

The Republic of Trinidad and Tobago

**In the High Court of Justice
San Fernando**

Claim No. CV2006-02256

Between

RASHEED ALI

Claimant

AND

SUPER INDUSTRIAL SERVICES LIMITED

Defendant/Ancillary Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Ancillary Defendant

JUDGMENT

Appearances: Mr. N. Mohammed instructed by Mr. P. Persad Maraj for the Claimant

Mr. J. Camacho for the Defendant/Ancillary Claimant

Mr. S. Alsaran for the Ancillary Defendant

BACKGROUND

1. The Naparima Mayaro Road (hereinafter referred to as the main road), runs east to west in the vicinity of Iere Village Princess Town. On both the northern and southern sides along the roadway there exist houses. Along the northern side in particular, the land slopes downward on a ratio of 1:4. The houses along the said road therefore stand on the downward slope and are situated considerably lower than the roadway. The Claimant's house in which he resides to date, at 17 Iere Village Princess Town, is one of those houses. It lies approximately one hundred and sixty feet away from the main road.
2. The land in the area where the Claimant's house stands, inclusive of the main road, is unstable and prone to slippage.
3. The Claimant's house is a two storey dwelling structure made of concrete. It was purchased by the Claimant from his father-in-law for the sum of fifteen thousand dollars. At the time of purchase, the house was a wooden structure measuring approximately twenty feet by twenty feet, and built on nine wooden posts. It is not clear as to the precise date of the purchase of the house by the Claimant, but the fact of purchase is not disputed. The Claimant moved into the house after his marriage in or around the year 1980. By this time, his wife had been residing in the said house for approximately twenty four years. It may therefore well be that the said house was at least twenty four years old in the year 1980.

4. Subsequently, between the years 1980 and 1984, the Claimant renovated the house. This renovation brought the house up to the standard in which it was found in the year 2004, when the events which form the subject of this action occurred.
5. The renovation consisted of rebuilding the entire structure. The Claimant first began works to the back of the house and lived to the front during the renovation. He began with the foundation. A trench measuring twenty inches in depth was dug and filled with steel. Three foot butts were made with the steel, and fourteen columns were cast in place. The columns were ten to twelve feet apart. A structured reinforced concrete house on piled foundation tied with ground beams was then built. The masonry walls were held together at the top with a roof ring beam. Rubble masonry stone walls were built at the front and back of the premises.
6. Concrete drains eight inches in depth and twelve inches in width were constructed around the house. One of those drains measured sixty feet in length and another forty feet. These drains were to channel water to the back of the house, further north into another drain.
7. Two retaining walls were constructed by the Claimant. One is situated to the front of his house almost parallel to the main road, seventy feet in length. This would be to the South of the house. The other retaining wall measures one hundred and ten feet and is situated to the West.
8. The house of Basdeo Bocal is situated to the immediate west of the Claimant's house. The house of Maharaj Singh is located to the west of the house of Basdeo Bocal. To the east of the Claimant's house, is the house of Amin Mohammed.

9. In relation to the title of the land upon which the Claimant's house stands, it is the evidence of the Claimant that the purchase of the land was included in the price he paid but that a deed was never done in his favour. He further testified that prior to the death of his father-in-law Latiff Mohammed, no document or proof of ownership was shown to him.
10. The court therefore finds that in 2004, the Claimant was more likely than not possessed of an interest in the subject land. The precise nature of that interest however remains unascertained. What is clear, is that at the least, the Claimant was an occupier of the subject land and had been an occupier thereof for twenty four years prior to 2004.
11. The geology of the general area displayed highly fissured clay deposits with swelling in the rainy season and shrinkage in the dry season. Bore hole samples taken by the Defendant prior to the beginning of construction indicated that there were deposits of brown and dark and light grey clays. There was silt, pockets of sand and gypsum. The clay deposit was encountered from 0.6 metres to 8 metres in depth. The moisture content of the soil ranged from 25% to 42%. Alterberg Limits indicated that the fines were inorganic clay of high plasticity. The natural moisture contents were above the plastic limits. Soils of this nature are well known for their instability and relatively high activity and expansive potential.
12. Prior to 2004, a major landslide occurred in the area. The Claimant's house, that of his three neighbours and the main road all fell within the area of the landslide. The land slippage was so severe that premises located to the south of the house of Maharaj, that is

between the main road and Maharaj collapsed. Further, the access road leading from the main road to the Claimant's house was severely affected. As a consequence, it became necessary to perform rehabilitative work to shore up the main road thereby avoiding further slippage. The Defendant company was contracted by the Government of Trinidad and Tobago through the Ministry of Works and Transport to conduct such rehabilitative works.

