

Claim Nos. B20CL030, B40CL092

IN THE COUNTY COURT AT CENTRAL LONDON

TECHNOLOGY AND CONSTRUCTION LIST

His Honour Judge Edward Bailey

IN THE MATTER OF THE PARTY WALL ETC. ACT 1996

BETWEEN:

(1) KAMTHON CHATURACHANDA
(2) AUDREY GUAT LIN NG

Appellants

- and -

(1) STEPHEN JAMES FAIRHOLME
(2) STEFANA RUXANDRA FAIRHOLME

Respondents

AND BETWEEN:

Claim No B20CL048

ABINGDON GARDENS MANAGEMENT LTD

Appellants

- and -

(1) STEPHEN JAMES FAIRHOLME
(2) STEFANA RUXANDRA FAIRHOLME

Respondents

JUDGMENT ON PRELIMINARY ISSUE

1. The Respondents to these appeals, Mr and Mrs Stephen Fairholme, are the owners of 32 Abingdon Villas, London W8 6BX. To the left, looking at the front elevation of the Respondent's property, is 30 Abingdon Villas owned by Mr and Mrs Kamthon Chaturachinda the Appellants in appeal B20CL030 and BCL054. To the right is a block of flats, 1-12 Abingdon Gardens, 40 Abingdon Villas, owned by Abingdon Gardens Management Limited the Appellants in appeal B20CL048.

2. On 4 October 2013 the Respondents served notices under the Party Wall etc Act 1996 on both these adjoining owners in respect of proposed building works. The Party Wall notices were served under ss 3 and 6 of the 1996 Act on Mr and Mrs Kamthon Chaturachinda, and under s 6 of the 1996 Act on Abingdon Gardens Management Limited. The works concerned involved excavation for and construction of a new basement and the erection of a back extension and were designed by Mr Sean Pringuer-James, consulting engineer. The design appears in a series of drawings numbered L1084-004 to 014. Both owners served counter-notices. Surveyors were appointed for the purposes of the 1996 Act, Mr Kevin Wright CEng FRICS for Mr and Mrs Kamthon Chaturachinda, Mr Richard Grove FRICS for Abingdon Gardens Management Limited while Mr Christopher Barber FRICS was appointed by Mr and Mrs Fairholme. The appointed surveyors selected Mr Alistair Redler FRICS to be the Third Surveyor for the purposes of s 10 of the 1996 Act.
3. In due course disputes arose between the appointed surveyors and Mr Redler was called upon to make an award dealing with a number of matters of dispute. Mr Redler's award relating to 30 Abingdon Villas is dated 11 February 2015, and that relating to 40 Abingdon Villas is dated 3 March 2015. In each award Mr Redler dealt with four separate matters of which three overlapped. Both adjoining owners have appealed Mr Redler's awards and Mr and Mrs Kamthon Chaturachinda have appealed a further award issued by Mr Redler and Mr Barber on 27 February 2015.
4. By Order dated 20 April 2015 I ordered that there be a trial of the preliminary issue whether the works begin carried out by the Building Owners involve a reinforced underpinning constituting a special foundation for the purposes of the Party Wall etc Act 1996. This is the issue common to both the awards issued by Mr Redler as Third Surveyor, and identified by him as 'whether special foundation consent is required for the detail proposed'.
5. At the heart of the matter is the proper definition of 'special foundations', a question of considerable importance to house owners contemplating the construction of a basement extension to their properties and to surveyors and designers concerned with such basements. It is matter on which there is no authority. Counsel who have appeared before me are acknowledged experts in this field. Both have written textbooks on the 1996 Act. Mr Nicholas Isaac appears for both Appellants. The Respondents have been represented by Mr Stephen Bickford Smith.

The Party Wall etc. Act 1996

6. The Party Wall etc. Act 1996 ('the 1996 Act') makes possible the commission of what would otherwise be a trespass where the interests of adjoining landowners may conflict. It permits one landowner, the building owner, to build at the line of

the junction between his land and his neighbour's, the adjoining owner, section 1. It gives a building owner a package of rights to carry out works which affect a party wall or other party structure and which at common law the adjoining owner could prevent by injunction, section 2. It also protects an adjoining owner against risks inherent in excavation and construction works carried out by a building owner in close proximity to the adjoining owner's property, section 6.

7. To achieve these ends the 1996 Act imposes a statutory scheme which regulates the work a Building Owner may carry out, thus affording a measure of protection to the Adjoining Owner, and provides a dispute resolution procedure where agreement as to proposed works cannot be reached between the two owners. The dispute resolution procedure involves the engagement of either one surveyor agreed by both owners, or in the absence of such agreement three surveyors (one appointed by each owner and a third selected by the owners' surveyors). An agreed surveyor, or all three or any two of the appointed or selected surveyors may make an award which is conclusive and binding on the two owners.
8. The jurisdiction of the surveyor or surveyors making an award is wide. An award may determine the right to execute work, the time and manner of its execution and any other matter arising out of or incidental to the dispute, including costs and compensation. Against any award there is a right of appeal to the county court which must be exercised speedily, within 14 days of receipt of the award. On such an appeal the court is given wide powers to rescind or modify the award.
9. Accordingly, provided he complies with the statutory scheme, a building owner has conferred on him rights which he does not have in common law. Those rights are restricted by the provisions of s.7.

7 Compensation etc

- (1) A building owner shall not exercise any right conferred on him by this Act in such a manner or at such time as to cause unnecessary inconvenience to any adjoining owner or to any adjoining occupier.
- (2) 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.
- (3) Where a building owner in exercising any right conferred on him by this Act lays open any part of the adjoining land or building he shall at his own expense make and maintain so long as may be necessary a proper hoarding, shoring or fans or temporary construction for the protection of the adjoining land or building and the security of any adjoining occupier.
- (4) Nothing in this Act shall authorise the building owner to place special foundations on land of an adjoining owner without his previous consent in writing.

