Case No : 1CL20046

IN THE CENTRAL LONDON COUNTY COURT

26 Park Crescent
London
W1N 4HT

26 January 2012

Before:

HIS HONOUR JUDGE EDWARD BAILEY

PETER J DAVIS & MARY A DAVIS

Claimant

- and -

TRUSTEES OF 2 MULBERRY WALK

Defendant

JUDGMENT (Approved)

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His Honour Judge Bailey

1. This is an appeal against a Party Wall Award where the third surveyor, Mr North, found that the adjoining owners, the appellants, were to pay the building owners, the respondents, £43,988 for expenses incurred in removing over-spill concrete which Mr North considered amounted to special foundations under s.11(10) of the 1996 Act.

2. In reaching the conclusion that the concrete overspill amounted to special foundations Mr North was in error.

3. The surveyors who have appeared before me have pointed out that Mr North is in good measure to be excused from culpability in making this error. In the course of the submissions made to him plans were provided which suggested that there was indeed reinforced metal-work within these foundations. These plans were not plans of the foundations as constructed. It appears that Mr North was confused by them and as a result made the error that he did. Accordingly, strictly, the appeal must be allowed and Mr North's award set aside.

4. However the respondents, the building owners under the party wall agreement under which works were carried out during 2007 to 2009, suggest that they are entitled to the same sum as was awarded by Mr North under s.7(2) of the 1996 Act. The respondents argue that the reasoning given by Mr North very shortly in his award dated 16 November 2010, is equally applicable in the circumstances to a claim by them under s.7(2) of the Party Wall Act 1996.

5. The appellants are the owners and occupiers of a dwelling house at 4 Mulberry Walk, London, SW3. The respondents own and occupy the adjoining dwelling house at number 2 Mulberry Walk. These 2 properties have a party wall which, viewed from the rear, is at the right of number 2 and at the left of number 4.

6. During 1998 the appellants constructed a basement at number 4 Mulberry Walk. They served the requisite notices under the 1996 Act and an award was made under that Act, ('the 1998 award').

7. The drawings for that award are available in the trial bundles. As is usual, the 1998 award permitted the appellants to carry out works to the party wall in accordance with various drawings and it is those drawings that define the work that the appellants were entitled to carry out. The works included permission, indeed a requirement, that the appellants should underpin the existing foundation to a required depth. This work was carried out and the 1998 foundations were cast underneath the then existing foundation.

8. The works were carried out during 1998 and 1999. During the course of these works there was some damage to the respondents' property at number 2 Mulberry Walk. Essentially this damage required decorative repair only; that was carried out and the appellants paid an agreed sum to the respondents in settlement of the claims for works that had been carried out during the course of the 1998 award works.

9. The circumstances in which that payment was made, and the terms on which it was made, form one of the issues in this appeal. It is a matter to which I will return later.

10. In 2007 the respondents decided that they too wished to construct a basement beneath their property. The requisite notices were served under the 1996 Act. Party wall surveyors were appointed on each side, a Mr Perry for the appellants and Mr Hughes for the respondents. These same surveyors had acted for the same parties in the course of the 1998 award.

11. The award again referred to drawings and these drawings have been the subject of consideration in the course of this appeal. It may be noted that in addition to the works to the basement very substantial works were carried out to the respondents' property. Put simply the respondents decided to gut and rebuild their property at 2 Mulberry Walk. It was therefore a very considerable building contract, and was let to the main contractors in a total sum of about £4 million.

12. The basement that was to be newly constructed as part of these works extended well beyond the back elevation of the property and ran for some way underneath the garden to the rear of 2 Mulberry Walk.

13. In about August 2007, in the early part of the works, the respondents' builders dug a trial pit adjacent to the party wall towards the rear of the property. It was only then that the architect responsible for the project, Smallwood Associates with a Mr Spencer acting as the responsible architect, discovered that the existing foundations extended onto the land on which number 2 was built by some 173 millimetres further than had been anticipated.

14. In all, the foundation, ('the 1908 footing', or '1908 foundation'), projected laterally almost 13 inches from the face of the party wall.

15. When the appellants' contractors had been underpinning the foundation to the party wall in 1998, they had very properly laid their foundations underneath the entire width of the 1908 foundation. Indeed they were required to do under the terms of the 1998 award.

16. However, it is the respondents' complaint that the appellants' contractors did rather more than underlay the 1908 foundation. It is their claim that the foundation laid in 1998 extended beyond the end of the 1908 foundation, that is the '329 millimetre line' shown on the plans, and therefore beyond the party wall.

17. The ground conditions beneath 2 and 4 Mulberry Walk as found by Geo Structural Solutions Ltd and reported by them in a letter dated 31 March 2008 to the respondents' contractors Walter Lily Company Ltd, were well compressed layers and bands of fine sands, coarse sands and gravels, all as uniformly graded bands with little fines present within the coarse bands. This was different to the anticipated ground conditions, which inferred a well graded material of gravelly sands.

18. The net result, suggest Geo Structural Solutions Ltd, of the segregation of the sands and gravels was to affect the internal frictional angle of the material and its inherent ability to remain self-supporting over short distances of unrestrained height. This indicates that a contractor pouring a concrete footing might well find that without a shuttering on the further side of the pour, concrete may well spill over beyond the line where he has excavated for the purpose of making the foundation.

19. For a brief summary of the works that were carried out at 2 Mulberry Walk, I refer to the quantity surveyor narrative, which is to be found at page 247 of the bundle. This is the narrative prepared by the quantity surveyors who prepared the claim that was presented by the respondents for payments by the appellant.

20. It may be noted that in selecting the quantity surveyors concerned, Ian Carman Associates, the respondents selected the same quantity surveyors who had previously acted for the adjoining owners at 4 Mulberry Walk.