2004

13. In or around the end of January 2004, the Defendant began rehabilitative work on the main road. The entire project consisted of three phases. It must at this stage be noted that the works on the subject area was part of an even larger project in relation to rehabilitation of other areas along the main road. There were approximately fifteen to twenty workers on the crew including carpenters, masons, a civil technician and according to the evidence of the construction manager Hardeo Chattergoon, a "steel man".

14. Work began on the 23rd January 2004. Shrubs were cleared, a failed masonry wall and sidewalk were removed. Excavation of earth for the purpose of construction of shoring began on the 25th January. The excavated material was placed north of the main road between the main road and the house of the Claimant on the slope.

15. A preliminary step in shoring up the main road necessarily involved the process of driving piles into the ground which would eventually hold and stabilise the shoring. The process of driving these piles into the earth began with the forcing of "I" beams made of

steel, which were about twenty five feet in length, into the soil by an excavator with a bucket attached. The excavator would force the beam into the soil as far as the soil would permit. Thereafter, to get the beam to the required depth, the excavator would drive the beam into the earth by pounding each beam several times as until it was driven to that depth. That depth was, at the most on the evidence, twenty feet into the ground. Out of the full depth, the beams would therefore have, on the evidence, been pounded in for about five to seven feet.

16. The process of planting the beams into the earth produced both noise and vibrations.

Some ninety of these beams were driven into the ground in the subject area. The driving of the beams was performed mostly at daytime but on some occasions this process would go on well into the night. The process of planting the beams took about five days at the least.

17. After the planting of the beams the augering for 'cast in place' concrete piles was carried out. The concrete piles were then tied with reinforced steel into the base of the retaining wall. The area was then backfilled. Part of the backfilling involved the spreading out of the excavated material by tractor between the said main road and the house of the Claimant.

18. Prior to the commencement of the works, and in order to facilitate same, drains were constructed for the run off of water from the main road down the slope so as not to cause flooding down slope. These drains appeared to have been covered over by the subsequent spreading of the excavated material after completion of the construction.

19. There was heavy rainfall in or around April of that year and the Claimant's home became water logged resulting in damage to the house.

The Claim

20. The Claimant claims damages for negligence and/or nuisance and/or in *Rylands v Fletcher* and/or for the right or withdrawal of support resulting in damage and consequential loss caused to the Claimant's property as a result of works carried out by the Defendant in the excavation and construction of a retaining wall along the Naparima Mayaro Road, during the period of January, 2004 and January, 2005.

21. The Particulars of **Negligence** as claimed are as follows:

- (A) The works were undertaken by the Defendants servants and or agents without any or any proper examination and testing of the terrain and the terrain immediately adjoining the said road along which the Defendant set out to work with the result that the work was commenced without any or any proper understanding of the likely impact of the works on the said property.
- (B) The construction of the said wall was undertaken and carried out by the Defendant, its servants and or agents without any or any proper monitoring or examination of the work from the time of its commencement and continuously while the works progressed to ascertain whether, and the true extent to which, the adjoining property was being or likely to be affected by the works which were being carried out.

- (C) The Defendant did not at any material time prior to and during the course of the works estimate or assess with any reasonable skill the extent of the likely impact of the works on adjoining properties including the said property.
- (D) The Defendant failed and or neglected to commission personnel who were reasonably qualified for the task and or failed to hire competent personnel to evaluate the impact of the works and or failed to assess the effect of any such report submitted.
- (E) The Defendants failed and or neglected to take or cause to be taken precautionary measures against the occurrence of the damage to the said premises.
- (F) Failure to heed the reports and complaints of the Claimant.
- (G) The Defendant carried out the construction of the said wall without regard to the safety of the adjoining occupiers and property or investigating the effect of the potential effect that the works could have to property owners in the immediate vicinity.
- (H) The Defendants failed and or neglected to take measures to assess whether and how the works could be undertaken without causing damage to the adjoining properties.
- (I) The Defendants failed to inform the Claimant prior to the commencement of the works of the danger of the execution of the works to enable the Claimant to take measures for their own protection.