- (5) Any works executed in pursuance of this Act shall—
- (a) comply with the provisions of statutory requirements; and
 - (b) be executed in accordance with such plans, sections and particulars as may be agreed between the owners or in the event of dispute determined in accordance with section 10;

and no deviation shall be made from those plans, sections and particulars except such as may be agreed between the owners (or surveyors acting on their behalf) or in the event of dispute determined in accordance with section 10.

10. It will be seen from the provisions of section 7(4) of the 1996 Act that Parliament has determined that there should be a specific restriction on a building owner's rights with respect to special foundations. Section 7(4) gives the adjoining owner an absolute veto on any work which constitutes 'special foundations'. There is no qualification, such as a requirement that the adjoining owner's consent is not to be unreasonably withheld.
11. Both 'foundation' and 'special foundations' are defined in section 20 of the 1996 Act:

"foundation", 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.'

An 'assemblage of beams or rods' when used with concrete is, in everyday language, reinforced concrete.

12. It is the case that reinforced concrete is in common use in basement extension design. It enables the designer to provide for thinner walls or foundations than would be required were concrete alone, 'mass concrete', to be used. This enables a design which maximises the available space underneath the ground floor of a residential property which may be utilised in the basement extension. Basement extensions are not universally popular and attract much adverse public comment. The ability of an adjoining owner to veto a basement extension design which incorporates special foundations is of wide significance. As I understand the position both adjoining owners seek to employ such a veto in respect of the Respondents' proposed development, and this, in the case of Mr and Mrs Kamthon Chaturachinda, notwithstanding the fact that they themselves have the benefit of a basement constructed with special foundations as recently as 2012.
13. In the case of the appeal relating to 30 Abingdon Villas Mr Redler describes the dispute between the surveyors as follows:

“The party wall that is to be underpinned is a historic brick wall originally on spread brick footings. The Adjoining Owner has underpinned this wall in the past with reinforced concrete. The Building Owner’s proposal involved further underpinning of this wall with reinforced concrete as part of a reinforced concrete basement box. Beneath the reinforced concrete vertical structure that forms the underpinning, there is to be a mass concrete strip foundation running beneath the edge of the basement box. Mr Barber makes a submission that this is not a special foundation on the basis that the foundation that transmits load to the ground is the mass concrete strip foundation and that the reinforced concrete structure is a wall to enclose the new basement.

Mr Wright makes a submission that the mass concrete shown on the drawings forming the structure beneath the basement box is an artificial attempt to prevent the structure being defined as a special foundation in accordance with Section 20 of the Act. The mass concrete will not perform an actual foundation function and is effectively acting no differently to concrete blinding. Therefore, the foundation is a special foundation as defined by Section 20 of the Act and requires the express consent of the Adjoining Owners for that foundation to be placed beyond the centreline of the party wall and therefore partly on the land of the Adjoining Owners.”

In the case of the appeal relating to 40 Abingdon Villas Mr Redler describes the dispute between the surveyors as follows:

“The party fence wall that is to be underpinned is a historic brick wall originally on spread brick footings. The Building Owners’ proposal involves underpinning of this wall with reinforced concrete as part of a reinforced concrete basement box. Beneath the reinforced concrete vertical structure that forms the underpinning, there is to be a mass concrete strip foundation running beneath the edge of the basement box and through which the vertical load of the structures above will be transmitted to the ground. Mr Barber makes a submission that this is not a special foundation on the basis that the foundation that transmits load to the ground is the mass concrete strip foundation and that the reinforced concrete structure is a wall to enclose the new basement.

Mr Grove makes a submission that the mass concrete shown on the drawings forming the structure beneath the basement box is an artificial attempt to prevent the structure being defined as a special foundation in accordance with Section 20 of the Act. The mass concrete will not perform an actual foundation function. Therefore, the foundation is a special foundation as defined by Section 20 of the Act and requires the express consent of the Adjoining Owner for that foundation to be placed beyond the centreline of the party wall and therefore partly on the land of the Adjoining Owner. Mr Grove also submits that the Act does not permit downward raising of the wall it only permits raising under 2(2)(1). Mr Grove also refers me to “The Law and Practice of Party Walls” by Nicholas Isaac para 22-16 and the conclusions reached there.”

14. The design for the basement extension is seen therefore to comprise a reinforced concrete basement box under which there is a mass concrete strip foundation. During the course of argument Mr Bickford Smith described this design as a reinforced box on concrete rails. The dispute between the respective surveyors may be summarised shortly. Having regard to the definition of special foundations ('foundations ... for the purpose of distributing any load') Mr Barber, the party wall surveyor appointed by the Building Owner, asserts that the foundations that transmit the load to the ground are the concrete rails. The reinforced box structure may be seen as a wall to enclose the new basement. Messrs Wright and Grove, the party wall surveyors appointed by the respective Adjoining Owners say that this argument constitutes an artificial attempt to circumvent the effects of section 7(4) of the 1996 Act. The concrete rails do not perform an actual foundation function. They are effectively acting as concrete blinding. In short the designer has engaged in an artifice or device.
15. In his awards Mr Redler held that the design did not involve special foundations. Accordingly the building owners did not need the consent of the adjoining owners to carry out the works in accordance with Mr Pringuer-James' design. His reasoning is in precisely the same terms in each of the awards:

“In coming to my decision, I have considered the interpretations [definitions] set out in Section 20 of the Act. This defines a special foundation as “foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load”. It is appropriate to consider reinforced concrete to be a foundation within this definition and therefore a reinforced concrete foundation beneath the party wall that extends across the boundary onto the Adjoining Owner's land to be a special foundation required the Adjoining Owner's consent. However the definition of foundation is “in relation to a wall, means the solid ground or artificially formed support resting on solid ground on which the wall rests”. Therefore, what is important is the nature of the structure that transmits the load from a wall to the ground. There is no prohibition on a wall being formed in reinforced concrete without the express consent of the Adjoining Owner.

