

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2000/330

BETWEEN:

RHONA HENRY
ERIC HENRY

Claimants

And

TROPIC BUILDERS LIMITED

Defendant

Appearances: Ms. Stacy Andrews-Anjo for the Claimants
Mr. John Fuller for the Defendant

.....
2009: November 19

2010: February 24
.....

DECISION ON ASSESSMENT OF DAMAGES

- [1] **Thomas J (Ag.):** The matter before the Court is the assessment of damages payable to the Claimants consequent on a determination by this Court that the Defendant was liable in negligence and breach of contract. The damages relate to the construction of a dwelling house at Friars Hill, St. John's by the Defendant under a fixed price contract of \$684,500.00 with the Claimants.

Background

- [2] On 5th October, 2000, the Claimants, Rona Henry and Eric Henry, filed proceedings against Tropic Builders Limited and Oliver Davis, T/A Davis Engineering Services. At the trial of the matter both defendants were held to be liable both in contract and in the tort of negligence. However, Oliver Davis successfully appealed¹ against the finding of liability against him.
- [3] At the time of the judgment, in the matter 11th November, 2004, directions for the filing affidavits and exhibits by the parties within a specified time. Leave was also granted to any party to file an expert report under Part 32 of CPR 2000. Further, directions were given on 16th February, 2007, and 20th April, 2009.
- [4] Pursuant to these orders, Mrs. Rona Henry filed two² affidavits while Bengt Berntsson filed one affidavit on behalf of the Defendant, Tropic Builders Limited.³ An expert report was also filed pursuant to an order of this Court.⁴

The Evidence

- [5] In her affidavit filed on 27th June, 2009, Mrs. Rhona Henry deposes that since 18th November, 1995, she has lived in a house that is now "barely habitable". In this regard the deponent identifies two basic problems: (1) huge cracks in the floors, walls up to roof level, which cracks continue to widen; (2) the leaking of the house in the area of the cistern and the basement level making the basement smelly, moldy, wet and unusable for a number of years since construction up to today. Mrs. Henry goes on to detail valuables⁵ lost over the years as a result of the condition of the subject house.

¹ Civil Appeal No. 37/2004 with the decision rendered on 4th December, 2004.

² Affidavits were filed on 27th June, 2008 and 8th October 2009.

³ Affidavit filed on 29th July, 2009.

⁴ Report filed on 27th June, 2009.

⁵ These are as follows: (a) 1 large rug - \$1800.00, (b) two curtains and drapes - \$2100.00, (c) 1 large bookshelf with books - \$1400.00, (d) 1 love seat and curtains - \$1460.00, (e) 1 dressing table - \$2240.00, (f) 1 wardrobe – bequeathed by family member, (g) 1 stereo set - \$3500.00, (h) 1 desktop computer - \$4000.00, (i) 2 television sets - \$1000.00 (j) 3 clothes irons - \$300.00, (k) 2 ceiling fans with lights - \$971.00, (l) 2 pieces travel luggage - \$600.00, (m) miscellaneous pieces of clothing - \$1500.00, (n) 4 framed pictures - \$250.00 (o) 3 bed spreads, (p) 2 blankets - \$1200.00, (q) 4 pillows - \$180.00.

- [6] The affidavit also addresses the matter of hot and cold water facilities which were not provided by the Defendant as required by the contract executed. Also addressed, is the issue of the retention of \$34,225.00 as detailed at section 9(e) of the said agreement.
- [7] On matter of the rebuilding of her home, the deponent contends that based on the expert report this appears to be likely and that in this regard she obtained an estimate from a local contractor. The estimate according to her is "at least \$1,141,705.00 to demolish and rebuild my house".
- [8] It is also Mrs. Henry's contention that while her house is being rebuilt, she would be in need of a place to live and has been advised that the rental will be in the vicinity of \$7,000.00 per month over the rebuilding period of 12 months.
- [9] In a supplemental affidavit filed on 8th October, 2009, Mrs. Henry says that her purpose is "to place on record several documents⁶ and matters which were presented a part of the Trial Bundle and discussed in the substantive matter." In this context paragraphs 4 to 9, Mrs. Henry details the nature of the correspondence sent to Mr. Berntsson in connection with the problems that were being experienced at the house, and also of various meetings proposed in this regard.
- [10] Mrs. Henry contends that as a consequence of one such meeting, involving Mr. Berntsson, it was sought to agree on a time frame for the completion of the works that were necessary to complete the problems with the house. But according to Mrs. Henry no suggestions or any other answer came from Mr. Berntsson. And at paragraph 10 Mr. Henry deposes as follows:
- "We therefore proceeded to ask for an independent assessment of the cause of the continuing damage from Mr. Cedric Henry, a structural engineer. This is the report attached to the Affidavit in Reply of Mr. Berntsson. Unfortunately, Mr. Henry would not say definitely what was causing the damage to the house and recommended soil testing to further assist in the identification of the problem. He also recommended remedial work such as disconnecting downpipes from the cistern which was done."
- [11] And at paragraph 14 of her said affidavit, the deponent says in part that: "I was prepared, however, to work with Mr. Workman and the Defendant but after the release of Mr. Workman's

⁶ These documents relate substantially to correspondence between the Second Claimant and the Defendant and between the Claimants attorney and the Defendant's representative.

report the Defendant did nothing and proposed nothing. At that time, the Defendant knew that it would not be as simple as cutting a few walls and clipping floors based on Mr. Workman's report".

