

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2008-00383

BETWEEN

HARESH BALKARAN

Claimant

AND

NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO

Defendant

Before: Master Alexander

Appearances:

For the Claimant: Mr Dons Waithe instructed by Rebekah Ali-Gouveia

For the Defendant: Mr Andre Rajkumar instructed by Mr Narine Harrikissoon

DECISION

Background

1. The claimant, Haresh Balkaran (hereinafter “Balkaran”), is a truck driver who owned and occupied a concrete dwelling house situate at No 22C Oropouche South Trace, Barrackpore, in Trinidad (“the house”). The house was built in 1992 and measured approximately 25 x 45 feet. The defendant, National Gas Company of Trinidad and Tobago (hereinafter “NGC”), is involved in the exploration and management of the gas resources of Trinidad and Tobago. By claim form and statement of case filed on 1st February, 2008, Balkaran claimed damages and consequential losses to the house arising out of construction works undertaken by NGC in 2005 (hereinafter “the works”). On 20th November, 2008 judgment was entered by consent for Balkaran against NGC with damages to be assessed by a master.

2. Balkaran particularized his damages as including:
 - a) Widespread random cracking to the walls and partitions of both the ground floor and the first floor.
 - b) Structural cracks to most of the 1st floor beams at approximately mid span.
 - c) Structural cracks to many of the beams/columns intersections at the 1st floor level.
 - d) Structural cracks to the ground floor slab.

As at 2010, his special damages amounted to \$589,986.79 (discussed below).

The Evidence

Balkaran's evidence

3. Balkaran testified that on or about January, 2005, NGC commenced the construction of the cross island 56' natural gas pipeline from Point Fortin to Beachfield in Trinidad. The works were carried out approximately 300 feet from Balkaran's house. His house had been constructed 13 years earlier (in 1992) and was a 2 storey building with extensive yard space. During the period when the works were being done, NGC used tractors, excavators and other heavy equipment, including multiple track cranes, to dig trenches and lay pipelines. In carrying out the works, NGC through its servants and/or agents caused excessive, loud, exploding noises and vibrations to enter and explode around Balkaran's house. The house shook for 4 to 5 days and thereafter numerous large cracks appeared throughout the structure and in particular on the concrete beams and concrete walls. He has testified that as of January, 2012, the cracks have opened wider and now the concrete beams are falling off in junks.
4. In issue is whether the appropriate damages would be for the house to be repaired or demolished and rebuilt. Balkaran is seeking compensation for reconstruction of his house on the basis of the structural damage done to it. In support of his case, he obtained a structural report on 27th July, 2006 from Dipnarine & Associates but its author (Mr Dhanoo) died so he secured another from M & S Engineering Services Limited dated 30th July, 2009. Subsequently, he got a replacement cost report from Welch, Morris & Associates based on the recommendations of the structural engineer's report. Both reports were tendered into evidence in this matter.

Mc Quilkin's evidence

5. Preston Allan Mc Quilkin (hereinafter "Mc Quilkin") is a civil/structural engineer and the managing director of M & S Engineering Services Limited. He testified in chief that he is qualified in the field of engineering, holding a bachelors degree in civil engineering and a Master of Science in Construction Engineering and Management from the University of the West Indies, St Augustine, Trinidad. He is also a member of the Association of Professional Engineers of Trinidad and Tobago as well as a member of the Board of Engineers, Trinidad and Tobago.

6. It is his evidence that he was approached by Balkaran on 19th July, 2009 and subsequently retained to prepare a structural report. He conducted an inspection and evaluation which revealed damage in the form of numerous cracks at various parts of the house. He described these cracks as "*extensive stress cracking*" of the masonry walls, floors, beams, columns and other elements of the house, but that some of which were hairline in nature. Further, some of these cracks were "*vertical cracks*" which were occurring at mid-span and which he claimed were evidence essentially of the concrete breaking because of the severely weakened beams. He avers that the cracks on the first floor beams indicated, "*a classic failure mode of overstressing.*" According to him, "*All first floor concrete beams had a crack through the middle of the span between the columns and I observed cracks throughout the building on all elements. ... The general cracking throughout is indicative of a 'shattering' failure. Essentially concrete is brittle and cannot flex during vibration and cracking occurs as a result.*" [emphasis mine]

7. Mc Quilkin avers further that all of the cracks were consistent with a vibratory caused mode of failure resulting in structural damage. He concluded that this structural damage to the frame of the house was beyond repair. It is Mc Quilkin's evidence that it would be impossible to restore this house to a similar state of strength as that before the excessive vibratory events and that it must be demolished and rebuilt. Patching the cracks would not restore strength since cracked masonry remains broken even if patched on the surface.