21. It is also the case that the quantity surveyors made regular visits to the site. They did not rely wholly on information passed to them by the architects and the contractors.

22. In the narrative the quantity surveyors state that during the construction of the basement area to number 2 Mulberry Walk, it was found that the underpinning of the party wall between 4 and 2 Mulberry Walk, constructed during the contract for the alteration and refurbishment of number 4 Mulberry Walk in 1998/1999, projected beyond the face of the existing party wall foundation, encroaching onto 2 Mulberry Walk's planned basement area. The extent of the concrete overspill was inspected on site by the architect Mr Spencer and the quantity surveyor.

23. The architect notified the party wall surveyors of the problem by e-mails dated 7, 8 and 20 August 2007. I pause to note that these e-mails were sent to Mr Hughes of Downham & Hughes Ltd, the party wall surveyors for number 2, for the respondents. They were not sent to Mr Perry the party wall surveyor acting for the appellants.

> "The original underpins for number 4 below the party wall were carried out in the normal way. Maximum 1.2 metres wide. Pins constructed sequentially in the order set out on the structural engineer's drawing, number 8362/10. The existing soil conditions are sand and gravel to a depth of nearly 10 metres. The faces of excavations in this type of soil would tend to be unstable during excavation work. The concrete for the pins was cast directly to the face of the excavation. No back shutter or earth work support left in

was used. Earth work support to underpinning pits is a measurable item in the standard method of measurement of building works."

24. I pause to recall that the quantity surveyors were the quantity surveyors instructed during the 1998 works. They continue;

> "The faces of the concrete pins were very irregular. The thickness of the overspill varied from pin to pin. To achieve the proposed basement plan utilising the plan area that should have been available, it was necessary to cut back the overspill and the architect's issue to construction under the contract to the main contractor, proceed with the works. Work commenced on the breaking out in November 2007 using handheld pneumatic breaking equipment to cut back the overspill on the vertical face of the concrete pins. Work proceeded during December, January and February 2008."

25. I pause again to note that the recollection Mr Spencer, in the course of his evidence, was that work did not start until January 2008. But that was a mere recollection, some distance in time, and it would appear that the narrative is the more reliable evidence.

> "The work proceeded slowly due to the difficult nature of the work; the strength of the concrete, health and safety issues. The breaking operation was very noisy and as a result delay and disruption to other trades and works occurred. By February 2008 it was apparent that other measures needed to be considered to deal with the amount of cutting back, overspill still to be carried out. Options were considered and it was decided to employ specialist diamond cutting company to diamond track saw the face of the concrete pins, to a depth not exceeding 200 millimetres deep at approximately 100 millimetre centres. The concrete between the cuts was then removed by pneumatic breakers. These works commenced on 23rd April 2008 and were carried out over a period of approximately 3 weeks."

26. It is common ground that the diamond cutting works continued until 14th May 2008. These works were regularly inspected on site by the architect and the quantity surveyor.

27. The quantity surveyor then continues the narrative explaining how it is that he has valued the cutting back work. The extension of time costings are given and he continues under the head;

> "Party Wall Matters.
> The overspill problem was discovered in July and August 2007 and the party wall surveyors were notified at that time. The architects and the quantity surveyors dealt with this matter on the basis of the effect of the additional works on the main contract works. The progress of the works and the value of the variation as required by the terms and conditions of the main contract. The architects at once obtained sufficient contemporaneous details, records, photographs and details, together with regular site inspection of the works, to deal with the progress of the works and establish the cost and value in accordance with the conditions to the contract."

28. During October 2008 there were various communications between BLDA, (the consultancy firm which Mr Perry, the party wall surveyor acting for the appellants here is a member), and the quantity surveyors.

29. There appeared to be some confusion on BLDA's part between the costs for cutting back the overspill and the defrayed cost of the use of the existing underpinning to number 4. These matters were responded to by the quantity surveyors.

> "BLDA also at the time requested details and photographs of the area of the concrete cutaway which appeared to indicate that this work had neither been inspected on site, nor measured, or any contemporaneous records taken by the party wall surveyors."

The architects were requested by the party wall surveyors to provide them with a sketch drawing, indicating the areas and extent of the overspill and copies of the architects photographs of the work.

The drawing which is we have as SK2 can only be considered indicative as it was prepared at the party wall surveyor's request in 2009, substantially based on photographs and well after the work had been completed and covered. The area shown on the drawing (SK161009) is 14.8 square metres.

The architects consider that the areas on the drawings are very conservative, as contemporaneous area records shown in the diamond cutting details attached to extract of valuation 16, are for the areas of 11 square metres, plus an additional 2.1 square metres giving a total of 13.1 square metres.

Prior to the diamond cutting works hand pneumatic cutting had been carried out between November 2007 and February 2008 and while this work was progressing slowly, far more than 1.7 square metres had been cut back.

The quantity surveyors (inaudible) requested by the respondents party wall surveyor to carry out an exercise to apportion the cutting costs for a niche, of 115 millimetres deep in the area of the basement WC.

At a meeting on 17th December 2009 the party wall surveyors following the meeting carried out site measures to establish the correct depth of the niche as it appeared 115 millimetres was incorrect.

By the time of the summary, the outcome of that measure had not been received. It is a measure that is not agreed between them.

The BLDA would appear not to dispute that there was concrete overspill, however they appeared to be disputing the costs and were attempting to do so using a measured quantity, based on the architects drawings and the photographs. The quantity surveyors considered that this is erroneous and inappropriate approach.

The costs of this variation of the contract had been valued under the terms and conditions of the main contract and these sums have been included in the final account, that this variation occurred as a direct result of concrete underpinning overspill encroaching in to number 2 Mulberry Walk basement area and the

conditional cost to remedy the work has been incurred by the employer Mr and Mrs McDermott."

