

Basement Development Property Law Issues

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Landmark Chambers
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But I have got planning permission!

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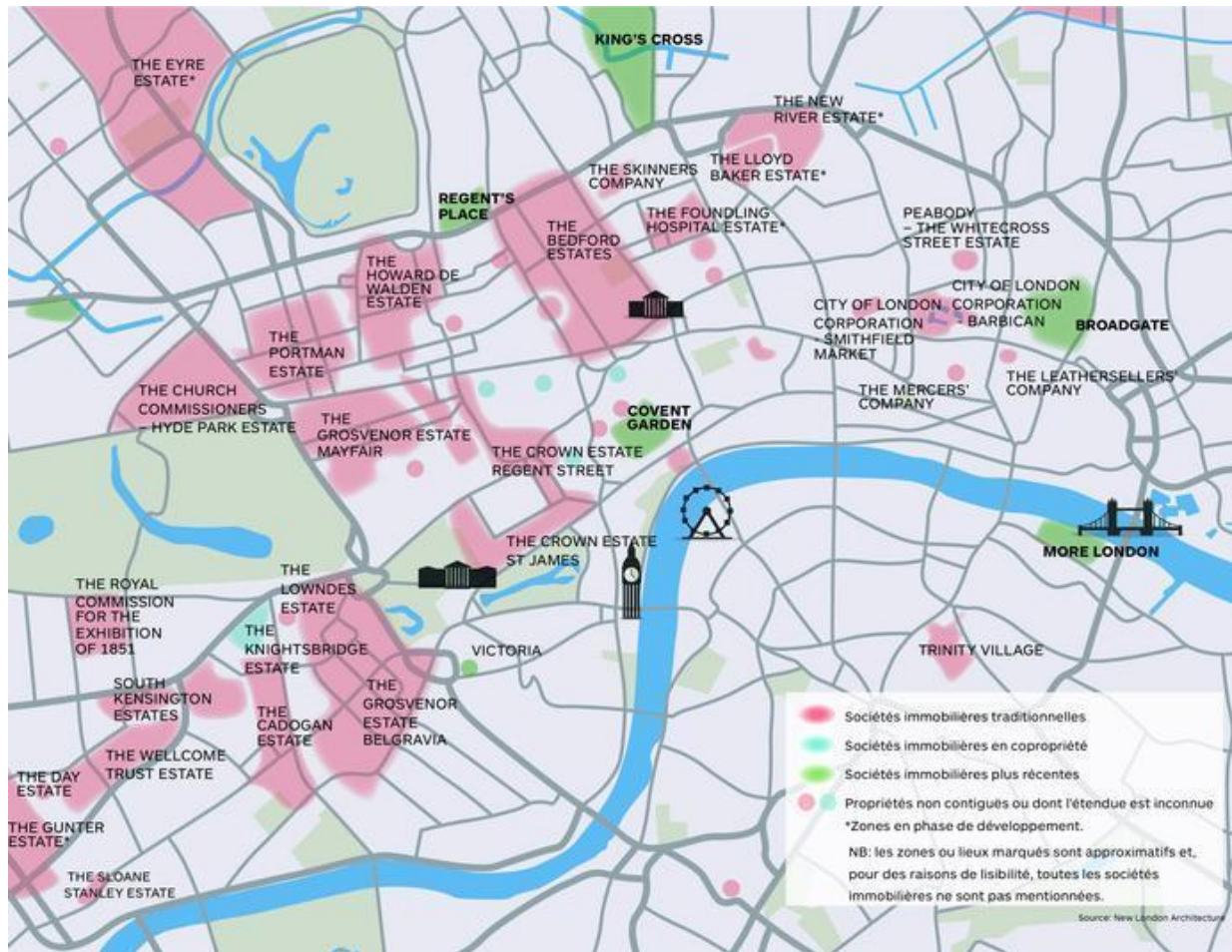
Issues to be faced

- Estate Management Schemes
- Restrictive covenants
- Trespass
- Nuisance
- Leasehold Issues

Estate Management Schemes

- Made under section 19(1) of the Leasehold Reform Act 1967:
 - "to maintain adequate standards of appearance and amenity and regulate redevelopment in the area in the event of tenants acquiring the Landlord's interest in their house and premises."
- Belgravia, Mayfair, Phillimore, Holland Park, South Kensington, John Lyon, Dulwich, Hampstead Garden Suburb and more

The Great Estates



Alteration covenant: Belgravia Estate



- “The owner shall not make any alteration in the construction height elevation or external architectural appearance of the enfranchised property or any part thereofnor cut or alter any of the exterior or the internal load bearing walls or timbers thereof nor erect or build any additional or substituted building or erection thereon without the previous written consent of the Landlords of their Estate Surveyor (such consent not to be unreasonably withheld) ...