Where a basement is being formed beneath a party wall, then it is not necessarily the case that the whole structure that is placed beneath the existing wall is itself a foundation. This was identified in the case of *Standard Bank of British South America v Stokes* [1878] in which it was decided that a wall can be raised downwards as well as upwards. In my view, the key issue is the primary function of the structure in question. A vertical structure formed for the purpose of enclosing an occupied space is primarily a wall and not a foundation. The fact that the load from the original wall is transmitted through that structure and ultimately to the ground does not make that structure a foundation any more than a wall above ground is a foundation simply because it transmits a load from a roof to the ground. With this design, the feature that transmits the load from the vertical reinforced concrete wall to the ground is

the mass concrete strip foundation and as a result there is not a special foundation in this design that requires the Adjoining Owners' consent. I have taken note of Mr Wright's contention that the mass concrete foundation is not a necessity for the structure being proposed and has been designed to achieve the result of this interpretation. That may be the case but I do not believe that means that it does not succeed in achieving that".

16. I would summarise the essence of Mr Redler's reasoning to be:
- (1) 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';
 - (2) no adjoining owner consent is required for a reinforced concrete wall, and this includes a reinforced concrete wall built below ground level;
 - (3) the reinforced box is designed for the purpose of enclosing an occupied space and thus the vertical sections of the box are walls;
 - (4) 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;
 - (5) 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;
 - (6) it may be that the concrete 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.

This was the argument developed by Mr Bickford Smith before me.

17. For the adjoining owners Mr Isaac submits that the court should be at pains to avoid defining special foundations in a way which enables designers to avoid 'the clear purpose of the special foundations regime' by the simple expedient of adding an entirely otiose concrete pad beneath the reinforced concrete box structure.

The purpose of the special foundations regime

18. But what is the clear purpose of the special foundations regime? The term "special foundations" was first introduced into the party wall legislation in section 45 of the

London Building Acts (Amendment) Act 1939. This Act defined both ‘special foundations’ and ‘foundation’ in precisely the same terms as now appear in the 1996 Act. The 1939 Act was a local act, and as such was not debated in parliament with a record in Hansard. Counsel has visited the parliamentary archive where the minutes of the parliamentary committee considering the Act are available. Unfortunately there is no reference to, let alone discussion of, section 45 within those minutes.

19. What is clear from reading the 1996 Act is that Parliament has given a veto to adjoining owners with respect to the use of special foundations. An adjoining owner cannot prevent a basement extension. That right exists in common law as extended and controlled by the 1996 Act. But an adjoining owner can, in effect, insist on the Building Owner employing mass concrete foundations if the extension is to go ahead. Pressed to suggest a reason why an adjoining owner might do so for reasons other than those that might be characterised as of a ‘dog in the manger’ nature or born of envy or greed, for an adjoining owner might be persuaded to cease his opposition with an appropriate payment, Mr Isaac suggested that there might be a legitimate concern as to control of the foundation.
20. The suggestion is this. If mass concrete foundations are used they will become part of the party structure and the building owner could not then interfere with them without employing the 1996 Act. On the other hand with the reinforced concrete box the building owner may legitimately remove parts or indeed all but the edge of the base of the box without the adjoining owner having any say in the matter. As the structural integrity of the box is dependent on it remaining an entire box structure, and as the vertical parts of the box give support to the adjoining owner’s house, the removal of the base of the box could cause serious damage to the adjoining owner’s property. So it might, but the English law of tort is not so feeble that it does not give a remedy where an owner of land removes the support to his neighbour’s property, particularly when this is done in circumstances where it is so eminently foreseeable that the removal of support will cause damage. For these purposes it is necessary of course to overlook the fact that for the Building Owner to behave in way suggested would warrant him being sectioned.
21. The manner in which basement extensions may be excavated and constructed is a matter of considerable interest to the party wall fraternity and surveyors and engineers generally. The Pyramus & Thisbe Club has issued a Guidance Note on Special Foundations, note no. 12 dated September 2014. The Note records as ‘two views’ the opposing arguments deployed in these proceedings, suggesting that the Respondents’ arguments represent the ‘current legal authority’, a reliance it would seem on comments of Lord Jessel MR in *Standard Bank of British South America v Stokes* (1878) 9 Ch D 68 at 75. The Guidance Note suggests that the implications for the Adjoining Owner of the Building Owner employing a reinforced concrete construction for his basement are:

- “(1) the alternative solution is usually a foundation of mass concrete without reinforcement which will be of greater volume and which in turn will require more excavation than would otherwise have been the case. This could cause greater disruption during the course of undertaking the works and encroach further under the land of the Adjoining Owner;
- (2) in the event the adjoining owner wishes to undertake works in the future which require the projecting material to be cut away, without reinforcement, there will probably be more to be removed and there maybe costs implications associated with this. On the other hand, there are also costs implications with cutting away reinforcement which can be recovered from next door;
- (3) the potential future use that the Adjoining Owner may wish to make of the work undertaken by Building Owner. There may be cost implications in connection with the Adjoining Owner’s decision to consent or refuse to [the use of] special foundations which it would be legitimate to take into account in future discussions in respect of payment in accordance with the provisions of s 11(11) of the Act;
- (4) the greater volume of unreinforced concrete will, if it is required in connection with excavations to form a basement, reduce the size of the basement upon which it encloses.”