[12] In cross-examination by learned counsel for the Defendant, Mr. John Fuller, Mrs. Henry restated the fact that the problems with the house surfaced in 1995, at which time there were multiple cracks which resulted in water coming into the house – walls, living room, passageway, and stairway. He added that she knew from the beginning that the house was leaking both upstairs and downstairs and that it was rainwater that was coming in. She also said that she gave the Defendant a chance to fix the house. With respect to the court proceedings, Mrs. Henry testified that they were instituted in 2000 and by this time several items were lost due to the water.

[13] It is Mrs. Henry's testimony that in 1999 the main problem was the cistern, some four and a half years after the house was first occupied. She said that during this time the Defendant did several repairs and that Mr. Berntsson went into the device seven times. It is her further evidence that she did not recall telling Mr. Berntsson that she did not want him to come to the house any longer. Mrs. Henry went on to testify that in August 1999, she met with Mr. Berntsson at her home at which time Mrs. Anjo present. According to her, the matter of the cistern was discussed and it was agreed that another cistern would be built within the existing cistern. Further, that during this time tanks would be provided by Mr. Berntsson which was never done as agreed. The witness, in this connection, denied that she refused to let Mr. Berntsson do the agreed work.

[14] Continuing her cross-examination, Mrs. Henry testified thus: "I had several engineers look at the property, Cedric Henry, Barrymore Davis and Addison Workman. They looked at the house after I had filed the case. Nobody looked at it before. I do not agree that Cedric Henry looked at it in July 2000. None of these persons recommended the house being torn down."

[15] Mrs. Henry's evidence in re-examination is that she did not get a reason from anyone regarding the state of her house and repeated earlier testimony that Mr. Berntsson went into the cistern seven times. It is also her further evidence that he did repairs to the ceiling and walls.

[16] Finally, the witness testified that she was not aware of any engineer looking at the house on behalf of the Defendant.

Bengt Berntsson

- [17] In his affidavit in reply, filed on 29th July, 2009, the affiant deposes that, for the purposes of the assessment, he places reliance on their reports produced at the trial. He deposes further that none of these reports contain a recommendation for the destruction of the Claimant's home. And in this regard, too, he places reliance on an estimate of \$252,700.00 contained in the report of Charlesworth Barry Davis dated 28th November, 2000.
- [18] At paragraphs 6 and 7 of his affidavit, Mr. Berntsson addresses the questions of mitigation on the part of the Claimant and the losses complained of by the Claimant at paragraph 3 of her first affidavit.
- [19] Finally, at paragraph 8, the affiant contends that the Defendant offered to effect the necessary repairs and renovations under the guidance and instruction of the Claimants' experts but all such offers were rejected until the action commenced in 2000.
- [20] In cross-examination, Mr. Berntsson said that it is his recollection that the property was not damaged as a result of hurricane Luis. He went on to testify that he was not aware of any leaks at the time of Luis and did not remember a letter in October 1995 relating to a number of problems.
- [21] As far as the cistern is concerned, Mr. Berntsson said that he could not recall exactly, but conceded that the water leaking out might have happened. And as far as the other problems are concerned, he said that he took care of them based on a list he carried to the job.
- [22] Mr. Berntsson continued his testimony in this way:
- "I am aware that I was negligent. At the time of the ruling there were still problems some of which were not solved, but I tried to fix them. I sought advice from an engineer, Mr. Davis. He gave me recommendations. They were both verbal and written and we proceeded on that basis. At one time I did require Mrs. Henry to move out of the house to effect repairs. Mrs. Henry told me she did not want me to commence the work."
- [23] It is Mr. Berntsson's testimony that he recalls receiving a letter from the Claimant's attorneys, Hill and Hill, on 28th January, 1999. He said that in that letter it was suggested that two engineers should give reasons for the problems. The witness went on to say that he was sure that there was no written response.

- [24] Mr. Berntsson also acknowledged that there were several attempts to meet to estimate the problems and there were meetings for this purpose. He said that on 11th July, 2000, a letter was sent by the Claimants' attorneys at which time no court proceedings had commenced.
- [25] With respect to Mr. Henry's report the witness said that he recalls seeing it and recalls further that none of the recommendations were implemented. He went on to say that he did not agree with Mr. Henry's conclusions.
- [26] Mr. Berntsson, on being crossed-examined on specific recommendations made by Mr. Henry said as follows: "The down pipe to the cistern was disconnected but it was not done by him. The soil test, as recommended, was not done, as far as I know". And with respect to the letter dated 1th July, 2000, said he could not recall his response. However, when it was put to him that there was no response to the letter, Mr. Berntsson testified that he did not engage in any soil test. At a later stage in the cross-examination the witness gave this further testimony: "I did not think it necessary to do the soil testing at the time in July, 2000. I did not agree with it. I cannot say I had no intention of doing anything to solve the problem".
- [27] With regard to Mr. Addison Workman's report, Mr. Berntsson said that he met with Mr. Workman at the Claimants' house at which time the possibilities of repairs were discussed. He also said that he did not do anything in relation to the house after he saw the report.
- [28] In concluding his evidence, Mr. Berntsson said that at a later stage the Claimants did not want him to do anything, but was not sure as to the time frame as to when there was the refusal.
- [29] Finally, it was put to the witness by learned counsel for the Claimants' that Mrs. Henry was forced to start because nothing was done as was recommended. The response was that Mrs. Henry was aware of the position after he failed to carry out the recommendations. He went on to express the belief that the site caused the problem and, further, that he was not aware that he could have brought in an expert as he did not think of the matter.
- [30] In re-examination Mr. Berntsson said he asked Mr. and Mrs. Henry to move out of the house for the purposes of the repairs which would have taken "three months or so".