8. He was extensively cross examined on his report dated 30th July, 2009, particularly the stress factor of the house and his failure to explain certain terms, such as "*extensive stress cracking*", "*classic failure mode over stressing*", "*shattering failure*" and how he arrived at those conclusions

without setting out the tests undertaken. He disagreed with the various suggestions of counsel for NGC that the structural cracks he discovered could be repaired sufficient enough to allow it to regain its structural integrity. The cross examination failed to establish that the house when examined by Mc Quilkin had not demonstrated signs of considerable structural damage. Mc Quilkin gave his evidence in a clear and credible manner, remaining resolute that cracks relieve stress and that in its un-cracked state, it would obviously have been a stronger building. His evidence was unshaken that the cracks could not be repaired by re-plastering and that he had considered whether it would be a viable course of action to use cementitious patching material to fill them and concluded that it would not. The various methods to repair vertical and horizontal cracks were considered but deemed inadvisable for several reasons:

- (i) Patched cracks usually re-open over time.
- (ii) In most cases of patched repairs or re-plastering, the structural problems are not fixed.
- (iii) There is a difference between a superficial crack and a deep one;
- (iv) Specialist products can be used to repair cracks that are not structural cracks.
- (v) The cracks manifested on the beams, columns and walls are structural and repairing these with specialist products would not restore the structural integrity of the house.
- (vi) He did not recommend the specialist products for repairing/re-plastering because they do not solve the problem of a broken beam. The products do not join back the broken beam but fill the space – the beams remain separated.
- (vii) Before repairing a crack, further damage has to be done to the area/site of the crack then the product is used. What results are 2 cracks because of the material used. The cracked surface could never be returned to its first stage.

Candice Welch's evidence

9. Candice Welch gave evidence on behalf of Balkaran. She testified in chief that she is a quantity surveyor and a director at Welch, Morris and Associates, holding qualifications in the field of quantity surveying from University of Reading, England obtained in 2003. She is a member of the Institute of Surveyors of Trinidad and Tobago, the Royal Institute of Chartered Surveyors and the Chartered Institute of Building. It is her evidence that she has prepared a replacement cost appraisal report in the instant matter following a site visit on 18th February, 2010 in which

she detailed the replacement work required and the respective cost for each unit of work. The global estimate of reconstruction of the house to one that is similar to the pre-structural damage, inclusive of value added tax, is \$536,000.00. This evidence was not contested and her report was accepted.

10. At the assessment, NGC called 2 witnesses to give evidence, only one of whom was crossed examined. The evidence of Leslie Harper, Chartered Quantity Surveyor, to wit that it would cost \$38,184.00 (VAT exclusive) to repair the cracks was uncontested and her witness statement, with annexed report dated 27th September, 2008, was accepted.

Janine Webster's evidence

11. Janine Webster (hereinafter "Webster") is a civil/structural engineer with Trintoplan Consultants Limited. She holds a degree in civil engineering from the University of the West Indies, St Augustine, Trinidad and is qualified as a project manager professional as of June, 2009. She claims to have a wide range of experience in structural surveying, having been involved in the extension of the local Diego Martin highway project, designing various secondary school structures and inspection of houses for the company Home Construction Limited, in east Trinidad. She prepared a report dated 3rd September, 2005 (hereinafter "the said report") on the damage done to Balkaran's house along with one Hermosura Lutchman, civil engineer, following a visit to the house (hereinafter "Lutchman"). It was concluded in the said report that the house was structurally sound and safe to inhabit; all damage seen could be repaired and that negotiations for any reasonable settlement should be conducted on this basis as opposed to a full reconstruction basis.