There is, frankly, nothing here to suggest that there is a significant interest in the adjoining owner which is being protected by the special foundations regime. The Guidance Note also points out that where there is a reinforced concrete box construction the floor of the box will create a raft which in practical terms will be difficult to strengthen employing usual methods of underpinning. Accordingly ‘the ability of either owner to impose additional load on the party wall, such as raising it, will be compromised’. But the Guidance Note continues: ‘It should however be appreciated that there are engineering solutions to most situations likely to arise’.

22. Mr Isaac also refers to the views of Mr Simon Pole, as expressed in an article in The Structural Engineer of March 2012. Mr Pole expresses concern that lack of specialist engineering input into basement design will cause problems for the future and ‘needs to be addressed urgently before the basement tidal wave completely engulfs our housing stock and creates problems for future generations’. But the essence of his complaint is the concrete box on raft foundations or supported by developer’s piles. His examples of good practice are both mass concrete underpinning and also reinforced underpinning albeit independent of, not integral with, a basement raft.
23. 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.

Origins of Party Wall etc. Act s 7(4)

24. In considering the purpose of the special foundations regime I return to the legislative history of the relevant provision, that in Section 7(4) “Nothing in this Act shall authorise the building owner to place special foundations on land of an adjoining owner without his previous consent in writing”.
25. Special foundations, that is foundations involving an assemblage of beams or rods, were the result of the introduction of steel-framed buildings in London in the first decade of the twentieth century. In contrast to all previous building methods, which distributed the load of the structure along the full length of load-bearing walls, the steel frame imposed point loads onto the ground through steel columns. These columns were typically founded on pads. Due to the forces involved these pads were reinforced with a grillage of beams and rods. Where it was intended that the external walls of a framed building be constructed close to the building owner’s boundary such pad foundations would need to project onto the land of adjoining owner.
26. In the first part of the twentieth century the statute governing party walls was local to London. The Metropolitan Building Act 1855 was replaced in turn by the London Building Act 1894 and the London Building Act 1930. In 1931 the London County Council decided that an advisory committee should be appointed to consider and report to the Council as to any necessary amendments to the 1930 Act. The Advisory Committee reported in 1935. Its Report dealt with the rights of building and adjoining owners in Recommendation 9. While observing that the relevant provisions of the preceding statutes had worked to the general satisfaction of such owners the Committee considered that the procedures could be improved and that “modern development of building methods has created difficulties and problems with which the present provisions are inadequate to deal”.
27. In this regard the Advisory Committee identified “problems which have arisen as to the concentration of loads on columns and grillages as compare with loading distributed along the area of foundations of a party wall”. The Advisory Committee recommended that the Building Owner’s rights should include a power to place “below the level of the lowest floor of his building, grillage foundations to support the columns of the building owner’s building” but that this power should not be exercisable without the Adjoining Owner’s previous consent in writing. The rights of the Building Owner were to be contained in Section 114 of a revised statute with the Advisory Committee’s suggested amendment to read:

“Section 114 (Rights of the building owner)

(i) That the building owner shall have the right –

(a)

(f) To construct grillage foundations for columns of the building of the building owner under a party wall, provided they do not, without the consent of the adjoining owner, project beyond the footings or foundation concrete of an ordinary wall.”

Plainly the Advisory Committee were proposing a right for grillage foundations restricted to the use of columns in a steel frame construction; there was to be no general right to employ grillage foundations. When the recommendation came before the Planning & Building Regulations Committee of the Council in July 1938 however, the view was taken that this suggested amendment went too far:

“We do not recommend the adoption of the recommendation of the Advisory Committee. We are advised that to permit a building owner to project steel grillages on to an adjoining site might have the result of seriously interfering with the redevelopment of that site at a later date. We, therefore, consider that an adjoining owner should have the power to veto such projections on to his site. We, therefore, consider that the section should be amended to provide that grillage foundations for columns of the building owner should not, without the consent of the adjoining owner, be constructed under a party wall, on the land of the adjoining owner.”

28. The Advisory Committee also proposed a substantial revision of the definition of ‘foundation’. The 1930 Act, s 5 definition:

“‘Foundation’ in relation to a wall having footings means the solid ground or artificially formed support on which the footings of the wall rest but in the case of a wall carried by a bressummer means such bressummer.’

Had the proposal of the Advisory Committee been adopted the definition of foundation would have focused on the distribution of load and become:

“A structure entirely below the surface of the adjoining ground, which is employed for the purpose of distributing load from columns, beams or walls on to the ground, and may include any retaining or other wall based upon the ground, provided that it is of sufficient strength and stability adequately to carry its own weight together with all imposed loads and forces.”

However this recommendation was not carried through into the 1939 Act.

29. The Committee’s advice to give the Adjoining Owner a power of veto over grillage foundations was adopted. The veto was enacted in s 45(2) of the London Building Act Amendment Act 1939 which was in the same terms as the present s 7(4). Grillage foundations were now renamed ‘special foundations’ with the same definition as is now found in s 20 1996 Act, namely:

“foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load”.

30. I am grateful to counsel for their researches. The conclusion is that there is little in the statutory history to assist with the proper interpretation of s 7(4) 1996 Act, save to note that the underlying purpose of the special foundation provision is to ensure that there should be no interference with the future redevelopment of the Adjoining Owner's site.