30. There then follows a cost and summaries. These costs have been expanded and explained in part by an e-mail dated 16 November 2009 at page 321 of the bundle.

31. As has been seen from this quantity surveyor's narrative, Mr Perry, the party wall surveyor for the appellants, was not involved at the time with the problems arising from the overspill or perceived overspill encountered by the contractors. In retrospect this was unfortunate. It is understandable however that the architects and Walter Lily, the main contractors, were anxious to get on with the works and the involvement of a party wall surveyor may well have been seen as a potential delaying factor.

32. As a consequence however of not being involved at the time, Mr Perry has approached the issue as to whether or not there was any overspill and if so how much, solely as an office exercise. He has carefully assessed the various plans and, so far as it is possible to do so, the photographs. As a result of this assessment he is not convinced that there was any, or any significant, overspill of concrete.

33. Much of the hearing has been taken up with a consideration of Mr Perry's assessments. This exercise has not been without interest. It has however been a rather frustrating experience, not least for Mr Perry.

34. It is the common experience of the courts that photographs can be confusing. It is a rare case where they assist a detailed analysis of the structure photographed. In the main photographs are at best indicative. In the present case many of the photographs are of very poor quality. To Mr Perry's even greater frustration, he has on a number of occasions been at pains to develop arguments on the basis of architects plans, only to be told that the plans on which he has based his assessments are erroneous.

35. At the end of the day however the appellants have to conduct this appeal in a theoretical manner for they have no direct evidence. The only first-hand evidence the court has had is from Mr Spencer, the project architect. The appellants do not suggest that Mr Spencer is lacking in integrity and is not giving truthful evidence as he sees it. Any such submission would, incidentally, have been roundly rejected.

36. But the appellants do suggest that Mr Spencer was in error. He did not appreciate what it was that he was seeing. Further, Mr Spencer relied on Walter Lily, the main contractors, to carry out their instructions accurately, which Mr Perry suggests they did not, without careful checking of their work.

37. The court has had no evidence from the contractors. At this distance in time it may well not have been helpful. With a claim limited to some £44,000 there is I can well see a real risk that the additional costs of calling contractors would

have been disproportionate. The relevant witness, is as I understand it, out of the country.

38. All this has left us with argument as to what Mr Smith described as burden of proof; what is in essence the correct approach of the court. Where an architect has given a main contractor an instruction and in particular an instruction as to where to set out his work and the main contractor has carried out work, apparently in accordance with that instruction, should the court proceed on the basis that the work is not correct until it is shown that it is, or should the court assume that the work was correct until the contrary is established.

39. At the heart of the difficulties encountered during the works and at the hearing, is of course the 'additional' 1908 foundation or footing. The existence of this footing was not appreciated before the work started. The plans and drawings for the works were prepared in ignorance of the existence of this foundation. The loss of 173 millimetres was ascertained after this footing was discovered, to be taken in to account in revised plans for construction purposes.

40. As I have already stated, the 329 millimetre line 1908 footing was discovered when a trial pit was dug towards the rear of the property. As I understand the position no other trial pits were dug. Of course during the course of the works, the whole of the ground floor was exposed. But no plan was prepared of the exposed foundation, neither were photographs taken of such foundation as was exposed as the works continued.

41. It is part of the agreed facts set out in the surveyors joint statement at paragraph 3.3, that;

> "In the main the width of the pre-existing footings on the side of number 2 was 329 millimetres measured from the number 2 face of the party wall, between the properties."

42. It is difficult for the court to deal with the connotations which flow from "in the main". For the purposes of this hearing I have proceeded upon the basis that it is agreed between the parties that this 329 millimetre foundation extended all the way from the rear to the front of the property. Of course that does not mean that it was precisely 329 millimetres throughout its length; almost certainly it varied in width. But such variations as there were would have been only a few millimetres at most.

43. When the parties refer to overspill or encroachment, it must be encroachment or overspill beyond the 329 line, as seen from the appellants' property.

44. For the sake of completeness, I note that at page 267 (the plans prepared by the engineers Price and Myers for the work in 1997 and 1998) at number 4, drawing 8362/10, the requirement is to underpin existing walls as and where they are shown. There is certainly no issue between the parties that that was the requirement of the works under the 1998 award. And of course by reason

of the award the appellants were permitted to encroach upon the respondents' land to the extent that the existing wall and footing was underpinned.

45. The areas of encroachment in diagrammatic terms are shown in plan SK009, prepared by Mr Spencer on 23 April 2008. That is the date on which the diamond cutting began. This plan shows 2 separate areas of overspill described as 'underpin overhanging'. In very diagrammatic terms the first or left hand area is more towards the front of the house, being wholly within the basement area underneath the ground and upper floors of the house; the right hand area starts within the curtilage of the house, but extends well in to the garden.

46. The area wholly under the house falls between gridlines 4 and 5 on the respondents' plans. The area which protrudes in to the garden starts within between 4 and 5, but extends well beyond it.

47. Of the first area, there are only 2 photographs available before the court which show the 1988 footings at all clearly. Those are photographs 310a and 307a. These photographs have been the subject of some careful consideration in the course of the hearing. Both show the new 2007 underpinning that was required under the respondents' works.

48. Because of the depth of the respondents' basement, excavation continued below the level of the 1998 foundations. A new foundation had to be cast underneath the 1988 foundation and that is shown quite clearly in photograph 310A and it also appears in photograph 307A.

49. The photograph at 310A also shows a niche which is an integral part of the respondents basement plan. This niche can be conveniently seen on plan 585111, the as built plan which is at 291 at the bundle. It accommodates a wash room and WC which serves the hall, function room and kitchenette and laundry which form a substantial part of the new basement.