- (J) The Defendant knew or ought to have known that their acts would have caused damage to adjoining properties.
- (K) The Defendant failed and or neglected to execute, manage or control or monitor construction of the said wall with engineering and or other skills to prevent and or minimize damage resulting.
- (L) The Defendant failed to observe or heed the impact of the continuing operations on the said premises.
- (M) The Defendant having first seen or become aware of the adverse impact of its works on the Claimant's premises failed to cease works or to take steps to prevent or arrest further soil movement and or to take steps so as to secure and or prevent and or arrest further damage of the Claimant's property.
- (N) There was significant loading of the slope due to equipment and material during construction.
- (O) The Defendant failed to take steps to prevent the excessive water run-off and or the impact and or effect of the stockpiling and or the fissures or cracks that were likely to occur during piling.
- (P) Failure to take steps to prevent secondary landslips.

- (Q) Causing and or causing to effect secondary landslips the consequences of which resulted in land movement whether by noise, vibration, stockpiling or widening fissures/cracks in the ground.
- (R) Causing sustained vibration from the use of equipment that resulted in tension cracks being developed in the soil and which cracks were widened as a consequence of the Defendant actions and activities and enhanced by periods of dry and rainy season resulting in slipping of the land or movement.
- (S) Causing land movement to occur by the stockpiling of materials.

22. The Particulars of **Nuisance** as claimed are as follows:

- (A) The Defendant caused or permitted such noise and vibrations to arise from their said works.
- (B) The Defendant failed to take any or any sufficient precautions against such noise or vibration.
- (C) The works were executed without any or any proper steps being taken to reduce the effects of the noise or vibration and dust resulting from the works.
- (D) The Defendant knew or ought to have known that their acts would have caused damage to adjoining properties.
- (E) The level and sustained vibrations caused or resulted in the tensions cracks widening.

The Defence

23. The Defendant denies liability in respect of the claims in Negligence, Nuisance and *Rylands v Fletcher* and avers that if the Claimant sustained any loss and or damage, the Claimant contributed towards same by his own negligence, the particulars of which are set out as follows:

- a. Constructing and or purchasing a dwelling house on lands which the Claimant knew or ought to have known was liable to land slips and or subsidence and or soil movement after excessive rainfall,
- b. Failing to take adequate steps and or any to ensure proper and or any sufficient foundations for the dwelling at the time of construction or at any material time thereafter,
- c. Failing at all material times to take all and or any steps to mitigate their alleged loss and or property damage,
- d. Failing at all material times to ensure proper drainage and or to divert the natural flow of rainwater and excess water away from the said property,
- e. Failing at all material times to take all and or any steps to preserve and or maintain the structural integrity of the said property,
- f. Failing to construct any retaining wall on the said property to lend support to the said lands.

The Ancillary Claim

24. Additionally, the Defendant/Ancillary Claimant claims against the Ancillary Defendant, that it is entitled to be indemnified by the Ancillary Defendant in respect of any damage which may be found to have been caused to the Claimant.

25. The Particulars of the **Ancillary Claim** are as follows:

- a. By an agreement in writing dated 11th April 2003 made between the Ancillary Defendant through its servant and/or agent Yolande Gooding, Permanent Secretary of the Ministry of Works and Transport acting for and on behalf of the Government of the Republic of Trinidad and Tobago and the Ancillary Claimant, the Ancillary Defendant retained the services of the Ancillary Claimant to construct a reinforced concrete retaining wall on the northern side of the Naparima Mayaro Road, Iere Village, Princess Town.
- b. By condition **22.1** of the Condition of Contract it was provided that the Ancillary Claimant shall indemnify the Ancillary Defendant against losses and claims in respect of inter alia,

Loss of or damage to any property (other than the Works) which may arise out of or in consequence of the execution and completion of the Works and the remedying of any defects therein and against all claims proceedings, damages, costs, changes and expenses whatsoever in respect thereof or in relation thereto, subject to the exceptions defined in Sub-Clause 22.2.

The “exceptions” referred to include:

Damage to property which is the unavoidable result of the execution and completion of the Works or the remedying of any defects therein in accordance with the Contract.

c. It is provided by clause **22.3** as follows:

The Employer (the Ancillary Defendant) shall indemnify the contractor (the Ancillary Claimant) against all claims proceedings, damage cost charges and expenses in respect of the matters referred to in the exceptions defined in Sub-Clause 22.2.