Findings of fact

[31] The Court makes the following findings of fact:

1. The problems with the house were noticed before it was occupied which were brought to the attention of Bengt Berntsson by letter dated 4th October, 1995, plus other letters from the Claimants and meetings.
2. Bengt Berntsson attempted to do repairs to the walls and ceiling and went into the leaking cistern seven times to repair it.
3. The Claimants, in particular Mrs. Henry, did not refuse to allow Bengt Berntsson to enter the house to effect repairs. This is supported by the uncontradicted evidence that Mr. Bengt Berntsson made seven visits to the house in an attempt to stop the leaks in the cistern.
4. The Defendant failed or refused to give effect to any of the recommendations made by Cedric Henry regarding the problems with the house.
5. The Defendant failed or refused to provide tanks for water storage, as agreed, in an attempt to reduce reliance on the cistern.

ISSUES

[32] There are two issues for determination namely,

1. The measure of damages in contract and tort.
2. The quantum of damages to which the Claimants are entitled.

Issue No. 1

1. The measure of damages in tort and contract.

[33] It is common ground that the measure of damages both in contract and tort are along the same general path with some exceptions. The matter is discussed extensively in **McGregor On Damages**⁷ and in the case of **C. R. Taylor Ltd. v Hepworths Ltd.**⁸, Mr. Justice May in discussing the issue of measure of damages with respect to a building destroyed by fire had this to say:

⁷ 15th Edition at paras. 725-735.

"The various decided cases on each side of the line to which my attention has been drawn, and some of which I have been referred in this judgment, show in my opinion merely the application in them of two basic principles of law to the facts of those principles of law to the facts of those various cases. These two basic principles are, first, that whenever damages are to be awarded against a tortfeasor or against a man who has been broken a contract; then those damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort or breach of contract not occurred. But secondly, damages to be awarded are to be reasonable that is as between the plaintiff on the one hand and the defendant on the other. That these are the underlying principles I think quite clear, for instance, from the judgments in **Jones v Gooday**, 8 M & W 146 and in particular from the judgment of Alderson B".

- [34] In sum therefore, the measure of damages of damages in tort and in contract is such damages that would put the Claimant in the position he would be in had there not been a tort of a breach of contract, but such damages must be reasonable.

Issue No. 2

2. The quantum of damages to be awarded to the Claimants.

- [35] It is the contention of learned counsel for the Claimants that rectification is the appropriate measure of damages in the circumstances. In the main these are the submissions:

"The normal basis for damages for breach of contract is to put the innocent party in the position he would have occupied if the promise had not been broken. The two methods of calculating this loss is usually, (1) the costs of rectifying the defects; (2) the amount by which the defects reduce the value of the asset. Rectification can be assessed at the time that the homeowner gains a judgment or assessed damaged if the cost of such rectification simply cannot be afforded by the homeowner. Cost of rectification may mean reinstatement. The homeowner can be denied this remedy if it is clear that he does not intend to reinstate the property.

The expert has come to the conclusion that "with...the high degree of failure" he could not recommend cosmetic repairs. It is beyond the point of repair. He has recommended that the building be demolished and rebuilt at a value equivalent to the valuation cost.

The general principles relating to reinstatement and the judgment in **Alcoa**, require that the damages be assessed in a manner that will bring the Claimant into the position that she would have been had the contract been completed as agreed. This can only be then the cost of rebuilding as at today's date.

⁸ [1977] WLR 659, 667.

Even if the award is made on the basis of difference in value of the building, we submit that this will still be the full value of the building because the building as it stands has no commercial value. The Claimant's evidence that she was unable to afford this exercise is not challenged and would ask that the court accept that the Claimant was unable to mitigate her loss in this regard due to her impecuniosity. In **Dodd Properties (Kent) Ltd. v Canterbury City Council**, the Claimant delayed rectification because it could not afford to pay and the court allowed recovery on the higher figure. The Privy Council *Alcoa* case (already cited) is also authority for the above stated legal position.

It is our submission that the only method of compensating the Claimants in the instant case will be the award of a sum which will allow them to rebuild the home that the Defendant negligently and in breach of contract constructed. That sum has been estimated at EC\$1,141,705.00. Further naturally arising out of the demolition and rebuilding of the property the Claimants will need to be housed in suitable accommodation which is estimated at EC\$7,000.00 over 12 months a total of EC\$84,000.00.