12. Webster testified that at the time of the inspection of the house, she observed small cracks, ranging from 0.5 mm and 3 mm wide, which were not excessive so no conclusion could be made that failure of the component (wall, beam or slab) had occurred. The said report described the cracks as "*very, very fine hairline cracks*", "*very, very fine mortar cracks*", "*vertical mortar cracks*", "*horizontal mortar cracks*", "*two small structural cracks approximately 300 mm in length on both sides at the top of the window*", "*a 2 mm wide structural crack approximately 2 mm in width and 1500 mm in length ... along the width of the wall*", "*a fine 12 mm wide structural crack on the window sill*" and on the

south wall, “*small structural cracks approximately 125 mm in length.*” It is her evidence further that she had no information about the structural components of the house such as the strength of the concrete used, the type and depth of the foundation or the amount of steel members. Consequently, she could not make a statement about the structural integrity of the design components of the house. The said report indicated that it was difficult to determine whether the damage seen at the time had previously existed or if it was caused by the construction activities of the laying down of the pipe lines. A pre-construction structural survey or one done before the laying of the pipeline was required. It was noted in the said report that if the critical members of the house such as the beams, columns and load bearing walls were to fail, then the house would be unsafe to occupy. However, at the time of the inspection, as no critical member of the house had failed, the recommendation was given to repair the visible cracks.

The Law

13. Where property is damaged, the normal measure for assessing damages is the amount by which its value has diminished as at the time and place of the destruction¹. This is normally ascertained by reference to the cost of repairs; see *Bacon v Cooper (Metals) Ltd*². The same is true where land and buildings are concerned; see *Harbutts “Plasticine” Ltd v Wayne Tank and Pump Co Ltd*³. As regards the measure of damages to be awarded when land or building is damaged due to the negligence of another, the principles to follow are not fundamentally different from those governing damage to chattels. However, when assessing damages to lands and buildings, the different character of the land and/or building is to be taken into account⁴. The governing issue is the reasonableness of the proposed expenditure. Thus, while the general rule is that damages for a tort are to be assessed at the time when the tort is committed, that rule is subject to exception. In a repair case, the applicable principle is that the date for assessment of damages is the time when having regard to all relevant circumstances repairs can first reasonably be undertaken. And in determining this question, it is proper to pay regard to the claimant’s financial position.

¹ Winfield supra pages 629-630

² *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397

³ *Harbutts “Plasticine” Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447

⁴ Winfield and Jolowicz on Tort 13th edition Sweet and Maxwell pages 633-634

14. Several cases on these principles were looked at including *Jones v Gooday*⁵ where the alternative measure of making an award for the cost of replacement or repair was rejected. The facts were that the defendant had cut a ditch in the plaintiff's field and carried away soil. Lord Abinger CB said that he could not assent to the proposition that the plaintiff, whose soil had been taken away, was entitled to the “*amount which would be required to restore the land to its original condition. All that he is entitled to is to be compensated for the damage he has actually sustained.*” This case can, however, be distinguished from the present one as it is not land but Balkaran's house that may have been structurally damaged to the point of being irreparable.
15. As regards replacement cost, the case of *Bunclark v Hertfordshire CC*⁶ was instructive. In that case, extensive and continuing damage was caused to a block of flats neighbouring tree roots. An award was made for diminution in value because the bad reputation given to the block by the nuisance had reduced the amount the flats would fetch on the market as well as for cost of repair and reinstatement. The latter award was made on the basis of building cost in 1976 and 1977 when the work was done rather than the much lower cost of 1969 when the nuisance was commenced for 2 reasons: first, reinstatement had not been worth carrying out while the defendants' tree still stood and secondly, the plaintiffs did not have the financial resources to effect an earlier reinstatement.
16. A similar position was adopted in *Dodd Properties Ltd v Canterbury City Council*⁷, where the Court of Appeal reversing the judge's decision accepted the plaintiffs' contention that they were entitled to damages based upon the much higher cost of repairs at the time, some 10 years later, when the claim was heard. The rationale for this was that the plaintiffs were financially unable to effect the repairs at the time when the defendant's pile-driving operations had damaged their building, and secondly, it would not have made commercial sense for them to spend the money needed for repair on a property which would not produce corresponding additional income before being sure of recovering the cost from the defendant. Megaw LJ stated, “*The true rule is that, where there is a material difference between the cost of repair at the date of the wrongful act and the cost of repair when the repairs can, having regard to all relevant circumstances, first*

⁵ *Jones v Gooday* (1841) 8 M&W 146

⁶ *Bunclark v Hertfordshire CC* (1977) 243 EG 381 and 455

⁷ *Dodd Properties Ltd v Canterbury City Council* [1980] 1WLR 433

reasonably be undertaken, it is the latter time by reference to which the cost of repair is to be taken in assessing damages.”

