

Beyond questions

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Matthew Hearsun discusses the legal issues arising from neighbouring basement extension works

As basement extensions become more popular, surveyors are frequently coming across cases where the formation of the basement of one property (the first basement) has encroached on adjoining land, thereby affecting or preventing the formation of a basement on the adjoining property (the second basement).

Removing the trespass

Most basement extensions are formed by underpinning a party or boundary wall, commonly with mass concrete or reinforced secant piling. It is generally accepted that the right to underpin, which is contained in the [Party Wall etc. Act 1996](#), extends only to the width of the foundations of the wall. If the underpinning to form the first basement encroaches beyond the width this will constitute a trespass. This trespass is only ever discovered during excavations for the second basement, at which point the adjoining owner has a number of options.

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First, the adjoining owner may apply to the court for an injunction ordering the first building owner to remove the trespass. However, this is not without difficulty. It may take as long as a year to reach court, which will cause unacceptable delay to the construction of the second basement. The result is also uncertain; the court retains a discretion to award damages instead of an injunction.

Because of these difficulties many adjoining owners elect to use the remedy of self-redress. This empowers the adjoining owner to take unilateral action and cut away the trespassing underpinning without the permission of the building owner. Encroaching underpinning is a simple and obvious trespass, and removal is almost always urgent to avoid delay on site, usually at great cost. But self-redress is not without risk.

The adjoining owner must take reasonable care to avoid any damage to the building owner's property. This will usually require the use of a low-vibration techniques such as diamond stitch-drilling or, in suitable soil conditions, water lancing.

Figure 1: Trespassing piles prior to removal

The adjoining owner should notify the building owner as soon as they discover the trespass and set out their intention to remove it (ideally enclosing a method statement). They should also invite the owner to take whatever steps they think are necessary to protect their property; for example, removing any wall hangings.

While it is a good idea to invite the building owner's surveyor to review and if possible agree the proposed removal works, this is not mandatory. The adjoining owner may proceed to remove the trespass even without the building owner's permission.

Damages

Once the trespass has been removed the adjoining owner may seek to recover any losses incurred:

- if the trespassing underpinning included reinforcement, and written consent was given, a claim may be made under [section 11\(10\)](#) of the 1996 Act against the building owner at the time the second basement is constructed;
- a claim at common law for damages for trespass, which may be made against the original building owner or any subsequent owner;
- a claim under [section 7\(2\)](#) of the 1996 Act, which may only be made against the original building owner.

Claims under sections 11(10) and 7(2) of the 1996 Act may either be determined by the original surveyors (who dealt with the first basement) or in the county court. A claim for damages for trespass must be brought in the county court.

Note that none of these claims can be determined by the surveyors appointed to deal with the second basement.

Limitation

Claims under sections 11(10) and 7(2) are sums due under statute for which the limitation period is 6 years from the date they became due. A claim for damages for trespass must also be made within 6 years from the date the loss was incurred.

However, limitation periods apply only to bringing a claim in court. There is no limitation period on referring a claim to the original surveyors.

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Further information

- Image ? Peter Bird
- Related competencies include [Legal](#)
- This feature is taken from the RICS *Building surveying journal* (October/November 2015)