The Claimant also under general damages asks the court to award a reasonable figure for loss of use. In **Rawlins v Rentokil Laboratories** and later **Ruxley Electronics v Forsyth**, ..., the court acknowledged that damages could be allowed for the discomfort and dislocation to the Claimant living in a house which is in a defective state. The court will note that in the instant case the house is beyond repair and so the inconvenience to the Claimants was greater. The court will note the Affidavit of Rona Henry in this regard".

[36] Learned counsel for the Defendant has advanced the following submissions:

"23. It is submitted that the guiding principle for the Court at this stage is *reasonableness*.

24. Irrespective of the category under which an award for damages and irrespective of whether an award is made in respect of contract or tort, the Court has to carry out a balancing exercise.

25. *"The damages to be awarded are to be reasonable, reasonable as between the plaintiff on the one hand and the defendant on the other."* (see *C.R. Taylor Ltd. V Hepworths Ltd [1977] 1 W.L.R 659 at page 667*)

26. In applying this principle in the case of *Taylor v Hepworths*, while the Claimants sought the cost of reinstatement, the Court awarded damages in the sum required to carry out *'immediate necessary remedial and safety work'*.

27. Further in *Ruxley Electronics Ltd v Forsyth* 1996 1 A.C. 345 at 354 it was held that *"to hold...that the measure of building owners's loss is the cost of reinstatement, however unreasonable it would be to incur that cost, seems to me to fly in the face of common sense"*.

28. It is finally submitted that in determining an award, reasonable between the Claimants and the Defendants, it would be entirely unreasonable and grossly unfair to award the Claimants a sum equivalent to the cost of entirely rebuilding the property.

29. Additionally, any award made by the court ought to be reduced by \$34,225.00, being the amount retained by the Claimants.

30. The appropriate sum, it is submitted, ought to be the cost of repairs (\$252,700.00) less the retained sum (\$34,225.00), being a total sum of \$218,475.00.

Analysis

- [37] In essence then, while the Claimants are saying that there should be damages to effect rebuilding the house, the Defendant is saying that that would be "entirely unreasonable and grossly unfair" and as such the damages should be for repairs.

Basic facts concerning the property.

- [38] It is common ground that the house is built on sloping on the lower side of the Friar's Hill Road. It is also common ground that the Claimants' house, which was erected by the Defendant, is characterized by a number of cracks in the walls and floors of the building; and that water leaks into the said building, and further, that the cistern, located within the said building at ground level, also leaks.

- [39] The construction of the house was completed sometime in 1995 and the Claimants went into occupation from 18th November, 1995.⁹ It is constructed, essentially, of reinforced concrete and masonry blocks

The technical evidence

- [40] Before the Court is an Expert Report of Keith Thomas submitted pursuant to an order of the Court dated 16th February, 2007. Also before the Court are reports by Addison Workman, Cedric Henry

⁹ See Rhona Henry's affidavit filed on 27th June, 2008, at paragraph 2.

and Charlesworth Barry Davis on which Mr. Berntsson indicated in his affidavit in reply he intends to rely.¹⁰ These various reports must now be analysed.

Addison Workman

- [41] Mr. Workman's report in the form of a letter is addressed to Mrs. Rhona Henry and is dated 28th October, 1999. In his report Mr. Workman, a civil and structural engineer, indicates that since 8th February, 1999 he had visited the house at Friar's Hill "in an attempt to understand the mechanisms of failure which are at work and have caused widespread and persistent damage to the building." He makes the point that "all" the examinations thus far have been non-destructive and as such limited in scope and he goes on to say that destructive investigation will be necessary in order to widen the scope of the investigation "so that the structural failures can be determined". He also notes that in the house almost all areas of the superstructure show signs of structural distress while none of the exposed substructure shows failure.
- [42] Mr. Workman identifies four areas or parts of the house and gives comments on each of them. They are: the cistern, the master bedroom, the roof and the other walls.
- [43] With respect to the cistern he says that: "[t]he ongoing and inexplicable problems with this element have led to the decision to stop relying on the existing structure as far as water retention is concerned." And he goes on to suggest remedial structural work.
- [44] As far as the master bedroom is concerned, this is what he says: "This room has extremely severe cracks in the walls and floor. The details exposed by these cracks show that the floor was not constructed as specified in the drawings prepared by Eng. J. Oliver Davis. This room will be completely demolished and rebuilt to revised details which will be provided".
- [45] Regarding the roof Workman speaks of "considerable movement" having taken place. He goes on to say that: "such movement brings into question the effectiveness of the tie between rafter and ring beam". And "[i]t is therefore clear that large areas of the roof will need to be dismantled".

¹⁰ See paragraph 3.

the structure and could not recommend 'cosmetic repairs'. Instead he recommended that the building be demolished and rebuilt.