Alteration covenants: John Lyon Estate



- No existing building shall be reconstructed or pulled down and rebuilt except in accordance with site plans [etc] submitted...and approved by the landlord
- Except with the written consent of the landlord.....no alteration shall be made in the external appearance of any building of structure on any property

Principles for deciding if consent has been unreasonably withheld



- Is the decision one which no reasonable body of estate governors could have come to?
 - *Alleyn Estate v Williams* [1994] 1 EGLR 112
- Estate Governors can only have regard to public interest in amenities of area
 - *Zenios v Hampstead Garden Suburb* [2011] EWCA Civ 1645
- Principles derived from Landlord and Tenant cases
 - *Constance v Cavendish* [2012] EWHC 3434

Landlord and Tenant principles (1)

Iqbal v Thakrar [2004] 3 EGLR 21



- (1) The purpose of the covenant is to protect the landlord from the tenant effecting alterations and additions that could damage the property interests of the landlord.
- (2) A landlord is not entitled to refuse consent on grounds that have nothing to do with its property interests.
- (3) It is for the tenant to show that the landlord has unreasonably withheld its consent to the proposals that the tenant has put forward. Implicit in that is the necessity for the tenant to make sufficiently clear what its proposals are, so that the landlord knows whether it should refuse or give consent to the alterations or additions.

Landlord and Tenant principles (2)

Iqbal v Thakrar [2004] 3 EGLR 21



- (6) Although a landlord will usually need to consider only its own interests, there might be cases where it would be disproportionate for a landlord to refuse consent, having regard to the effects upon it and upon the tenant respectively.
- (7) Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.
- (8) In each case it will be a question of fact, dependent upon all the circumstances, as to whether the landlord, having regard to the actual reasons that impelled it to refuse consent, had acted unreasonably.

Factors which can be taken into account

- Disruption
 - Constance v Cavendish
- Effect of movement of ground water
 - Shebelle v Hampstead Garden Suburb [2013] EWHC 948
- Policy, and consistency of application
 - Mosley v Cooper [1990] 1 EGLR 124
- Planning permission not determinative
 - Re Zenios [2011] EWCA Civ 1645
- But relevant
 - Coventry v Lawrence [2014] UKSC 13

Grosvenor policies – relevant factors

- Whether the house is listed or in a Conservation Area
- Whether the house is in a terrace, semi-detached or detached
- Likely fragility of the existing structure, the ground and sub-soil conditions and the depth of the excavation
- The professionalism of team and proposals
- Need to prove only risk of minimal damage
- Relationship with other projects
- The extent of excavation under the garden
- Access to the site

Grosvenor Policy – general current policy

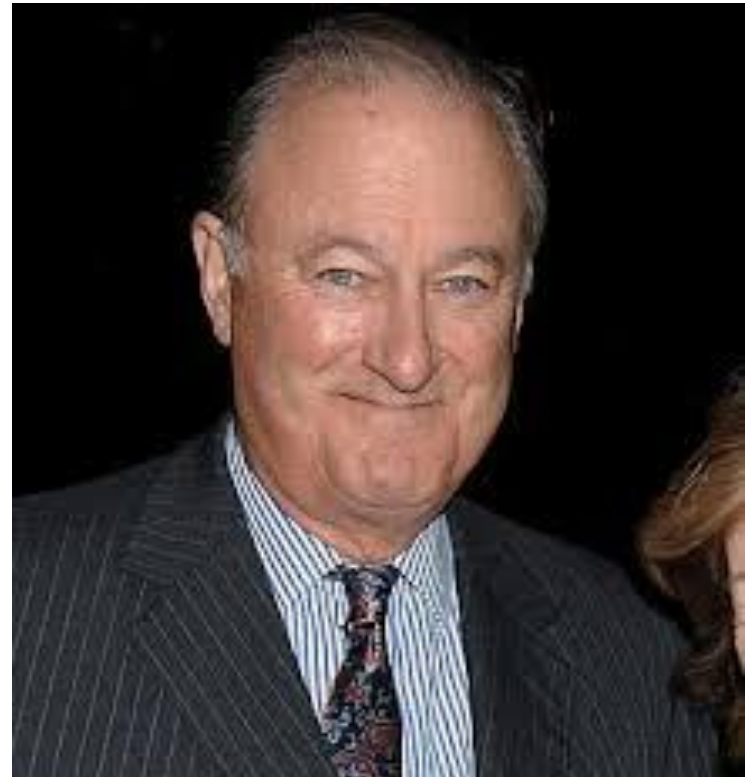


- Excavations below existing floors that are already below street level are unlikely be permitted unless the existing floor to ceiling height is less than 2400mm, or where a swimming pool, isolated from the party walls, is to be installed
- Basements more likely to be acceptable if
 - commercial buildings,
 - where the site is to be fully redeveloped, where there is good access to the site and where nuisance and inconvenience to neighbours will be minimal.
- In the event that consent is granted, it will be subject to an extensive list of conditions

Other covenants`



- Enfranchised properties
- Neighbours
- Absolute
- Consent not to be unreasonably withheld



Methods of challenge

- Just go ahead
 - Treloar v Bigge (1873)
 - Risk of injunction
- Claim for declaration that consent unreasonably withheld
 - Alleyn v Williams;
 - Constance v Cavendish
- Application under s84 Law of Property Act 1925
 - Eg Vertical Properties v Hamsptead Garden Suburb Trust [2010] UKUT 51