17. It is clear from the ***Dodd case (supra)*** that in assessing the damages to award in cases involving damage to a building, the critical question to be considered is the date on which the damage is to be assessed. ***Dodd*** has established that a judgment representing the cost of repair as at the time of the wrong, even with interest, would be unlikely to be sufficient to cover the work when the action came on for trial. This was the position also in the case of ***Ward v Cannock Chase District Council***⁸ where the appropriate award was deemed to be the cost of replacement and it was accepted by that court that that cost fell to be measured as at the date of the inquiry into damages. To my mind, this position conforms with the fundamental principle of awarding damages to put a claimant back in the same position as if he had not sustained the wrong.

Analysis

18. The award to be given in the instant matter hinges on whether the house can and should be repaired or be demolished and reconstructed. From the evidence, it was clear that there were loopholes in the evidence on both sides and this issue was not a straightforward or simple one.

19. The expert for NGC (Webster) has recommended that the house be repaired. To be noted upfront is that Webster’s inspection of the house was done in 2005 (closer in time to the works and when the damage to the house began to manifest) unlike Mc Quilkin’s report that came some 4 years after the damage was done. She admitted under cross examination that she did not return to the house after the first site visit to see if there was any continuing or further damage before preparing her witness statement (discussed further below). There were several inconsistencies unearthed in Webster’s evidence under cross examination, both in her methodology and the product she recommended for use in repairing the house.

20. Before looking at these inconsistencies, of interest is Webster’s admission under cross examination that she was not the ‘sole’ author of the said report and that she was in fact unable

to specify the portion for which she was responsible with any degree of certainty. She testified that Lutchman, who had visited the house with her, was the one who had sourced the information with respect to the method of repairs. She admitted that the technical manufacturer's specification for the suggested method of repair was not in the said report and, that she did not know what those were but would have to go online to obtain same. To my mind, this was unacceptable and pointed to her ill-preparedness as a witness called to assist this assessing court and as the co-author of a technical report advising the use of specialist products to effect repairs.

21. Of some concern also was her admission that the house could safely be repaired based on 1 visit in 2005. In my view, it would have been reasonable for her to return to the house to examine the present state of affairs before being so conclusive as to the viability and sustainability of her recommended course of action in treating with the damage. In fact, when pressed under cross examination, she admitted that the present state of the house would be pertinent to her recommendation for repairing it. She stated that if the cracks were structural then it could not be repaired. However, she did not know if the cracks were indeed structural because the test to determine this one way or the other was not done. She had also seen Mc Quilkin's report and formed the view that the cracks had not worsened. It is her evidence that she had met with Mc Quilkin and agreed with him on the cracks (i.e. of them possibly being structural) but did not see the need to go back to visit the house. She felt that these 'structural' cracks could be repaired so opted to eke out alternatives and to recommend different products to treat the worsening situation. When pressed further, she admitted that "*there may be structural cracks and the products in this report may not be sufficient to fix these cracks.*" Further, she expressed the view that if the cracks went beyond the suggested width outlined in the product manufacturer's specifications, it would be unfair to Balkaran to use the recommended products.

22. Of note is that throughout the entirety of her evidence, Webster admitted that the products she was recommending may have limitations of which she did not know. Yet she did not contact an expert from the manufacturer on how to apply the products or to treat with any limitations. She also could not say how deep the cracks were or how much product would be required to fill the spaces. Further, she averred that the products she was recommending did not cater for

vertical cracks and that she could not determine where the cracks started in order to determine which method and/or product to use. Despite the foregoing evidence, she maintained that she was still standing firm by her recommendations to use the suggested products or the alternatives, as the cracks she had seen in 2005 were small.

23. The manner in which Webster gave her evidence, the many inconsistencies, her methodology employed and conclusion arrived at inspired little to no confidence in her recommended course of action. It was clear from her evidence under cross examination that she was not intimately familiar with whether the products would work in this instance; she could not say for sure that the cracks rendered the house structurally unsound and she did not know how to use the recommended products. She insisted that there was a specification manual for the products. In the face of all the uncertainty, she was adamant that as the cracks were “small” in 2005, and despite being unable to tell how they started or their current state, she was of the opinion that there were products available to repair them and Balkaran should be offered this course of action as opposed to reconstruction. I found her evidence inherently unreliable and her credibility to be very poor, even after taking into account the passage of time. Of note is that she could give no evidence as to the impact on the structural integrity of the house should repairs be effected but was content to say that if the cracks were indeed of a structural nature, Balkaran would suffer an injustice if the house were merely repaired as against being rebuilt. I could find also no justification for her recommendation of repairing products with whose specifications, manner of use, reliability and applicability to the particular damage she was clearly unfamiliar. In fact, there was absolutely nothing concrete to her conclusions on the science of using these specialist products and her woeful inability to say with any degree of precision that the cracks were not structural led me to reject her evidence. Her evidence as a whole being unsatisfactory and porous, I was unable to accept her recommendation to repair as the required fix for the instant problem.