The legal authorities

- [51] In **C. R. Taylor (Wholesale) Ltd v Hepworths Ltd**¹¹ as a result of a fire to a disused billiards hall the Claimant incurred the cost of removing the debris and certain remedial work. The cost of reinstatement was claimed in the subsequent court action. This was disallowed on the ground that the Claimant still owned the property for its potential development value and since had no intention of using again as a billiard hall, the measure of damage was the diminution in market value, but since it would have cost the Claimants the sum claimed to clear the site they were only entitled to be compensated for the money expended on the immediate necessary remedial work.
- [52] In coming to this conclusion; Mr. Justice May reasoned that: "To have awarded them the cost of reinstating the premises would have put them in a better position than they would have been from a monetary point of view had the collision never occurred any in any event it would have been unreasonable as between the plaintiffs and the defendants."¹²
- [53] In **East Haun Corporation v Sunley & Sons Ltd**.¹³ after the completion of the work and some two years after the architect had given his final certificate, stone panels fixed to the exterior wall fell off owing to defective fixing by the contractors. They were repaired by the local authority who sought to recover the cost from the contractors in an arbitration pursuant to clause 27 of the contract. The House of Lords in considering the questions (a) whether the arbitrator had power to reopen the architect's final certificate and (b) if so, and liability were established, at what date damages were to be assessed also determined that the proper measure of damages was the cost of the reimbursement.
- [54] The more recent case of **Ruxley Electronics and Construction Ltd v. Forsyth**¹⁴ concerns a pool that was not built to the agreed or required depth. It was 6 feet rather than 7 feet 6 inches at the deep end.

¹¹ [1977] 1 WRL 659

¹² Ibid at page 668

¹³ [1966] AC 406

¹⁴ [1996] 1AC 344

- [46] In terms of the other walls, the engineer described them as having “tremendous cracking in several areas of the house and these will have to be opened up to check their construction quality”.

Cedric Henry

- [47] Cedric Henry is a civil engineer and his report is dated 30th June, 2000. He then makes observations on the house itself and then comes to a number of conclusions and recommendations. Included is the following: “It is my view that the problems stem from an incomplete investigation of the subsoil conditions in the first place. Such an investigation is costly and not usually applied to a dwelling house project. This, however, is a site with a history that is far from usual, so that an investigation was and, judging by the performance of the building, still warranted.”

Charlesworth Barry Davis

- [48] The report by Charlesworth Barry Davis, an architect, is dated 28th November, 2000, and was done “as the basis for insuring the property”.
- [49] In reporting on the general condition of the house Davis says this: “[T]here is evidence of serious structural problems in various areas. The most serious area is the Master Bedroom which has severe cracks in the wall and floor. Although one cannot be entirely sure, the extensive cracking through the building suggests that the building has experienced excessive movement and quite possibly differential settlement. There is also evidence that the roof structure has been affected because in some areas the rafters have moved appreciably. The cistern leaks and therefore is not able to be filled to capacity. In my opinion this structure is in need of immediate repairs before it can command a good price on the market”.

William Keith Thomas

- [50] The expert report of Keith Thomas is dated 17th September, 2007. It is comprehensive and deals with the subject under the following heads: General analysis of cracks, development of damage, the roof, health and safety and insurances. He concludes that there was a high degree of failure in

A claim for reinstatement was disallowed at first instance, allowed on appeal but disallowed on appeal to the House of Lords.

[55] In disallowing the appeal the House of Lords enunciated this principle: Where the expenditure was out of all proportion to the benefit to be obtained, the appropriate measure of damage was not the cost of reinstatement but the diminution in the value of the work occasioned by the breach, even if that would in a nominal award; and that accordingly, since there was no dispute over the amount awarded by way of general damages, the judgment of the trial judge should be restored.

[56] Lord Bridge in rejecting the claim for reinstatement reasoned thus:

“But quite independently of these conclusions, to hold in a case such as this that the measure of the building owner’s loss is the cost of reinstatement, however unreasonable it would be to incur the cost seems to me to fly in the face of common sense. My Lords since the populist image of the geriatric judge, out of touch with the real world, is now reflected in the statutory presumption of judicial incompetence at the age of 75, this is the last time I shall speak judicially in your Lordships’ House. I am happy that the occasion is one when I can agree with your Lordships still in the prime of judicial life who demonstrate so convincingly that common sense and the common law go hand in hand”.¹⁵

[57] In *McGregor On Damages*¹⁶ the following summary of other authorities is to be found:

“*Cory and Son v Wingate Investment*,¹⁷ went beyond these decisions by allowing as damages the cost of reinstatement at the time when the claimants’ claim was heard and when prices had risen steeply. The reinstatement had still not been effected at the date of trial since the claimants had felt unable to incur the considerable expenditure needed before they were assured of recovering this amount from the defendants, who had vigorously disclaimed liability right to the door of the court. This decision is in line with others appearing when inflation was severe, though not in the context of building contracts, where claimants have been held justified in deferring reinstatement up to the time of the trial without being branded with a failure to mitigate.

If, however, the cost of remedying the defect is disproportionate to the end to be attained, the damages fall to be measured by the value of the building had it been built as required by contract less its value as it stands. This measure was in effect awarded in *Applegate v Moss*,¹⁸ being the full value of the building, properly built, as it was

¹⁵ [1996] 1AC 344, 354

¹⁶ 17th Edition at paras 26-010 to 26-011

¹⁷ [1980] 17 B.L.R 104, CA.