Trespass

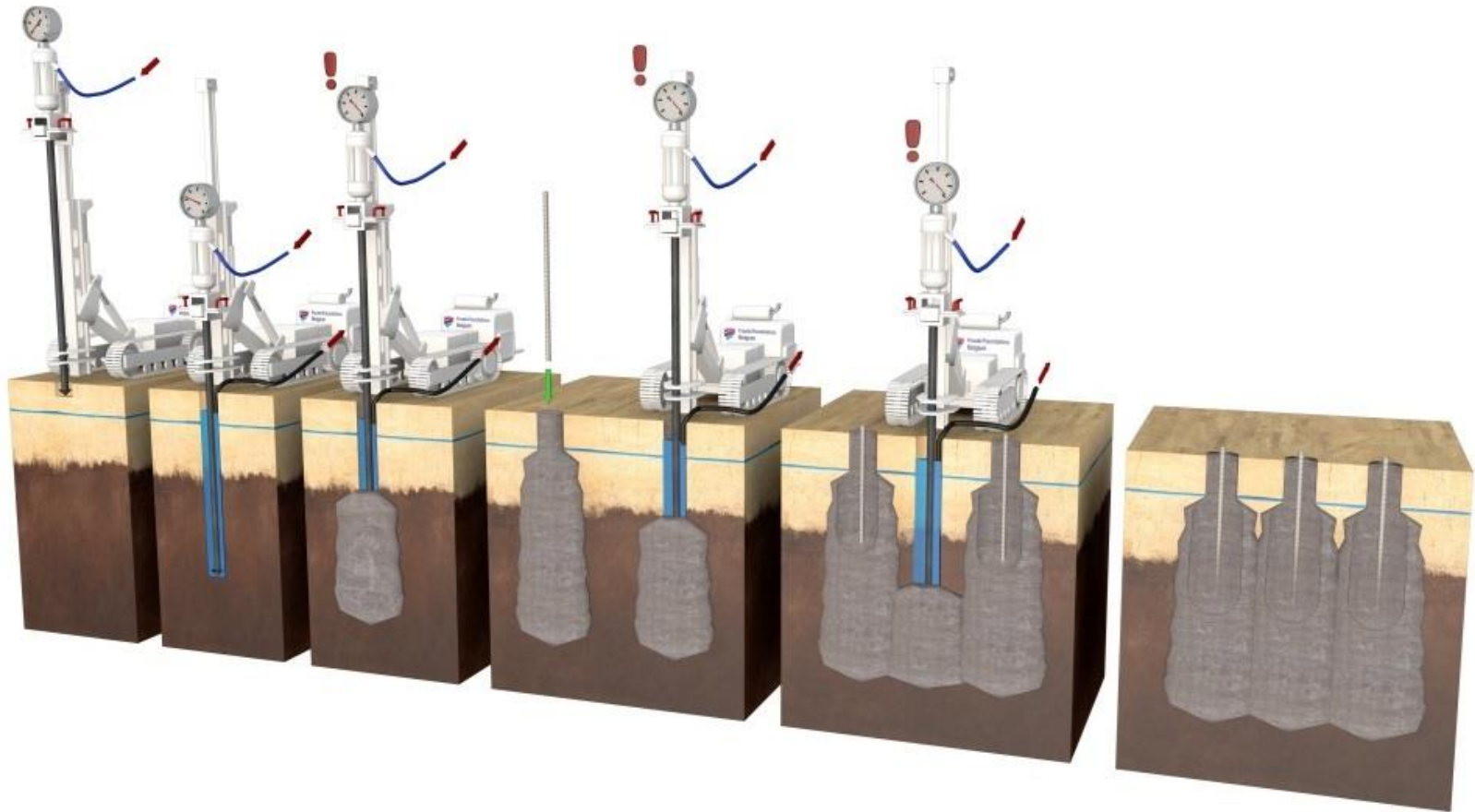


- Entering or putting something on or in land or airspace of another without consent
- Party Wall award does not authorise
 - Work to other walls
 - Special foundations
 - Work carried out without an award
- Risk of injunction or licence fee damages
 - Eg Dawoodi v Zafrani [2015] EWHC 3168

Scaffolding



Jet grouting



Nuisance



- Activities on land which
 - cause an encroachment on his neighbour's land;
 - cause physical damage to his neighbour's land or building
 - unduly interfere with his neighbour in the comfortable and convenient enjoyment of his land.
- Common law claims supplanted by Party Wall Award
 - *Louis v Sadiq* [1997] 1 EGLR 136

Leasehold issues

- Excavation under basement flat – what is demised?
 - *Lejorvarn v Cromwell Mansions* [2011] EWHC 3838
- Effect of covenant for quiet enjoyment
 - Unreasonable disruption can be breach
 - *Timothy Taylor v Mayfair House* [2016] EWHC 1075
 - Does not constrain Estate Manager
 - *Shebelle v Hampstead G.S.T* [2014] EWCA Civ 305
- Reservation of right to build
 - Narrowly construed
 - *Paragon v City of London* [2002] 1 E.G.L.R. 97