50. In order to provide a proper sized washroom and WC, it was necessary to project the basement further towards the party wall, than the remainder of the basement wall. This provides the niche which can be seen in photograph 310.

51. Viewed quite simply, the photograph at 310 suggests a considerable amount of overhang beyond the 2007 foundation. It is important however to note that insofar as the 1988 foundation is seen overhanging the 2007 foundation in the niche, it is common ground that the foundation, the 2007 foundation, is set within the area that is bounded by the 329 line. In other words the respondents have chosen to set out their basement wall within the area covered by the 1908 foundation.

52. Secondly it is to be noted that the appellants do not accept that the main contractors set out the line of the 2007 footing in the correct place. In the event the respondents decided not to cut back all the perceived overspill and there was some reduction in the internal dimensions of the basement.

53. As for photograph 307A it shows quite clearly the 329 line, the 1908 footing, and the 1988 foundations underneath the 1908 footing. I should perhaps have observed earlier that it is not clear from photograph 310a that the 1908 footing exists at all. But it is possible that it did exist and by the date of this photograph, 23 April 2008, had been removed either by a digger or pneumatically. At all events, as I have observed, there is agreement between the experts as to the presence of this 1908 footing.

54. With respect to the overspill in the garden area, there are no useful photographs at all. The respondents' case is that the overspill is present in the two areas I have indicated, on SK009. This necessitated cutting back, which amounted to some 2.2 cubic metres.

55. This calculation is taken from the plan prepared by Mr Spencer, SK009 as amended 009A, where the overspill is shown in diagrammatic terms, extending in a downwards in a triangle, with the greater part of the overspill being at the base.

56. Mr Spencer has calculated the volume by calculating an area of the overspill as seen from front to back of the property, at 0.26 square metres. He has then arrived at his volume of 2.2 square metres, by applying the length of the overspill which he calculates at 8.5 metres, that being 3.7 metres for the area under, wholly under the property and 4.8 metres for the area partly underneath the property and partly intruding in to the garden.

57. Quite how he has arrived at 0.26 square metres, is a mystery. It was not explored in the course of evidence. But it is the figure which was relied on by the quantity surveyor when preparing the claim. It was then developed in the e-mail of Mr Clements of 16 November 2009, to which I have already made reference.

58. In that e-mail Mr Clements has taken the 2.2 cubic metres, as assessed by Mr Spencer, and Mr Clements has made a calculation of the volume of material removed from the niche arriving at a total volume of concrete overspill removed of 3.09 cubic metres.

59. It is evident that he is wrong in adding his niche calculation to the total volume of concrete cut. If he is not wrong, he has based it on information that has not been made available to the court. But on the basis of the material before the court, I am satisfied that the total amount of volume removed on the basis of Mr Spencer's assessment is restricted to 2.2 cubic metres. As will appear, I doubt that that is a useful finding, but it is a finding which I think I should make.

60. I turn then to the appellants' case. As I have indicated the appellants are reluctant to accept that there was any overspill. It is unfortunately the case that Mr Perry was not involved at the time and was not able himself to inspect the 1988 foundations as they were uncovered in the course of excavation in the respondents' works.

61. It does appear that in the initial stages Mr Hughes understood wrongly that 176 millimetres of this footing was overspill. It was not until 21 April 2009 that Mr Hughes appreciated that the full extent of the 329 footing was a lawful foundation. As a result he appreciated that the material removed from the niche was not material the cost of excavation at which could be properly charged to the appellants.

62. The fact that Mr Hughes was under this misapprehension is relied on by the appellants as indicating a more general uncertainty amongst the respondents from which they suggest that the court has to take great care with any of the evidence adduced by the respondents, either as to overspill or perceived overspill found in the back end of 2007 and during 2008.

63. I can see the cause that this gives the appellants for concern, however I am satisfied that Mr Spencer, the architect for the respondents, did properly appreciate the position. He was the professional immediately engaged on the discovery of the 1908 footing, and it would have been apparent to him and indeed it was apparent to him, that the 1988 foundations underneath the 1908 footing were properly cast and constructed under the 1998 award.

64. Mr Smith on behalf of the appellants developed four reasons why the respondents' case regarding the overspill in the area underneath the house should be rejected.

65. First he submits that there is no evidence that the 2007 foundations were correctly positioned. Of course much of the assessment of what constituted overspill was made by reference to the setting out of the 2007 footings. If they were not correctly positioned, then it is likely, indeed almost certain, that the respondents would fall in to error.

66. Secondly Mr Smith develops an argument based upon an architect's instruction, which was requested by the contractor on 16 May 2008, which is some 2 days after the completion of the diamond drilling. On 16 May 2008 Walter Lily requested Mr Spencer to issue an AI to cover works to the basement in the following terms;

> 1. "Breakdown 3 courses of block work from gridline 2 to 4 and move 35 millimetres towards gridline B, where underpins found relying on the block work break back locally.
>
> 2. Build a 65 millimetre course (brick on edge) and brickwork in front of the 3 courses of block work from gridline 4 to 5. The new overall dimension to the bathroom to be 2,020 and the electrical plant room 1840.
>
> 3. Due to excessive cavity behind the lining wall, drill stainless steel rods (acting as ties) in to the pins and build in to block work at 900ccs vertically and horizontally. Fill the cavity with concrete in maximum 1 metre lifts."

67. The architect Mr Spencer duly issued architect's instruction 14, on 27 May 2008 in precisely the terms that had been requested by the contractor. The AI can be seen in better context by reference to photograph 314 of the bundle. In the event this architect's instruction was not acted upon, but that has no effect on Mr Smith's argument.