24. As regards the evidence of the expert for Balkaran (Mc Quilkin), it was clear that his report used terminologies that were not broken down. It was also issued in a context where there was no pre-construction (of pipeline) structural survey. This meant that it would have been difficult to determine whether the damage to the house was solely due to the works or was pre-existing.

Mc Quilkin, having visited the house some 4 years after the works, found structural damage, which he was of the firm view could not be repaired. NGC's attorney has taken issue with his methodology and the conclusion arrived at in the absence of a pre-construction structural survey. I accepted that Mc Quilkin who concluded that there was 'excessive stress cracking' did not verify the nature or extent of the works conducted by NGC and, therefore, was in no position to make a viable comparison as to the strength of the building before and after the damage. What Mc Quilkin spoke to was the condition of the house 4 years after the damage. Counsel for NGC has asked the court to reject Mc Quilkin's conclusion as being based on generalized statements as to the strength of reinforced concrete beams and columns and as not relating to the specific circumstances of Balkaran's house, given that he must have assumed there were no pre-existing cracks. This submission is rejected. It was clear under cross examination that Mc Quilkin's assessment of the cracks and possible treatment options were diametrically opposed to Webster's. It was also clear that he had arrived at his conclusion after considering repairs with cementitious patching materials (as recommended by Webster) and had found none of those options viable. His expressed view is that patching does not restore a cracked building to its original state and that once the structural integrity is affected, no amount of cementitious patching materials can make a difference.

25. I have had the opportunity to hear the evidence of both experts and to have clarification of several issues, including that of the viability of repairing a house with specialist products. In this regard, I accepted Mc Quilkin's evidence that when a crack is plugged with these specialist products it does not restore the structural integrity of the house; the cracks in the house could never be returned to its first stage. I also accepted his evidence that the cracks he saw some 4 years after the initial damage were structural cracks, but that some were hairline cracks.

26. Also accepted is that the house as a whole was not totally destroyed. I have considered the amount and type of damage caused to the house and having accepted Mc Quilkin's evidence, that it was structural damage in the main and no amount of repair would be sufficient to bring the house back to a structurally strong position, I concluded that the only fair position in the circumstances would be to replace the house. To this end, I rejected the submission of counsel for NGC that it is quite possible that due to the natural movement of land over any given

period, cracks of a small nature in the house may have pre-dated NGC's works and eventually become worse due to the works carried out by NGC so the house should be repaired rather than reconstructed and that Balkaran should be awarded \$56,745.00 for the repairs. I have no evidence of this before me. Further, it is clear that a wrongdoer must take his victim as he finds him. In my view, based on all the evidence before me, to effect repairs would not be feasible or fair to Balkaran. I bear in mind that Balkaran is entitled to be restored to the position he would have been in had no damage been done to his house. The type of damage done being in essence tantamount to the house being destroyed and the evidence clearly and uncontrovertibly supporting replacement rather than repair, the measure of damages in this case would be the replacement cost. As indicated earlier, this award falls to be determined as at the date of the inquiry into the damages.

27. The only evidence of replacement cost was given by the quantity surveyor for Balkaran and it was not contradicted. I bore in mind that the cost of material and labour has not been stagnant over the period from damage to assessment and that damages should be assessed as at the time of assessment and not the time when the damage occurred. There was no updated report provided on this issue by either side. I, therefore, consider it reasonable to award Balkaran the sum of \$589,986.79 to replace his house, which for all constructive purposes is deemed destroyed. He is also awarded the sum of \$5,500.00 for the structural engineer's report and \$700.00 for the estimate. A total of \$596,186.79 is awarded in damages.

Order

28. It is ordered that the defendant (NGC) do pay to the claimant (Balkaran) the following:

- a) Damages in the sum of **\$596,186.79** with interest at the rate of 9% per annum from January, 2005 to today's date.
- b) Costs as assessed in the sum of **\$62,120.26**.
- c) Stay of execution of 42 days.

Dated 27th January, 2014

Martha Alexander
Master