¹⁸ [1971] 1 Q.B. 406, CA.

valueless and would have to be pulled down, was adopted in **Atkins v Scott**,¹⁹ where the expense of the completely stripping defective tiling was not allowed; and has now received the imprimatur of the House of Lords in **Ruxley Electronics v Forsyth**, reversing the majority decision of the Court of Appeal”.

[58] Based on the foregoing authorities, the following principles may be gleaned therefrom: 1. reinstatement will not be allowed or award if it is unreasonable as between the claimant and the defendant; 2. reinstatement will not be awarded if it would put the claimant in a better position than before; 3. reinstatement will be disallowed where the expenditure to be incurred will be was out of proportion to the benefit to be obtained.

[59] With that said the measure of damages to be awarded to the Claimants must now be analysed in some detail.

[60] In order to arrive at a determination on the quantum of damages the property will be further analysed, in terms of the evidence under the following subheads: the land, the cistern, the master bedroom, the roof and cracks.

The land

[61] Civil Engineer, Cedric Henry is the only witness to deal directly with this question.²⁰ He described it in his report, inter alia, as sloping from north to south and goes on to say that no effort was made to prevent the flow of storm water towards, or direct it around the building as the flow of storm water is towards the building and down to the foundation.

Cistern

[62] As far as this device is concerned Civil and Structural Engineer, Addison Workman has characterized it as having “inexplicable problems” and he also details the steps he considers necessary to remedy some. On the other hand, Cedric Henry reports that the device has series of fine cracks that are clearly visible which show the outline of the blocks.

¹⁹ [1990] 7 Constr. LJ 215, CA.

²⁰ In his report Charlesworth Barry Davis described the land as “a sloping lot bounded by Friars Hill Road at the front....” See his affidavit as exhibited to the Affidavit in Reply of Bengt Berntsson at page 103.

Master Bedroom

- [63] This room is described by Addison Workman as having “extremely severe cracks” in the walls and floor which he attributes to the fact that it was not built in accordance with the plans drawn by Engineer J. Oliver Davis.

Roof

- [64] Addison Workman says that the roof clearly shows considerable movement has taken place and that in some places it appears that the rafters have been withdrawn from the wall by more than ¼ inch. According to him, such movement brings into question the effectiveness of the tie between the rafter and the ring beam. Keith Thomas goes further by stating the following at page 4 of his report:

“The roof of the home is in a dynamic state. It is literally behaving like a wave if you were to increase its motion. This is not unusual for several reasons:

1. There is no steel tying the rafters to the beam;
2. There are no ‘beams’ in areas directly of the block walls.
3. There are no vertical reinforcements with the block walls (may not be necessary at all times if there is a supporting beam above)”

Cracks

- [65] The presence of cracks all over the building is mentioned in all of the reports.
- [66] Keith Thomas in his report in discussing matter begins by saying that: “A series of cracks has been observed at the hours, which raise an alarm in the safety and life expectancy of this property. My observation concerns the engineering discipline of structural integrity”. In giving a general analysis of cracks Thomas states the following at page 2:

“Visible cracking is generally initiated by either internal microcracking (volumetric change would usually induce this type) or flexural micro cracks.

Flexural micro cracks are surface cracks that are not visible except by careful close investigation and generally initiated by flexural stress. Once flexural microcracks are formed, a slight increase in flexural load causes these cracks to open up suddenly to measurable widths. As larger cracks form, the exposure of corrosive environment may be detrimental to the steels. Factors such as humidity, salt air, and

alternative wetting and drying may accelerate corrosion and contribute to concrete deterioration in the vicinity of large width cracks. Increase cover provides thicker protection but may result in wider cracks at the beam face, influencing corrosion. Wide cracks may be unsightly and contribute to the doubt about the structural safety. Although cracking cannot be eliminated, it is generally more desirable to have many fine hairline cracks than a few wide cracks."

[67] Keith Thomas makes further observations on the cracks at page 3 of his report:

"Some of the cracks that appear in the beams of the subject home are such that they are approaching 45 degrees in most instances. This indicates that the behaviors of the beams are acting as if they were without shear reinforcement, theoretically. Therefore, since engineering is an empirical based discipline, we must take this into consideration. This also shows that the incline cracks are originating at the top of the "beam" extending through the walls. This is a flexure-shear crack. Therefore, the shear reinforcement was probably inadequately spaced, undersized or did not exist. Investigation of this sort requires the exposure of twice the stirrup spacing at two or more positions without further damaging the beam."

[68] Addison Workman says that there are "tremendous wall cracking" in several areas of the house. He also says that: "Because no obvious foundation defects have yet been revealed, it is believed that these wall cracking problems stem from improper superstructure construction."

[69] Cedric Henry also addresses the matter of the cracks which he says are all over the building in the walls and on the floor. He goes on to say that the cracks in the wall are up to ¼ inch wide and suggest a lack of reinforcement in the blockwork.

