An Effective End to Special Foundations?

November 2015

The Problem

The explosive growth in the construction of basements in London and elsewhere has given rise to a corresponding increase in litigation as adjoining owners seek to protect their properties and to curb the extent of the building owners’ works. Those works of course require planning permission. The Royal Borough of Kensington and Chelsea for example, where many high value properties are situated, has adopted restrictive planning rules limiting the extent and depth of such basements. Construction of such basements is also usually subject to the need to comply with the Party Wall etc. Act 1996 (the Act). This typically applies in two ways. Firstly, section 2 limits and defines the rights of a building owner to do work to the party wall separating his house from that of an adjoining owner. Where a new basement is built lower than the base of the existing party wall, it will normally be necessary to excavate below the base of this wall and underpin it, effectively extending it downwards by the depth of the new space (See below). Secondly, section 6 of the Act governs excavations on the building owner’s land which are lower than the depth of the foundations of the adjoining owner, even where the excavations do not affect the party wall.

The Act provides that if any of these provisions apply, unless the adjoining owner consents to the works (which is rare in practice) a party wall award must be made before the works can proceed. An award may be made by a single surveyor agreed by the building owner and the adjoining owner but it is more common for each owner to appoint its own party wall surveyor
and for the surveyors then to select a third surveyor to act as umpire in the event that the appointed surveyors are unable to agree any issues between them. An award may be made by any two of those three surveyors or by the third surveyor acting alone. The resulting award may determine-

(a) the right to execute any works;
(b) the time and manner of executing any works; and
(c) any other matter arising out of or incidental to the dispute including the costs of making the award.

Either owner may appeal the award to the county court provided he does so within 14 days of service of the award.

**Underpinning in reinforced concrete—the legal issue**

Where the proposed basement is to be constructed adjacent to the party wall, it will generally be necessary to extend that wall downwards so that it forms the outer wall of the new basement. In some cases, it may be appropriate to avoid extending the party wall downwards and, instead, to build the new basement wholly on the building owner’s side of the wall. Where living accommodation is scarce and expensive, however, most building owners are keen to maximise the available space. Extending the party wall downwards, therefore, is the more popular option. This is usually achieved by underpinning the party wall to the depth required by constructing a series of 1 metre lengths of wall on new foundations below the existing wall and butting up to it. The new lengths of wall are limited to 1 metre to avoid the risk of collapse, and are constructed in sequence with no two adjacent lengths being constructed at the same time. Often the floor of the new basement will be formed by a reinforced concrete slab. Sections of this are cast to provide support for each underpin and then the remainder completed subsequently. It was decided as long ago as 1878 (*Standard Bank of British South America v Stokes*) that extending a wall downwards by underpinning
was permitted by the Metropolitan Building Act 1855 – one of the many statutory precursors of the Act. The Act now expressly authorises this in section 2(2) (a).

It is generally accepted that, in construction terms, the most appropriate method of constructing such underpinning is by using reinforced concrete; this creates a wall which is stronger than mere mass concrete underpinning and which is also slimmer – releasing more space for accommodation. It had long been argued on behalf of adjoining owners however, that reinforced concrete underpinning falls within the definition of “special foundations” in section 20 of the Act. This would create a potential obstacle to the use of reinforced concrete underpinning giving the adjoining owner in effect the whip hand: section 7 (4) provides that nothing in this Act shall authorise the building owner to place special foundations on the land of an adjoining owner without his previous consent in writing.

There have been many cases where adjoining owners have sought to exploit this provision either to obtain concessions from the building owner in return for their consent or to frustrate the building owner’s plans.

An adjoining owner could only adopt this stance, however, if reinforced concrete underpinning does indeed constitute special foundations for the purposes of the Act. In order to understand this point two more definitions have to be looked at, contained in section 20 of the Act. This defines foundations and special foundations as follows:

“Foundations”, in relation to a wall, means the solid ground or artificially formed support resting on solid ground on which the wall rests.

“Special foundations” means foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load.
It is generally accepted that “assemblage of beams of rods” in the context of concrete underpinning is intended to be a reference to the reinforcement within the concrete.

The origin of the prohibition on special foundations lies in the development of steel-framed buildings with foundations formed by large reinforced concrete pads under the base of the columns, rather than strip foundations. It was thought that such pads extending under and beyond the party wall over to the adjoining owner’s side would make development of his land unreasonably difficult. Following recommendations of an advisory committee of the London County Council in 1938, the prohibition first appeared in the London Building Acts (Amendment) Act 1939, applying only in London at that time.

**The decision in Chaturachinda and Ng v Fairholme**

Clearly, reinforced concrete underpinning can only constitute special foundations if the underpinning can properly be described as a “foundation” for the purposes of the Act and this question lay at the heart of a recent county court decision - *Chaturachinda and Ng v Fairholme*. In that case, the method of construction involved excavation below the party wall at the ultimate depth of the new foundations and placing mass concreted strip footings, rather than constructing sections of reinforced concrete floor slab. The reinforced concrete underpins were founded on the mass concrete. The underpins were then tied to a reinforced concrete slab designed to carry the load of the internal structure. The third surveyor held that this did not involve special foundations, so that the building owners, Respondents to the Appeal, were free to construct the foundations without the consent of the adjoining owners.

The Appellants, the adjoining owners, challenged this finding. They advanced 3 arguments:
1. They contended that the building was supported on the reinforced concrete underpins and slab and not in reality on the mass concrete which was otiose.