68. That is this; it will be seen on drawing SK2, that the electrical plant room as redesigned after the discovery of the 1908 footing, is 1,776 millimetres wide. That is an internal dimension, based taken up against the basement wall adjacent to the footings, which comprised a single skin of 100 millimetre block work. That wall, submits Mr Smith on the basis of the evidence given by Mr Spencer, can be seen at 185 millimetres in width. That is the wall shown on SK2.

69. If the architect's instruction was to be complied with, then that wall would have been 185 millimetres in width. That is made up of the 100 millimetre block, the 65 millimetres brick on edge course, 10 millimetres to be allowed for the mortar, between the block and the old foundation; and a further 10 millimetres for the mortar between the block and the brick.

70. If a wall of 185 millimetres thickness and an internal dimension of 1840 as suggested by the contractor were to be the new dimension to the electrical plant room, there would be 2,025 millimetres between the edge of the foundation and the inside wall of the plant room.

71. In the event a drawing at SK2 indicates an overall dimension from the footing, to the inside wall of the plant room of 1,983 millimetres. That is made up of the 1776 millimetres internal dimension shown on SK2; 85 millimetres of internal material made up as follows; 8 millimetres of aggregate, 45 millimetres baton; 18 millimetres of plywood; 12 millimetres of plaster wood and 2 millimetres of skin; the 100 millimetres of block with 10 millimetres of mortar. And there was another 12 millimetres which I will fill in later when I recall what it was.

72. The effect is this; that on the basis of the plan at SK2, the total distance as I have said would be 1983 millimetres; on the construction as envisaged by the contractor, there would have been 2,025 millimetres. Accordingly the 42 millimetres difference may only be accounted for on the hypothesis that the 2007 foundation had been set that far further in to the foundation beneath the party wall, than has been allowed for on SK2. That suggests an error in setting out of in the region of 40, perhaps 42 millimetres.

73. The third reason Mr Smith suggests should be relied on to reject the respondents case on overspill, appears from a proper analysis of Mr Spencer's drawing at SK9. That is a drawing at 232 which shows the two areas of overspill suggested by Mr Spencer from his observations.

74. At 232A two lines have been drawn on that plan, as a result of Mr Perry's work. The upper line, the red line, shows the base of the 1908 footings. The lower green line shows the depth of the trial pit which is not of immediate

relevance to this argument. The point made by Mr Smith is simply this; the red horizontal line shows quite considerable areas of overspill within the 1908 footing. Now that simply cannot be an area of overspill; it indicates that Mr Spencer really did not appreciate the true position as to the lawfulness of the 1908 footing and indicates essentially that his evidence as to overspill cannot be relied on.

75. The fourth point Mr Smith makes is that the 329 millimetre 1908 footing was measured in only one pit. He observes that that is unsatisfactory. I rather agree with him, but that matter cannot be taken any further because of the joint statement.

76. How far do these reasons go? They cannot be easily rejected. As for the first point, it is undoubtedly the case that Mr Spencer did not check that Walter Lily properly set out their 2007 foundations. There is no proof that they were properly positioned. However Mr Spencer, while young, appears to be a competent architect, and the main contractor is one against whom there is no evidence of incompetence. Where there is an apparently competent main contractor following the instructions of an apparently competent architect, I consider that in the absence of evidence to the contrary the court should proceed upon the basis that the main contractor has correctly set out the foundation.

77. Of course the second point as developed by Mr Smith, would if made good, suggest the reverse. A difficulty with this analysis is that the instruction concerned never went ahead. It depends of course on precise figures of the makeup of the actual wall and the hypothetical wall that was proposed and it is common experience that such theoretical build-ups are often not met in practice.

78. It would necessarily follow, if Mr Smith's argument was correct, that the plant room as constructed would be to some 40 millimetres wider than was anticipated as shown in SK2. Overnight measurements have been taken, which indicate this not the case. Objection may be taken to the reliability of such measurements. They were carried out by the client, rather than professional surveyors. They were carried out with a steel rule and not using laser measuring equipment. It is also the case that the respondent's son who reported back stated that there was some wooden structure on the inside face of the plant wall of which we have no more information than that.

79. I understand Mr Smith's concern as to this measurement. Nevertheless while it cannot be relied on to the millimetre, it is indicative that his argument is not in fact correct. We cannot really take it further than that. It is a matter of concern, but can it be more than that?

80. The answer to that must await consideration of the third reason put forward, that is the plan SK09 of the 1908 footings, overhanging the 2007 footings. It is abundantly plain looking at the plan that the areas of overspill are purely diagrammatic. They are shown (by reference, I assume, to some computer programme) with uneven jagged edges, which is not and cannot be suggested

is an accurate reflection of the overspill seen by Mr Spencer and others at the time.

81. That he has placed the area as high as he has is a matter of concern if this diagram were to be used to calculate volumes. But I cannot see that it can safely be relied on as showing that Mr Spencer either did not appreciate the importance of the 1908 footing from the party wall aspect, or was unable to differentiate between the 1908 footing and the 1988 footing.

82. These findings depend of course to a large measure on the view I have taken of Mr Spencer in the witness box. As I have indicated, understandably, he cannot recall everything in precise detail at this distance of time. But he is generally a witness who can be relied on.

83. The result is this; these are matters of genuine concern and I do understand why Mr Perry, who was unable to inspect as circumstances panned out and who did not inspect the perceived overspill at the time, is concerned. But to rely on these reasons to justify a finding by the court that it cannot be satisfied that there was overspill, must necessarily as I see it, involve a finding that the court cannot rely either on the integrity or the competence of Mr Spencer. Those are not findings that I am prepared to make.

84. With the garden, the position is much more uncertain because there is so little clear evidence. There is not much for the court to rely on despite valiant attempts by Mr Perry and Mr Spencer to analyse the most useful photograph showing excavation in the garden, further on from the dwarf wall that ran beyond the house under which there was a footing which was to be underpinned, in the course of the appellants work.

