubai all signage must have the approval of the Dubai Municipality. In addition, the approval of the relevant Master Developer and the RTA could be required. As noted above, the ability to create such signage areas in strata communities may also require the Dubai Land Department's approval.

Telecommunications: Cell Tower Agreement Essentials

Over the last approximately 20 years the use and popularity of mobile phones has grown exponentially. This has required corresponding support from telco's, who have in turn often required the support of private land owners to enable sufficient expansion of their infrastructure, particularly with the placement of cell towers.

In many cities one will find cell towers on the roofs of tall buildings, in rural areas on the apex of hills and on roadsides disguised as trees. Unless the land is public, or the law provides otherwise, it will be the case that the land owner has negotiated a commercial arrangement with a telco for use of their land for a cell tower. For land owners this can be a small but useful income source from an otherwise unproductive part of their property.

Land owners approached by telco's in relation to use of land for a cell tower or other telecommunications infrastructure can expect agreements with a number of common factors, subject to their local laws and provider.

Where the equipment or technology appears to have a fixed life of a relatively short period, say less than 15 years, the form of arrangement with a landowner is most often through a licence to occupy or lease for a period of time. Where the equipment is more in the nature of fixed long term infrastructure it is often dealt with by way of easement over the land. In many jurisdictions, the government also enacts laws to cover arrangements for essential infrastructure over private land. In this section we focus on the essentials of cell tower licenses to occupy private land or buildings ('Cell Tower Agreements').

Cell Tower Agreements should clearly define the area that is being used and how it is to be accessed. The telco will be responsible for the installation of their equipment, connection to the necessary infrastructure and all repair, maintenance and risk of their equipment as well as for any damage their access over the land or the equipment may cause whilst it is present.

The land owner will promise not to interfere with the telco's equipment nor do anything to interfere with the way it functions. Interference includes both physical interference with the equipment or relevant part of the land and in relation to transmissions that may interfere with any frequency or electromagnetic field that the cell tower uses.

Where the cell tower is on the roof of a commercial or retail building, land owners must consider their tenants, the nature of the businesses and whether there are any restrictions in their lease documents on transmission of any audio or visual material or electromagnetic radiation of any frequency outside of the premises, which may cause a breach to the Cell Tower Agreement.

It is common in commercial and retail leases to include restrictions limiting broadcasting of electronic, digital and electromagnetic radiation that may interfere with other tenants or the landlord. For some tenants, the nature of their business will require such broadcasting. Land owners will need to assess their particular building and its current (and future) tenants in relation to any restrictions in a Cell Tower Agreement.

The land owner and the telco will need to agree appropriate limitations on liability and arrangements for insurance in relation to damage to the equipment. The nature of the equipment will often equate to any damage being financially significant.

The telco should pay for the installation of a separate electricity meter and be responsible for its own costs of operation. The telco will also pay a licence fee or rent to the land owner. The licence fee or rent is sometimes a fixed cost, particularly when the term of the licence is quite short. With longer terms the licence fee is increased, often annually, by a fixed amount or linked to the rate of inflation by reference to changes in the consumer price index.

The telco will be responsible for the cost of reinstating the land owner's property for any damage caused during the installation of the equipment, during any repairs, maintenance or upgrades and at the end of the licence period when the equipment is removed.

If a land owner is approached by a telco for use of their land to expand the telco's infrastructure the land owner must ensure that the Cell Tower Agreement between them properly defines the rights of both parties so that the effect to their property is cost neutral and the licence fee provides a financial return.

Conclusion

Although Dubai has a modern and flexible real estate law framework, the implementation (or lack thereof) of aspects of this sometimes means that the commercialising of otherwise unproductive areas of a development requires careful consideration at the planning stages in order to capitalise on the benefits that rapid changes in technology may bring.

Technology continues to change and with it, comes the opportunity, through thoughtful use of existing legal principles, to create positive commercial outcomes for developers, land owners and technology providers alike.