2. They said that some lateral load from the adjoining owners’ property was transmitted to the underpins and thence to the slab. Therefore the underpins and the slab formed an integral foundation system.

3. They claimed that the design was a “sham” calculated to evade the Act by adopting an unusual method of construction. (This ground of appeal was not pursued in closing submissions).

The judge began by summarising the third surveyor’s reasoning as follows:

(a) The definitions of ‘foundation’ and ‘special foundations’ in the 1996 Act focus attention on ‘the nature of the structure that transmits the load from a wall to the ground’,

(b) No adjoining owner consent is required for a reinforced concrete wall, and this includes a reinforced concrete wall built below ground level.

(c) The reinforced box is designed for the purpose of enclosing an occupied space and thus the vertical sections of the box are walls.

(d) The fact that these vertical section walls transmit the load from the original walls down ultimately to the ground does not make them any the more foundations than those parts of the walls as are above the ground.

(e) The architectural feature which transmit the load from the walls to the ground are the concrete rails, and therefore it is these rails, and nothing else, which constitute the building’s foundation.

(f) It may be that the concrete strip footings (he termed them “rails”) are not necessary for the integrity of the proposed structure and that they have been designed to achieve the result of taking the foundation outside the definition of special
foundations. But they are present in the design and have the effect contended for by the building owner’s surveyor.

The judge rejected all 3 arguments.

On the first one, he noted that the definition of foundations requires the structure in question to be resting on solid ground on which the wall rests. It followed that, even if reinforced underpinning could otherwise be characterised as special foundations, the underpinning would not satisfy the definition if it were supported on a mass concrete pad. Under those circumstances, the function of transmitting load to the ground would be carried out by the mass concrete, not the underpinning. He accepted the evidence of the building owners’ expert engineer that the mass concrete foundations did indeed bear the load. They were constructed in advance of the underpins and the underpins rested on them. The slab was only constructed subsequently. Accordingly the mass concrete transmitted the load of the party wall to the ground.

On the second argument, the judge rejected this for 3 reasons. Firstly he observed that there is no warrant in the statutory definition of “foundation” to define foundation by reference to the transmission of load. If that were the case, it would make an external wall above ground a foundation because it, too, transmits load from the roof to the ground.

Secondly, he held that the load distribution argument was flawed in any event: the definition of “special foundations” is relevant only to the “solid ground on which the wall rests”. It follows that the distribution of loads to other areas (e.g., below the building owner’s land) is of no relevance. Hence even if the underpins transmitted lateral load to the slab which caused vertical deflection within the building owners’ property, this would not affect the area of land
beneath the party wall. In any event he was not convinced on the evidence that this had occurred.

The Appellants did not press their third argument. However, the judge expressed the view that, if the mass concrete had been installed merely as an artifice or device purely to circumvent the clear intention of parliament, it is unthinkable that the court would turn a blind eye to such behaviour. On the evidence, however, the adjoining owners failed to make good this objection.

**Conclusion**

The decision was obviously a relief for the Respondents, who had continued building the basement during the appeal process. Ironically, the Appellants had shortly before the dispute arose themselves constructed a reinforced concrete basement with special foundations, which had been consented to by the previous owners of the Respondents’ property.

*Chaturachinda and Ng v Fairholme* brings welcome clarity to the question of what constitutes “special foundations” for the purposes of the Act. Though only a county court decision, it will be highly persuasive to other courts and discourage adjoining owners from seeking a collateral advantage in return for their consent to reinforced concrete underpinning. Building owners and their contractors, however, must be careful to ensure that the design of their basements falls within the principles of the judgment. To this end, they should bear the following points in mind:-

(i) If reinforced concrete underpinning is to be used, the underpinning should be designed to rest on a pad of mass concrete or some other material which does not contain reinforcement. The mass concrete pad should of course be installed first of all so that the underpinning can then be installed on top.
(ii) It is permissible to employ a design which includes a mass concrete pad which is intended to take the construction out of the definition of "special foundations" but the building owner must be able to demonstrate that the pad serves a genuine structural purpose.

(iii) If the pad serves no genuine structural purpose or the design can otherwise be characterised as a mere artifice or device to circumvent the Act, the court would be likely to take the view that the design is indeed a special foundation.

The judge observed, with some understatement, that: "basement extensions are not universally popular" and it is perhaps unsurprising that some adjoining owners have sought to exploit what they perceived as an advantage. It was not uncommon, for example, for adjoining owners to seek a payment in return for their consent to special foundations or, alternatively, to require the building owner to forgo its right to obtain a payment from the adjoining owner under section 11 (11) of the Act if the adjoining owner should later make use of the building owner's works. Those practices are now likely to be curtailed.

Many practitioners take the view that the prohibition of special foundations without the adjoining owner’s consent is outdated in the light of current building practices and should be repealed. That view is reinforced by the judge’s comments in Chaturachinda. Having enquired whether there might be a good reason for an adjoining owner to insist on the building owner employing mass concrete foundations – other than reasons which might be characterised as a “dog in the manger nature or borne of envy or greed” he said: “it really is very difficult to see what legitimate concern there is in the Adjoining Owner to be protected against special foundations in the context of a basement construction in one of two adjacent
domestic dwellings”. There now appears to be no necessity for the prohibition of special foundations to be amended by legislation: the suggestion that the mere use of reinforced underpinning as part of an appropriate design is a special foundation subject to an adjoining owner’s veto will be a thing of the past.

This article first appeared in the Property Law Journal in November 2015.
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