85. Reliance is placed reasonably by the appellants on the step out from the main structure of number 4 Mulberry Walk as shown on the various plans for that work, in particular 8362/10 revision E which we have at page 267. That shows, at the bottom right hand part of the plan, a clear stepping out of the underpinning. It also shows the garden wall protruding beyond the end of the back wall of the property. As I understand the position the suggestion is that this wall was left in order to assist the contractors construct the retaining wall to the light well at the rear of number 4 Mulberry Walk. This gave light to the basement constructed in 1998.

86. That the foundation stepped out in the way suggested by the plan is not accepted by the respondents. I have concerns with the submission Mr Smith made that the presence of the step in the plan authorised the appellants to continue their footing in to the garden of number 2, even if that went beyond the foundations of the garden wall.

87. The fact that the plan indicates a step out does not in my judgment authorise works to be carried out in the position where the plan indicates there is a wall. (The plan, incidentally, is qualified by the rubric 'subject to party wall surveyor's recommendations'). Where underpinning is to be carried out to a particular wall, what is authorised is underpinning to that wall, wherever it

may be in fact, not the laying of concrete in the position indicated on a plan as being the position of the wall. A plan is not a gospel.

88. At the end of the day I have great difficulty in seeing how I may properly reject the evidence of Mr Spencer that there was overspill in the garden on the basis of the appellants' submissions.

89. I very much doubt that any analysis of mine of the respective drawings at 69 and 92A will take the matter further, and I will spare the parties in that regard.

90. I therefore find that there was overspill in general accordance with Mr Spencer's evidence. There is therefore the prospect of a claim, if properly presented, on behalf of the respondents for payment from the appellants arising out of the resulting trespass on the respondents land.

91. **Quantum.** I have already referred to valuation 16. The respondents' case, based on the quantity surveyor's work to which I have made reference, arises on the information to be obtained from valuation 16 which is at page 239. The claim is brought not by reference to volumes of material removed, but simply by charging the cost of removal.

92. That has been the subject of some comment by the appellants. Had it been possible to measure all the material that was removed, that would provide a very useful source of information to be used in the valuation of any claim brought by the respondents. However I can see that where pneumatic drills are used, and even more so where diamond cutting equipment is used, the considerable quantities of dust generated in that exercise would make measuring volumes exceedingly difficult. There is also the further difficulty that in removing material at the niche, material which is removed in lumps or chunks or strips could comprise material some of which was overspill and some of which was not, the latter being material that had to be cut away in any event for the creation of the niche.

93. In valuation 16 the respondents have included the two accounts for £19,351.50 and £2,976.50 rendered by GSS for their specialist work, together with a total of sum £11,805.50 for work carried out by the contractors. That work is shown simply in terms of individual figures by reference to individual reference sheets, which have not themselves been disclosed. Whether it is possible to obtain them or not, no disclosure has been made of them. It seems that some attempt has been made to secure the reference sheets, but they are not available today. The extent to which these sheets would have been useful had they been available is a matter of some doubt. There must be some force in Mr Stainer's submission that were the reference sheets to be made available they would give very little useful information as to the work actually carried out for which these individual charges are made.

94. That then is the claim which was upheld by Mr North, although it is clear from Mr North's award that he did so on the basis that the respondents' figures were not challenged by the appellants in the sense that they had put forward no counter figures or reasons why the respondents figures should not be accepted.

95. I should make two further short comments about volumes. So far as Mr Spencer's work shown on page 319 is concerned it is really very difficult to come to terms with his assessment. There is also the product of a lot of work carried out by the industrious Mr Perry, which can be seen on page 289 of the bundle. Mr Perry has divided the relevant sections of the wall in to four parts and made careful and detailed calculations as to the volumes that may have been cut from that area. Unfortunately the drawings on which these calculations are based are not safely to be relied on. Accordingly, at least from Mr Perry's perspective, very regrettably therefore, the work that he has carried out has come to nought.

96. In considering the question of valuation, I am persuaded that the correct approach is to make an assessment by reference to areas. I have already observed that the niche was an important feature of the design; it was work which incidentally should have been carried out only after an amendment to the party wall award which was not obtained, but nothing turns on that. But it is work for which no charge can be levied to the extent that it involved building in to the 239 line footing.

97. It will be seen that GSS, in rendering their bill, have identified two areas of work which they have carried out. The first at item 10 is approximately 11 square metres of concrete overspill, which coincides with the areas of overspill identified by Mr Spencer.

98. In addition there is a further quantity of concrete removal from a further area of work carried out towards the front of the building. It is accepted by Mr Spencer that work carried out at the front of the building did not involve overspill.

99. Accordingly we are left with GSS having covered an area of 11 square metres including the niche. The niche area may be calculated as at 5.95 square metres, that is a 3.4 metre length and a 1.75 metre height. 5.95 square metres represents 54% of the area cut by GSS.

100. Mr Spencer in giving evidence, thought by way of rough and ready assessment, that the niche represented only 30% of the area. As I have said I am generally impressed by Mr Spencer, but these particular calculations do suggest that in this respect at least his assessment was in error.

101. Incidentally, were a calculation to be carried out by reference to volume, even though I have indicated I think this a dangerous exercise, it may be seen that Mr Spencer's 2.2 cubic metres for the entirety of the concrete overspill removed gives figures that are not so very different from the figures arrived at by area.

102. There is of course a dispute between the parties as to the proper figure to be taken for the depth of the niche, Using areas rather than volume usefully avoids this dispute. But what can be said is that it is unlikely that the 150

millimetres taken by Mr Clements in his calculations on 16 November 2009 can be correct. It is more likely that the niche was at least 175 millimetres deep, it may have been as much as 180 millimetres deep.