[70] While Charlesworth Barry Davis does not dwell on individual aspects of the house. He does make observations on its general condition as follows:

"The house is fairly new having been built within the last six years. However, there is evidence of serious structural problems in various areas. The most serious area is the Master Bedroom which has severe cracks in the walls and floor. Although one cannot be entirely sure, the extensive cracking throughout the building suggests that the building has experienced excessive movement and quite possibly differential settlement. There is also evidence that the roof structure has been affected because in some areas the rafters moved appreciably. The cistern leaks and therefore is not able to be filled to capacity. In my opinion this structure is in need of immediate repairs before it can command a good price on the market."

[71] It is to be noted that Davis' mission was to provide a valuation of the property.

Reinstatement or repairs?

[72] It has already been noted that the purpose of an award of damages is to put the person in the position he would be in had there been no breach of contract or negligent action. It is further established that reinstatement can only be granted if it is reasonable in the circumstances. Also no award for reinstatement will be made if such an award will put the Claimant in a better position than before.

[73] On the authorities cited and the evidence the claimants are saying that there should be reinstatement. On the other hand the defendant contends that reinstatement does arise as none of the reports relied on, which were produced at the trial, make any such recommendation.

[74] Keith Thomas, in his expert report makes the point that engineering is an empirical based discipline. And according to the *Concise Oxford Dictionary*, empirical means "based or acting on observation or experiment, not on theory...deriving knowledge from experience alone". In other words, observations by the engineers over the years would lead to a certain conclusion based on what is now faced.

[75] The foregoing serves to dispose of the argument that, neither Addison Workman, Cedric Henry nor Charlesworth Barry Davis recommended the demolition and rebuilding of the Claimants' house. In this connection, too, it has been noted that the reports, from Workman to Thomas, were written between 1999 and 2007. Further, they all comment on the cracks, the cistern and the roof.

[76] It must be common ground that a reinforced building must, to say the obvious, have reinforcement given the nature and composition of concrete. And in this regard all of the reports relied on by the defendant suggest that the matter of reinforcement looms large whether they were spaced incorrectly in parts of the house, not built in accordance with the plans drawn for the purpose or

simply absent. At this juncture the following learning on reinforced concrete illuminates the equation:²¹

“Concrete has great compression strength. Each square inch of concrete can be designed to support loads of 10,000.00 lb [44,500 N] or more. However, concrete has little tensile strength, or resistance to pulling action. The tensile strength, of steel is 50,000 psi [345 MN/m²] or more. In reinforced concrete, steel and concrete are combined to take advantage of the high compressive strength of concrete and the high tensile strength of steel. In a reinforced-concrete member the concrete is generally assumed to resist all compressive loads and the steel to resist all tensile loads. Sometimes, to reduce the size of the concrete members, steel may also be used to resist a portion of the compression.

Concrete is cast around reinforcing steel bars, and as it hardens, it grips the steel bars to form a bond with the steel. This bond becomes stronger as the concrete hardens. Steel and concrete expand and contract with temperature at rates so nearly equal that the two work together as a unit under most conditions of temperature change.”

[77] In the context of a building that is supposed to be constructed, basically of steel reinforced, concrete and masonry blocks, the following commonality and severity of the language used by the engineers bears repetition. Addison Workman speaks of “extremely severe cracks in the walls and floor” of the master bedroom; tremendous wall cracking in several areas; “it is believed that these wall cracking problems stem from improper superstructure construction”; “almost all areas of the superstructure show signs of structural distress”. Cedric Henry speaks of “Cracks in the walls are up to ¼” wide and suggest lack of reinforcement in the blockwork”. Charelsworth Barry Davis speaks of “the extensive cracking throughout the building suggest that the building has experienced excessive movement and quite possibly differential settlement”. And Keith Thomas says that the behaviors of the beams are acting as if they were without shear reinforcement, theoretically.”

[78] And when addressing the matter of the roof Addison Workman says that: “Such movement brings into question the effectiveness of the tie between the rafter and the ring beam”, in the view of the Court he saying the same thing as Keith Thomas who says that “there is no steel tying the rafters to the beam and there is no ‘beam’ in the areas where the roof is loading directly [on] the block walls”. In a real sense Workman is questioning the ‘tie’ and is saying that it is either ineffective or simply not present.

²¹ Don A. Watson, Construction Materials and Processes, second edition at p. 65.