The Appellants' case in the Preliminary Issue

31. In advancing their argument that the works as designed by Mr Pringuer-James involve a reinforced underpinning which constitutes a special foundation the Appellants have put their case in two ways. The first is that the entirety of the artificially formed support which distributes the load to the ground, that is both the reinforced concrete underpin and the mass concrete strip beneath it (the 'rail'), must be viewed as 'the foundation'. As part of this argument it is suggested that the inclusion of the mass concrete strip is an artifice or device to evade the application of the statutory veto. The second is that the reinforced concrete box, irrespective of the status of the mass concrete strip, constitutes a foundation because it distributes load not only to the mass concrete strip immediately beneath the party wall, but also to the solid ground on the Building Owners' side of that wall.

(1) Both reinforced concrete underpin and mass concrete strip are the foundation

32. Although the adjoining owners on both sides of 32 Abingdon Villas object to the use of special foundations, and similar arguments arise, the evidence at the hearing of the preliminary issue was concerned primarily with the 30/32 side of the construction. On this side there is the more standard party wall, albeit one which has already been provided with a reinforced concrete underpin, under which the Building Owner wishes to insert a reinforced concrete structure placed on a mass concrete strip. On the 32/40 side of the construction is the block of flats, 1-12 Abingdon Gardens, 40 Abingdon Villas. On this side of 32 Abingdon Villas there is a party fence wall. The proposal is to underpin this party wall fence with reinforced concrete, this to form part of the reinforced concrete basement box, and this underpinning will sit on a mass concrete strip. This strip is in fact a projecting toe, with a minimum 300 mm depth, from a mass concrete underpin supporting an existing foundation on the land of 40 Abingdon Villas. The basement slab rests on this toe, matching the provision of the mass concrete foundation on the 30/32 side of the construction. The reinforced concrete wall making up this side of the reinforced box is tied into the slab and is vertically positioned underneath the party fence wall. Accordingly the two front to back 'concrete rails' on which the reinforced box sits are designed in different ways. It is possible that argument as to whether the mass concrete strips or rails on which the reinforced concrete box rests serve any function either in the temporary or the permanent works would develop differently. However that possibility has no immediate relevance.

33. The basement extension beneath 32 Abingdon Villas was designed by Mr Pringuer-James, Consulting Engineer. The design method is described in Mr Pringuer-James' expert report dated 22 May 2015. The design has to take into account the existing basement extension next door at 30 Abingdon Villas which, incidentally, Mr Pringuer-James had himself designed. The basement extension at 30 Abingdon Villas was completed in 2012.
34. From the perspective of 32 Abingdon Villas, the 30 Abingdon Villas basement construction involved the removal of the brick foundation where it extended beyond the footprint of the party wall on the 30 Abingdon Villas side and the insertion of a reinforced underpinning wall to the same width as the brick party wall between the two properties. At its foot the underpinning wall was incorporated into the reinforced concrete slab which formed the base of the 30 Abingdon Villas basement. Whether the reinforced concrete underpin was properly termed a wall or a foundation, it was plainly a special foundation. Both it and the reinforced concrete base comprised an artificially formed support resting on solid ground on which the party wall rested and contained an assemblage of beams or rods employed for the purpose of distributing load. The Appellants, as Building Owners at 30 Abingdon Villas, were able to employ this method of construction because consent was given by the Respondents' predecessors as owners of 32 Abingdon Villas for the purposes of s 7(4) 1996 Act.
35. Had the Respondents been content to have a basement the same depth as that at 30 Abingdon Villas it should have been possible for them to construct their basement making use of the reinforced wall and tying this into the reinforced concrete slab which formed the base of their basement. The Appellants' consent as Adjoining Owners would not have been required (subject to the second argument advanced by the Appellants in this appeal, see below) because no part of the reinforced concrete slab would have been on land of the Adjoining Owners.
36. However the Respondents wish to have a basement deeper than that at 30 Abingdon Villas by a metre or more. Accordingly Mr Pringuer-James needed to design a deeper party wall to accommodate a lower concrete floor slab. His design incorporates the removal of the brick foundation at the top of the basement, of no concern to the Adjoining Owners, and the deepening of the reinforced party underpin which rests on a mass concrete strip. The Appellants object to this element of the design as comprising a special foundation for which they will not give consent.
37. The work involved in deepening the party underpin is shown in the diagram at page 9 of Mr Pringuer-James' report, page 204 of the Bundle. This diagram, doubtless for presentational reasons, refers to a reinforced concrete 'wall' and a mass concrete 'foundation'. Mr Pringuer-James describes the method of work in his report and he returned to it in his oral evidence, stressing on more than one occasion the difficulty of working in conditions which are necessarily very cramped. It is a method of work

which would apply equally to a full depth basement excavation and construction as it does to the present basement wall deepening.