103. On the assumption that it was 175 millimetres, it would represent 47.31% of the volume. If it were 180 millimetres it would represent 48.68% of the volume. That gives an indication of the percentage of the GSS work which may properly be included in the value of the works which might be recovered by the respondents.

104. There remains however the work carried out during the latter months of 2007 and the early months of 2008, by the contractors using pneumatic tools. Here there is this difficulty. It is the evidence, which I accept, that work was carried out over these months using pneumatic tools. It was, no doubt, as the quantity surveyor's narrative suggests, long and arduous work. No precise or indeed any record was kept as to where this work took place. There is no indication as to the extent to which the work took place at the area of the niche, as opposed to other areas. And to the extent that work was done at the position eventually taken by the niche, there must be complete uncertainty as to what extent any removal was done before arriving at the 329 millimetre line. Altogether very considerable uncertainty.

105. Mr Smith suggests, on the basis of photograph 307A, that I should find that there was no work done in the area shown in that photograph with pneumatic drills. But I do not think that I can safely accede to that submission.

106. One is left therefore with this uncertainty. Given the figures that I have already indicated, and while accepting that it is pretty rough and ready justice, I am inclined to take a 50% figure and value the claim at 50% of that advanced, while noting that the entirety of the £2,976.50 GSS figure has to be excluded from the claim.

107. By my arithmetic that is 50% of £19,351.50 plus 50% of the £11,805.50 of the reference sheet works, plus 50% of the extension of time calculation carried out by the quantity surveyor. I have not covered that in detail, this judgment has gone on long enough, it is all there in the quantity surveyor's work, the total figure is £24,578.65.

108. None of this figure, say the appellants, is payable because it represents a claim which the respondents compromised following the first award.

109. As I have already stated, after the conclusion of the 1998 award works there was damage, minor damage I should say, to the respondents' property. Mr and Mrs McDermott obtained estimates in November 1999 from a firm Christoff Gollett or a firm Alistair Colvin Ltd, indicating redecoration works of £7,950 plus VAT including provisional sum, reduced to £4,800 plus VAT in the second of the two quotations.

110. These quotations, described as estimations, were forwarded for payment to the quantity surveyors on behalf of the appellants. On 29 November 2009 Mr Perry, writing to the quantity surveyor, enclosed estimation number 138 expressing the opinion that this estimate is reasonable and writing;

> "I am seeking confirmation from the surveyor for number 2 that payment of this sum will be accepted in full and final settlement of all claims under the award."

111. A shorter letter to the same effect was sent to Mr Hughes;

> "Please can you confirm that your appointing owner seeks this in full and final settlement of all claims arising under the award."

112. Mr Hughes' response on 14 December 1999, was that he had to go back to the adjoining owner and their decorator because it seemed that the estimate did not fully cover the reinstatement works and he encloses a revised estimate.

113. He then continues:

> Your letter is in terms of a full and final settlement, but as we spoke on the phone all I can report is that there are no other matters that we need to address at this time."

114. There is then further correspondence relating to the further estimation. On 12 January 2000 Mr Perry notes that the revised estimation included a provisional sum of £1,000 and he asked to be informed of the actual cost incurred so that settlement could be proceeded with.

115. Mr Hughes suggests that the appellant repay £7,000 plus VAT by way of interim payment with a further sum to be paid in due course. That was not a proposal that was acceptable to the appellants; they were prepared only to settle the matter on the basis of payment of £7,000 plus VAT, which incidentally involved a provisional sum of only £50. In the event that sum was acceptable to the respondents and on 10 July 2000 Mr Perry wrote as follows;

> "I enclose with this letter my appointing owner's cheque for £8,225 being £7,000 plus VAT in full and final settlement of all claims between your appointing owner and mine, arising from the building works carried out at 4 Mulberry Walk, over the past 2 years."

With that letter was enclosed a cheque, a cheque which was presented and was honoured on presentation.

116. Mr Smith submits that the payment of this cheque in the circumstances outlined operated as compromise of all claims known and unknown that arose from the building works in 1997 and 1998. The acceptance of the tendered cheque, without qualification, means that it is not now open to the respondents to raise any claim arising out of those works.

117. Quite plainly where a sum is tendered by cheque which is presented and honoured, the mere act of presentation may result in the party presenting the cheque being treated as having agreed the terms upon which the cheque has been tendered with the result that a concluded agreement is arrived at between the parties concerned. That this is the law is plain.

118. The issue for the court is the proper interpretation of the agreement arrived at by the presentation and honouring of the cheque. That exercise is primarily one of interpreting the words used by Mr Perry in his letter of 10 July 2000. It is not quite as straight forward as that; Mr Smith relies on the letter sent by Mr Hughes indicating that he is not aware of any other matter as supporting his argument that there is a compromise of all conceivable claims arising out of the building works.

119. I cannot agree with Mr Smith. In my judgment the proper interpretation of the letter of 10 July 2000 is that it settles all claims that are known about and which had been a matter of dispute. It would include claims known about but not actually disputed that had arisen or been notified between the parties. If to the extent that Mr Hughes letter assists one way or the other, I consider that it assists Mr Stainer's case rather than Mr Smith.

120. But on the letter itself I consider that claims that are not known about are not covered by this agreement. It is of course possible for a party to compromise any claims of which he is not aware. That is possible, but it requires clear words. One has to interpret this agreement as it would be understood by the reasonable man. I am quite satisfied an objective reasonable man would not consider that this payment made in respect of the estimations that had been submitted was intended to and did include claims of which neither party were then aware.