- [79] At an earlier stage the Court examined a number of cases in which there was a refusal to award reinstatement. But both cases are distinguishable on the facts. In the case of **C. R. Taylor (Wholesale) Ltd v Hepworths** reinstatement²² was refused on the ground the destroyed billiard hall was disused, there was no intention to use it as such and the award would have put them in a better position than before the fire. On the other hand, **Land in Ruxley Electronics and Construction Ltd v Ruxley**²³ the problem was minor in that the pool was built in accordance with specifications except that the required depth was not attained. Reinstatement was therefore refused.
- [80] The Court is faced with what Addison Workman described as “widespread and persistent damage to the building”. This was in October 1999. And on 19th November, 2009, Mrs. Rhona Henry said in cross-examination that the house was “barely habitable”. This is credible as there is water and severe cracks everywhere which she has had to endure since 1995. This cannot reasonably be said to be what the Claimants bargained for. And to add to the equation Mrs. Henry is now retired.
- [81] Part of the paradox in this case is that the Defendant has placed reliance on the three reports adduced into evidence at the trial by the Claimants, but these reports do not support its case in the least. And the fact that no ‘destructive investigation’ was carried out in any of the cases, does not, in the view of the Court diminish or weaken the Claimants’ case. The fact of the matter is that the behavior of walls or structures reveals certain things to an engineer. It is for this reason that Keith Thomas says at the start of his report that: “A series of cracks has been observed at the house, which raises an alarm in the safety and life expectancy of the property.” This in turn point directly to the leaking of water into the substructure, the movement of the rafters and effect of exposure of the corrosive environment on the steel due to the wide cracks, for at least ten years.
- [82] At this stage, nothing more needs to be said as the Court determines that reinstatement cannot be unreasonable. As such the building must be demolished and rebuilt. In this regard the Court accepts the figure of \$1,141,705.00 calibrated by K. Bertrand Joseph, less the unpaid retention of \$34,225.00. With that said, the Court rejects the cost of repairs advanced by Charlesworth Barry Davis and relied on by the Defendant.

²² Supra.

²³ Supra.

[83] At the juncture the following learning from **Emden's Construction Law** at para. 198 is appropriate to the equation:

"The cost of rectification must be assessed at the time it was reasonable to carry out the work. But if the defects reasonably remain undiscovered for some time, the contractor cannot argue that only the cost of rectification when they could originally have been discovered can be claimed. Further, in **Dodd Properties (Kent) Ltd v Canterbury City Council**,²⁴ the claimant delayed rectification primarily because it could not afford to pay, and also partly to await the outcome of the proceedings. By the time damages came to be assessed, the cost of rectification was considerably higher than it had been when the defects could originally have been rectified. The Court of Appeal nonetheless allowed the claimant to recover the higher figure, saying that the claimant did not have to mitigate its loss if it could not afford to do so."²⁵

[84] The other heads of general damages and interest must now be considered.

Alternative accommodation

[85] The sum claimed under this sub-head of general damages is \$84,000.00 based on a rebuilding period of 12 months at \$7,000.00 per month. It is based on rental value report by Haynes Smith and the estimate for rebuilding by K. Bertrand Joseph.

[86] It is the view of the Court that both figures are too high even though demolition, clearing and perhaps the trucking of material are involved. On the other hand, the rental value of \$12,000.00 is also high. In the circumstances a reasonable figure for alternative accommodation is \$5,000.00 per month while the rebuilding period is fixed at 10 months yielding a total of \$50,000.00.

Loss of use/interference with enjoyment

[87] Loss of use and interference with the enjoyment of property in this context, it is a matter of judgment and the precedents. However in **Watts v Morrow**²⁶ the English Court of Appeal ruled that

²⁴ [1992] 2 ALL ER 118

²⁵ In terms of the entire proceedings it is to be noted that this High Court decision, holding both Defendants liable was given on 11th November, 2004, the appeal filed by the then Second Defendant in the same year was determined on 4th December 2006. Final directions for assessment of damages were given on 20th April, 2009, and the actual hearing took place on 19th November, 2009.

²⁶ [1991] 1WLR 1421

the quantum of damages for distress and inconvenience caused by physical consequences of the breach of surveyor contract should be modest. In this case the award was £750.00; while in **Farley v Skinner**²⁷ the award was £10,000.00 with respect to a period of approximately ten years.

[88] The distinguishing feature in both cases is that no reinstatement was involved as there were merely defects discovered after purchase, on the one hand, and aircraft noise on the other.

[89] The Court considers that a modest figure would be \$5,000.00 per year for the 14 year period of 1995 to 2009. This yields a total of \$70,000.00.

Loss of personal effects

[90] Loss or damage to personal effects initially cannot be doubted on account of the water in the house. However, the Court agrees with the Defendant that the Claimant would have sufficient time and opportunity to place the items away from the water. However, in all the circumstances the Court awards nominal damages of \$5,000.00.²⁸

Interest

[91] These are general damages so that interest will run from the date of the service of the claim form to the date of judgment. Accordingly, interest at the rate of 10% will run from 24th October, 2000 to 25th September, 2003.

Costs

[92] Costs to the Claimants are agreed in the amount of \$14,000.00.

²⁷ [2001] 3WLR 899

²⁸ In **McGregor On Damages**, 16th ed. at para. 10-004 the following is stated in this regard: "Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded when there is a technical liability but no loss." See also **Greer v Alstons Engineering Sales and Services** [2003] UK PC 46 at para. 6.

IT IS HEREBY ORDERED that the Defendant shall pay the following damages, interest and costs to the Claimants.

1. General damages consisting of:

- (a) \$1,141,705.00 for reinstatement, less \$34,225.00;
- (b) \$50,000.00 for alternative accommodation during the reinstatement period;
- (c) \$70,000.00 for loss of use or interference with enjoyment for 14 years;
- (d) \$5,000.00 in nominal damages with respect to personal effects.

2. Interest at the rate of 10% on the total amount of \$1,232,480.00 in general damages from 24th October, 2000, to 25th September, 2003.

3. Costs will be prescribed costs.



.....
Errol L. Thomas
Judge (Ag.)