

Is down still the new up or have we seen the end of the “bankers’ bunkers” boom?



Few people will have pounded the pavements of London in the past few years without bumping into a soil-removal conveyor pouring a continuous stream of rubble into an awaiting skip to create a much coveted basement. Research shows that in the last decade the number of planning applications in the UK for the addition of basements to an existing home has soared by more than 183%. If side-returns and loft conversions were the must have of the “noughties” the basement dig out is, without doubt, the on-trend housing accessory of the “teenies”.

Whilst to neighbours and local residents they are a plague, to a developer or homeowner the basement dig out represents the ultimate opportunity to maximise square footage and of course value. From a homeowner’s perspective, families grow and moving is expensive and it is therefore hardly surprising that despite the dirt, disruption, stress and expense involved (not to mention the prospect of a dispute with the neighbours) the basement dig out is an attractive alternative to moving house.

Given that down does seem to still be the new up, here are a few areas to bear in mind from a legal perspective when considering undertaking a basement conversion.

Planning permission

The planning regime which covers the creation of living space in basements is continuously evolving and under review.

In most cases converting an existing basement space such as a cellar into living space is unlikely to require



planning permission provided that the basement does not become a separate unit or the use of the space significantly changes.

If a light well is added altering the external appearance of the property then the position changes and planning permission will be required. Excavating to create new basement space involving major works and often an alteration to the external appearance of a property will also almost always require planning permission.

Many local authorities have allowed basement conversions to take place under planning rules known as permitted development rights. These allow defined categories of development to take place without the need for planning permission. The bottom line however is that no works should be contemplated before contacting the local planning authority for guidance on local policy.

It is also important not to forget that building regulations will apply to any works. They cover areas such as fire escape routes, ventilation, ceiling height, damp proofing, electrical wiring and water supplies.

Construction documents

As planning restrictions tighten, anyone wishing to undertake such a project would be well advised to engage a competent team of planning, legal and technical advisers from the outset to ensure that the initial planning stage and the subsequent build run as smoothly as possible.

From a legal perspective, in order to prevent a basement build becoming plagued by design and construction issues it is important that a developer puts in place the correct contractual framework as early as possible.

For the majority of property owners a basement development will be the largest and most complicated construction job they will ever undertake. As such, the construction documentation for the project should be in such a form to ensure that the roles and responsibilities of the developer and each of the parties appointed by the developer is properly and clearly documented. To do this any building contractor and professional consultant is best appointed under a written contract and ideally before the contractor or the consultant starts undertaking its works or services to prevent the developer's commercial advantage being lost.

For instance, a properly drafted construction contract should include appropriate:

- terms and conditions which address the various roles and responsibilities of the developer and the contractor and any risk assumed by either party;
- dispute resolution provisions;
- commercial terms including timing of the works, the cost of the works and payment obligations of the developer; and
- technical documents (eg. drawings and specifications) which give clear detail of the works to be undertaken by the contractor.

A contract in this form won't necessarily prevent there being a dispute but it should enable any such dispute to be resolved more quickly and more cheaply than if the documentation is not sufficiently clear.

Impact on neighbours

Another important issue to bear in mind when considering a basement development is the almost inevitable applicability of the Party Wall etc. Act 1996 (Act).

The legal framework created by the Act ensures that specialist surveyors are appointed to monitor the works and agree an award, known as a party wall award, which, amongst other things:



- sets out guidelines governing how the proposed works should progress;
- details any damage caused to the neighbouring property; and
- perhaps most importantly, establishes how such damage will be made good and at whose cost.

Given the disruption and upheaval associated with a basement development, not to mention the potential financial gain, it is not surprising that those undertaking this kind of project often seek to maximise the internal area of the new basement.

Without getting too technical, the standard method used for a basement extension is to underpin the party wall using mass concrete. However, reinforcing the underpinning with steel beams or rods (known as “special foundations”) to distribute the load is a popular choice because the tensile strength of the beams or rods allows the concrete to be substantially thinner than the mass concrete alternative.

The catch is that under the Act there is no right to construct special foundations under the adjoining owner’s land without their written consent. A neighbour therefore needs to not only consent to the works but that consent needs to be formally documented by way of a special foundations agreement. For the avoidance of doubt this agreement needs to be entered into in addition to the party wall award.

Those who wish to use special foundations in their basement build need to be aware of the fact that not only is a neighbour under no obligation to give their consent but that even if they do (and are prepared to enter into such special foundations) they will require their associated legal and other professional costs (which can be considerable) to be covered by the developer.

Even if the initial planning process goes smoothly and a well drafted contractual framework is put in place to govern the project, party wall disputes are fairly common and often bitter.

Conclusion

In summary, for those considering a basement build it is crucial to ensure that: (i) expert technical advice is sought on the design, viability and rationality of the intended structure; (ii) expert party wall advice is sought at the earliest opportunity; and (iii) if required, the adjoining owners’ consent to the works is formally documented and legal professionals are engaged to draft and negotiate a formal special foundations agreement. Such steps will minimise the risk of facing an injunction to demolish the works if they are found to breach the Act.

These steps are also important in the context of a sale where well advised purchasers are likely to seek confirmation, as part of the due diligence process, that the basement works have been constructed in accordance with the Act and all necessary consents have been obtained and formally documented.

On the flip side, any purchaser considering buying a property with a “bankers’ bunker” would be well advised to appoint a surveyor with party wall expertise to ensure compliance as part of the usual due diligence exercise carried out prior to exchange.

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