121. Finally I have to turn to 2 arguments raised by Mr Smith, arising out of the positions of the Party Wall Act 1996. The parties agree, as I have indicated, that this award cannot be upheld under s.11(10). If it is to be upheld at all, that must be under s.7(2) 1996 Act. s.7(2) provides as follows:

> "The building owner shall compensate any adjoining owner and any adjoining occupier for any loss or damage which may result to any of them by reason of any work executed in pursuance of this Act."

122. The point Mr Smith makes quite simply is this; where the foundations laid by the appellants encroached on to the land of the respondents, it was not work executed in pursuance of the Act. Works executed in pursuance of the Act are the works which are covered by the party wall award. In the present case they are the works to or underpinning the party wall. Any works that go beyond the line of the party wall, cannot be work executed in pursuance of this Act.

123. This is an ingenious argument, based on a literal interpretation of the 1996 Act. The alternative approach would be to treat s.7(2) properly interpreted as covering any work executed in pursuance or in purported pursuance of an award made under the Act.

124. I consider that the proper interpretation is the latter. There is good reason for the courts to approach the interpretation of the 1996 Act in this way. The provisions now found in the Party Wall Act 1996 are of very great importance. They go back, at least in London, to the 18th century. They were more recently found in the London Buildings Act (Amendment) Act 1939. There have been over the centuries countless numbers of householders who have benefited from these provisions.

125. The Party Wall Act provides a self-contained scheme, whereby owners of adjoining properties can deal with any of the various problems that may arise when there is building work to either property which affects or interferes with the party wall between them.

126. The scheme by enabling or requiring each party to appoint a surveyor to arrive at an award and making provision where necessary for the referral or of disputes to a third surveyor provides a simple straightforward and informal manner of resolving any disputes that will arise.

127. It is commonplace that the works permitted under a party wall award are defined by reference to plans. It is almost inevitable in any building contract that the works, as constructed, do not comply in each and every particular precisely with the plans. Where works are carried out beyond that authorised by the party wall award plans it may well be that a tort is committed.

128. To say that as soon as the work deviates the plans that the owner who suffers as a result cannot rely on the convenient and informal mechanism provided by the Party Wall Act, but must instead go through all the procedural requirements and difficulties inherent in an action in tort in the county court or High Court, seems to me to be a matter that could not possibly have been contemplated by Parliament and would provide a significant detraction from the value of the Act.

129. Accordingly in my judgment s.7(2) should be interpreted so as to cover any work executed in pursuance of or purported pursuance of work under the Act, that is work carried out under a party wall award, even where the strict terms of that award are not closely complied with.

130. Finally I come to the argument that it is not open to the respondents to bring their claim under s.7(2), for however generously this provision might be interpreted, the statutory provision covers only building owners compensating adjoining occupiers for loss and damage. The point made is that under the 2007 award, the respondents are the building owners; they are not the adjoining owners. It is not open to a building owner under s.7(2) to obtain compensation from an adjoining owner. It is one-way traffic only.

131. The difficulty that arises here, unusually, is that here the building owner under one party wall award discovers during the course of his own works that works carried out by an adjoining owner under an earlier party wall award were not properly carried out.

132. The difficulty underlying the present position was in effect trailed by the argument as to settlement. The approach which should have been adopted by the respondents is to bring their claim, not under the 2007 award, but under the 1998 award. That is in truth what they are seeking to do. They are complaining that the appellants as building owners did not carry out the 1998 award works as they should have done and therefore they, the respondents, as adjoining owners to the 1998 award works, are entitled to compensation from the building owners under the 1998 award works.

133. Mr Stainer for whom this was as I understand it, a brand new argument today, suggests that an answer may be found in s.10(1) of the Act, relating as it does to disputes arising between building owners and adjoining owners.

134. I have some sympathy with that submission, but I cannot see that the provisions of s.10(1) can affect the argument under s.7(2). Mr Stainer points out that there has been this dispute between the parties since at least 2009, if not earlier. By 2009 at the latest, it had become plain that a dispute had arisen between the parties as to the way in which the works had been carried out under the 1998 award.

135. The appellants engaged with the respondents in that dispute. The parties relied on the services of their prospective surveyors, attempts were made to resolve the differences. They failed. The third surveyor was brought in, Mr North who unfortunately proceeded upon an erroneous basis as I have stated and we now find ourselves on an appeal, against Mr North's award.

136. Regrettably, and with the greatest possible reluctance in all the circumstances, I consider that Mr Smith's argument is a good and valid argument. Mr Stainer raises the possibility of estoppel. I feel bound to say it seems pretty rich that a party who has engaged for so long on the basis, mutually held, that a sum if shown to be due, might be payable under the 2007 award, should then turn round at the 59th minute of the 11th hour and argue that the argument has taken place under the wrong award.

137. But any amount of estoppel, any amount of behaviour which might be criticised on that basis, cannot give the court jurisdiction where it is not given under the 1996 Act. This court can only proceed to give an award under s.7(2) where s.7(2) is engaged. s.7(2) is only engaged where an adjoining owner seeks compensation from a building owner and not visa-versa.

138. If it were possible, properly, to rectify matters within the context of these proceedings I would endeavour to do so. The two party wall surveyors under the 2007 award were also the party wall surveyors in the 1998 award. However Mr North was not the third surveyor under the earlier award. This is an appeal against Mr North acting as the third surveyor in the 2007 award.

139. Accordingly while I consider, as I have indicated, that the appellants ought to pay the respondents the sum of £24,578.65 and such other adjustments as may arise from other parts of Mr North's award, I have to allow the appeal against

Mr North's award, founded as it is on the wrong basis, and I am unable to substitute any other award in its place.

140. As I have indicated to Mr Stainer, the justice of the situation might be met by some expedited procedure in this court with the respondents bringing a claim in trespass. But so far as this particular appeal is concerned, I have to allow it.

We hereby certify that this Judgment has been approved by His Honour Judge Bailey.

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