38. Neither a standard party wall nor the present party basement underpin wall will support itself across its entire length in the event that its support along this length is removed. Accordingly sections of wall are exposed at a time, each one metre wide. Working from a hole or trench no wider than the section being exposed, the workmen excavate to the required depth. This is to the bottom of the proposed mass concrete strip. On exposing a metre section to the required depth mass concrete is poured to make the 'foundation' strip (the 'concrete rail') on which the box will sit. Once the section of mass concrete strip has cured a wall is constructed off the strip up to the base of the exposed basement underpin wall. This wall is designed to be reinforced. Construction will involve inserting the necessary shuttering to the rear of the wall, the placing of the reinforcement rods (as detailed in the plans), completing the shuttering and pouring the concrete to form the wall in its vertical plane. The base slab is constructed later, after the completion of the vertical wall. In order to create an effective tie between the wall and the slab when the slab comes to be constructed, reinforcement rods bent through 90 degrees are used at the base of the wall. When completing the vertical construction the horizontal sections of the rods are left exposed for subsequent incorporation into the basement slab when this is cast.
39. This is a practical and effective method of constructing Mr Pringuer-James' design, simply stated albeit difficult to achieve in the very cramped conditions in which the workmen have to carry out their tasks. Section by section the sub-soil is excavated from under the reinforced underpin, the mass concrete strip is cast, and the wall carried up to the base of the reinforced underpin until this underpin, or wall, is supported along its entire length. No work will be carried out to any individual section of wall until the concrete poured in any adjacent section has cured and is of sufficient strength to withstand the increased load which will come onto it with the excavation of adjoining sub-soil.
40. The Appellants object that this method of construction (the '32 Abingdon Villas method') involves unnecessary excavation and additional, avoidable, pouring of concrete. A speedier and more economical method is that which was employed by Mr Pringuer-James next door in 2012, the '30 Abingdon Villas method'. This involves excavating down in sections only to the depth of the base of the slab. The required shuttering is installed and reinforcement rods inserted both to reinforce the wall and provide a metre or so horizontal tie with the slab. The first pour is to the horizontal section not, as in the 32 Abingdon Villas method, to the vertical section. Once this horizontal section of reinforced concrete has cured it provides a solid working platform from which the vertical wall is constructed up to the base of the party wall (or party basement underpin) which it then supports.
41. The advantages, say the Appellants, are twofold. First, the workmen are able to construct the vertical wall from the secure platform provided by the metre or so of now

cured reinforced concrete slab section. Secondly, both the work of excavation for and the concrete poured to form the mass concrete strip underneath the wall are saved. Both the work and the concrete are completely unnecessary, as has been demonstrated by the construction by the Adjoining Owners of their basement using the 30 Abingdon Villas method.

42. Potentially the most dangerous part of the exercise with either method is the exposure of the sub-soil when excavating down to the required level. The sub-soil may dry out and lose cohesion, there may be loose material within the soil which will not support itself while the wall is constructed, or the exposed face may collapse for some other reason. In the 32 Abingdon Villas method there will be a wait with the face of the excavation exposed while the mass concrete cures. In the 30 Abingdon Villas method there will be a similar wait while the horizontal slab section cures. Neither method avoids the risk that there will be collapse of the face of the excavation.
43. There being clear advantages and no disadvantages in the 30 Abingdon Villas method the Adjoining Owners initially argued that the 32 Abingdon Villas method, incorporating as it does a wholly unnecessary mass concrete foundation, does so purely to preclude the exercise of the Adjoining Owners' veto afforded by s 7(4) 1996 Act. The 32 Abingdon Villas method avoids the alternative of a mass concrete foundation which, extending both sides of the party wall footprint, has the effect of reducing the available space in the completed basement. Reducing space on both sides of the party wall incidentally, but in the present case a 'full height' mass concrete foundation will not impact on 30 Abingdon Villas' basement because it will be entirely below slab level. The 32 Abingdon Villas method involves a more expensive method of construction but that additional expense is worth paying by a householder anxious to maximise the resulting space.
44. In the circumstances it is plainly open to argument that the 32 Abingdon Villas method is in truth an artifice or device involving the insertion of an unnecessary mass concrete foundation purely to circumvent the veto provided by s 7(4) 1996 Act and for no other reason.
45. Mr Simon Pole gave expert evidence on behalf of the Appellants. His evidence is that of the 'many hundreds' of basement projects with which he has been concerned either as designer or as party wall surveyor he has not seen the 32 Abingdon Villas method of construction deployed before. He notes that Mr Pringuer-James himself used the 30 Abingdon Villas method of construction next door. In stark contrast, Mr Pringuer-James's evidence is that the 32 Abingdon Villas method of construction is his usual approach to basement extensions of which he has designed very many. He only employed the alternative method at 30 Abingdon Villas because he was instructed expressly to do so by the Adjoining Owners when they were Building Owners.
46. Where it is clear that a person has deployed an artifice or device purely to circumvent the clear intention of parliament it is unthinkable that the court will turn a blind eye to

such behaviour. At paragraph 22-16 of his textbook, Counsel for the Appellants has observed that the introduction of a ‘mass concrete pad’ underneath a reinforced concrete basement construction design will not result in the proposed works falling outside the definition of special foundations. The accompanying figure B shows a small pad unlikely to be able to withstand the forces imposed by the upward construction of a reinforced concrete wall as in the 32 Abingdon Villas method described above. Such a pad seems no more likely than a thin blinding layer of concrete (a more extreme example) to withstand the weight of upward construction. However, provided the pad or blinding layer is placed on solid ground the concrete box then constructed above it will support all the forces imposed from the building above.

47. Neither such a pad nor a blinding layer will protect the Building Owner from the Adjoining Owner’s veto in s 7(4) 1996 Act. The proper legal construction in these circumstances will be that neither pad nor blinding layer constitute a foundation independent of the reinforced installation which will itself comprise the basement foundations. Neither will qualify as a ‘support’ for the purposes of the 1996 Act definition of foundation. It may be argued that the basement construction with its pad or blinding layer will be one which ought not to incur the possibility of an Adjoining Owner’s veto because it does not interfere with the Adjoining Owner’s future redevelopment of his site. Neither will it. But to allow special foundations against the Adjoining Owner’s wishes (however ill-conceived they may be) except where the Adjoining Owner can demonstrate that the foundations proposed will interfere with his future development of his property would be to take purposive construction too far. It would amount to judicial legislation. Parliament could very easily have constrained the veto in this way. It did not do so.
48. The present case involves a much more substantial mass concrete strip than the pad envisaged by Counsel for the Appellants in his textbook or the suggested blinding layer. It is a self-supporting structure which enables the 32 Abingdon Villas method of construction. Mr Pole complains that he does not understand the role the mass concrete foundation plays in the permanent works. He is not impressed by the suggestion that it affords an additional level of support to the basement which might give useful protection to the Building Owners and Adjoining Owners’ properties at some time in the future. Mr Pringuer-James recognises that the mass concrete foundation is essentially a temporary works expedient and he does not seek to claim any essential reason for its presence in the permanent works. Nevertheless it forms a permanent foundation, and it is able to provide the not inconsiderable level of support of which it is capable of providing. It may be essential only in its temporary works context and, as part of the permanent works, it may represent over-engineering, but it cannot be castigated as an artifice or device on that basis alone.
49. In the event the Appellants did not press (although did not expressly abandon) the argument that this mass concrete strip was an artifice (or device or sham) included in the design purely in order to render nugatory the Adjoining Owners’ veto provided by s 7(4) 1996 Act. Such a result incidentally would have necessitated a finding on my part

that Mr Pringuer-James was not being truthful in his evidence that this method was a genuine approach to basement construction, a finding I am not prepared to make.

50. Whatever views may be held about it, and however well-advised a Building Owner may be to save the additional expense involved when consent is forthcoming to special foundations from his Adjoining Owner, the 32 Abingdon Villas method of construction is a valid approach to basement extension construction. As such it does not qualify as an artifice.
51. May it still be argued that the entirety of the artificially formed support, the reinforced underpinning and the concrete strip, constitutes the foundation? I cannot see why that should be. The reinforced underpinning and the concrete strip are separate features of the building. True the load imposed by the structure above the ground is transmitted through both the underpinning and the strip. But, as Mr Redler states in his award, the fact that a load from a higher part of the structure is transmitted through a lower part of the structure does not make the lower structural part a foundation. That argument would make an external wall above ground a foundation for it too transmits load from the roof to the ground. There is no warrant in the statutory definition of ‘foundation’ either to define foundation by reference to transmission of load or by reference to the position of an artificially formed support whether above or below ground.
52. The mass concrete strip is an element of the construction separate and distinct from the reinforced concrete underpin (wall) which sits upon it. It is the construction element, artificially formed, which rests on the solid ground beneath. It is ‘the foundation’ and it does not comprise an assemblage of beams or rods. Accordingly it is not a special foundation. The reinforced concrete underpin (wall) comprises an assemblage of beams or rods but it is not a foundation. It follows that it cannot be a special foundation.
- (2) The reinforced concrete box constitutes a foundation because it distributes load not only to the mass concrete strip immediately beneath the party wall, but also to the solid ground on the Building Owners’ side of that wall
53. The Appellants’ second argument considers the distribution of load. As submitted in Mr Isaac’s skeleton argument, at paragraph 14, “...if load is distributed to solid ground from an artificially formed support in which an assemblage of rods is used to distribute that load, the entirety of the artificially formed support (in so far as it distributes load to solid ground) must be viewed as the foundation.” Accordingly, in the present case, it is argued that the entire reinforced concrete box (i.e. the reinforced concrete walls of the basement structure together with the reinforced concrete slab) constitute a foundation. To the extent therefore that this foundation distributes load to the land of the Adjoining Owners, and for these purposes the assertion must be that it does, the Appellants argue that it is a special foundation for the purposes of s 7(4) 1996 Act and may not be constructed without the Adjoining Owners’ consent in writing.

54. The assertion that the foundation, seen, as described, as the entire concrete box, distributes load to solid ground comprising the Adjoining Owners' land is, say the Appellants, made good by reference to an analysis of the loads by Mr Pole contained in his expert report which, it is asserted, demonstrates that load is distributed by the reinforced concrete slab where it bears on the ground to the side of the mass concrete.
55. There are two elements to this argument which require particular consideration. The first is the definition of foundation, and the incorporation into this definition which the Appellants wish to make of the concept of distributing load. To the engineer this is what a foundation does; it distributes the load of the building to the ground on which the building is constructed. The definition of foundation used by the Advisory Committee / 1930 Act, quoted in paragraph 29 above refers to "a structure, entirely below the surface of the ground, which is employed for the purpose of distributing load ... on to the ground". This definition, furthermore, envisages that a retaining wall or other wall based upon the ground might also form part of a foundation.
56. However the 1996 Act, following the definition in the 1939 Act (itself derived from the 1930 Act albeit with slight amendment) does not follow this approach:

"foundation", in relation to a wall, means the solid ground or artificially formed support resting on solid ground on which the wall rests;

The statutory definition does not approach the question of what constitutes a 'foundation' from an engineering perspective. It simply refers to ground or artificial support on which the wall rests. That this is not only a different definition but a definition approaching the question of what is a foundation from a rather different perspective is evident from the fact that under the Advisory Committee definition solid ground could never constitute a foundation.

57. One objection to the Appellants' load distribution argument therefore comes directly from the 1996 Act definition of foundation. With this definition it matters not where the load is distributed. The sole consideration is where the wall 'rests'. Therefore as, in the present case, the wall rests on the mass concrete foundation, and as the mass concrete is not a special foundation, it may be simply asserted the Appellants' argument fails, and fails even if it were possible to demonstrate that load is distributed to the Adjoining Owners' land by the slab without such distribution bearing through the mass concrete.
58. This objection may be the more difficult to sustain because the 1996 Act definition of 'special foundation' does incorporate the engineering perspective:

"special foundations" means foundations in which an assemblage of beams or rods is employed for the purpose of distributing any load'

Nevertheless this definition incorporates ‘foundations’ and with it the requirement of where a wall ‘rests’, and so the distribution of load is within that context, that is where the wall rests, and cannot therefore extend to the distribution of load to ground which is not ground on which the wall rests.

59. The second element is the distribution of load. Assuming, for the present, that it is permissible to look to where load is distributed to ground other than that on which the wall rests, there must still be a distribution of load to land of the Adjoining Owners. This is inherent in the wording of the veto in s 7(4) 1996 Act, quoted in paragraph 9 above. In this connection it is plainly not sufficient for the Adjoining Owner to show that load is distributed to ground alongside the mass concrete on the Building Owner’s side of the foundation. It is necessary to show that load is distributed to ground which is directly beneath the party wall, which includes the basement party wall originally constructed for the basement of 30 Abingdon Villas, and which is to be deepened in the same vertical plane by the Respondents in accordance with Mr Pringuer-James’ design.
60. Mr Simon Pole considers the question of transfer of loads in sections 3 and 4 of his Report dated 15 June 2015, with his conclusions contained in section 4. Mr Pole’s report contains a series of helpful diagrams. These are prepared with a view to showing that, in addition to the load comprising the weight of the structure of 32 Abingdon Villas which bears directly down on the mass concrete foundation, there is:
 - (i) load resulting from the horizontal force of the soil and water pressure imposed underneath the basement of 30 Abingdon Villas (Pole SK7 and SK8 ignore the fact of the basement beneath 30 Abingdon Villas but is nonetheless descriptive of such horizontal forces comprising as they do bending moments) and
 - (ii) load (possibly) resulting from the downward load onto and horizontal forces into the slab (see Pole SK9. 11 and 12). The uncertainty in connection with the slab forces arises because the presence of downward or upward load (the latter never being load which would assist the Appellants’ argument) depends on the relative magnitude of clockwise and anticlockwise twisting forces. These are forces which Mr Pole has not been able to assess let alone calculate.
61. I see no need to rehearse the arguments presented by Mr Pole, and well presented too, with his diagrams. While Mr Pole succeeds in demonstrating that there are forces at work, with resultant downward loads, other than the (main) downward force consequent on the weight of the building comprising 32 Abingdon Villas, what he does not demonstrate is that these forces bear down on the Adjoining Owners’ land without passing through the mass concrete. Interestingly Pole SK12 is drawn so as to suggest that the ground reaction on applied loads comprised in the Adjoining Owners’ land is all through the mass concrete.
62. What Mr Pole appears to ignore in the course of his exposition is that it is not sufficient to demonstrate that there are loads on the Adjoining Owners’ land from the concrete box passing through the mass concrete foundation. For that foundation is not a special

foundation (unless it is mere artifice which is where this argument started and which has been rejected) and is free to carry loads onto the Adjoining Owners' land under the Building Owners' rights under the Party Wall Act without the possibility of veto by the Adjoining Owners.

63. For his part Mr Pringuer-James, in his supplementary report dated 24 July 2015, entirely rejects the argument that load will be transferred through the reinforced concrete slab directly to the ground. Mr Pringuer-James, with the advantage of much greater familiarity with the project than Mr Pole, analyses the position in three parts, dividing the basement construction into three zones A, B and C.
64. Zone A is that part of the basement structure which falls beneath the residential dwellings 30 and 32 Abingdon Villas. With respect to this zone, Mr Pringuer-James argues that all the horizontal load and forces are resolved within the vertical structure beneath the Party Wall. Accordingly no load at all will be transferred through the reinforced concrete slab directly to the ground within zone A.
65. Zone B is further back from the front of the buildings. It includes both an underpinning wall and a bonded reinforced concrete wall spanning vertically between the basement and lower ground floor levels. Mr Pringuer-James describes it as an underpin transition zone where the underpinning steps upwards to minimise stress change on the supporting ground. He argues that there is no load transference to the reinforced concrete slab whether at between 30 and 32 Abingdon Villas or between 32 and 40 Abingdon Villas. Any deformation in the wall resulting from horizontal forces will occur between two reinforced concrete floor plates, those at lower ground floor and basement level. These forces will be resolved by the reaction of the floor plates.
66. Finally zone C at the rear of the property. Here there is a garden wall with little by way of vertical load. There will of course be horizontal loads. These however will be resolved by the reaction of the rear retaining wall and the steel frame which has been inserted in zone B. Again, therefore, there will be no loads transferred to the reinforced concrete slab.
67. I recognise that Mr Pringuer-James would have been under some pressure while giving evidence to defend his design as one which does not engage the s 7(4) veto. This point was fairly made by Mr Isaac in his submissions. Mr Pole also had his pressures in giving his expert evidence, having publicly adopted the stance he has with regard to reinforced basement structures. Nevertheless I considered that both experts engaged properly with the issues under consideration and did not allow external pressures to influence their evidence. I prefer the evidence of Mr Pringuer-James. There were times when I considered that Mr Pringuer-James may have felt that he might have been too adamant in arguing that no loads of any nature, even minimal, were distributed from the slab to the ground but I am entirely satisfied that Mr Pole came nowhere near establishing that any such loads were more than minimal (and as such should be ignored) and, more importantly, were distributed to land of the Adjoining Owners.

68. In the circumstances I reject this second argument. On the preliminary issue therefore I find for the Respondents. I hold that the works being carried out by the Building Owners do not involve a reinforced underpinning constituting a special foundation for the purposes of the Party Wall etc Act 1996. I will consider the appropriate form of Order and any matters consequential on this judgment with counsel by e-mail in the first instance.

23 September 2015

HHJ Edward Bailey

County Court at Central London
Thomas More Building
Royal Courts of Justice