Witnesses

26. Three witnesses testified for the Claimant, namely a neighbor, Basdeo Bocal, Bill Ramrattan registered Engineer and the Claimant himself. The Defendant called three witnesses namely, Nicholas Narine Civil Engineering Technichian, Hardeo Chatergoon, former Construction Manager and Anil Gosine registered Engineer with experience in Civil Engineering.

27. Both Ramrattan and Gosine were expert witnesses. Ramrattan visited the home of the Claimant in early 2005 and issued his report shortly thereafter. However Gosine visited the site in his capacity as an expert in the year 2007, some three years after the construction. Further, it is to be noted that Gosine was a consultant to the Defendant on

the said project in 2004. There is little dispute between the evidence of both experts and their evidence has been considered in the round when determining the facts of the case.

Findings on issues of facts

28. The evidence of the experts aside, there emerged a divergence in material facts. They were as follows:

Whether damage to the house of the Claimant existed prior to the commencement of works by the Defendant in 2004.

29. In this regard, the witness Nicholas Narine testified that he took photographs of the house on the 23rd January 2004 prior to the start of construction. He further testified that another individual present with him on that day also took photographs. He is clear that at the time of taking the photographs, the Claimant was present. The Claimant on the other hand testified that he was not present when any photographs were taken of his house. The court found the Claimant's evidence to be believable in this regard. It does not however mean that the witness Narine is being untruthful when he testified that he took photographs prior to the start of construction. The court finds that it may well be that photographs were in fact taken as testified to by the witness Narine but the Claimant was unaware.

30. The photographs taken by Narine were admitted as AG1, AG2 and AG3. AG2 and AG3 both appear to show a crack in the masonry of one of the walls of the house. These two

photographs are different depictions of the same wall. AG1 depicts another wall of the house but does not clearly show any damage.

31. Further, the expert witness Ramrattan testified that there may have been cracks on the structure prior to construction works. It is noted that at no time is it the testimony that Ramrattan visited and viewed the house prior to construction so that ordinarily such evidence would carry no weight and would be mere speculation. However the court understands Ramrattan's expert testimony in the context of there being prior to construction, a major landslip nearby. Further it is the testimony of Ramrattan that the house of the Claimant fell within the general area of the landslide. The court therefore finds by way of inference, that when this witness testified in relation to the pre construction presence of cracks he in fact meant that it was likely that there were cracks prior to 2004 which would have been caused by the major landslip.

32. The court does not therefore, given all the circumstances, believe the Claimant when he testified that his house did not have any cracks prior to 2004. It is more likely than not that given the soil composition of the land upon which the Claimant's house stands, coupled with the testimony of the Claimant himself that he had not performed any work on the structure for about twenty years prior to 2004, the house would have at the very least sustained some damage upon the occurrence of the major landslip.

Whether the damage to the Claimant's house was exacerbated by the said construction activity.

33. It is the testimony of the Claimant that at the time the works were in progress he observed the formation of minor cracks. These cracks progressed as the works continued. Should this have been the only evidence in relation to the appearance of cracks to the structure the court would have been hesitant to accept this evidence from the Claimant having regard to the court's finding in relation to his testimony in respect of the state of the structure prior to construction (supra). However, the testimony of the Claimant finds support from the witness for the defence Hardeo Chatergoon. Chatergoon testified in cross-examination that not only did he take photographs of the Claimant's house before the start of construction, but that he also did so on at least five or six occasions during construction. The reason for continuously taking photographs according to this witness was to monitor whether any damage was being done to the Claimant's house. The witness testified further that during the months of February, March and April, more cracks appeared on the said house. He further testified that by the time he left the project, the Claimant's house was in a greater state of disrepair than when he had visited on the first occasion, that is, prior to the start of construction. That state of disrepair, according to the witness progressed during the construction activity.

34. Further, in this regard, whilst the evidence of the expert Ramrattan may at first blush appear also to be of assistance in making a determination on this issue, the court finds that it is not. The witness Ramrattan testified on several occasions that some of the cracks he observed appeared to be fresher than others. However, the factual basis for such a determination by the witness was never given, short of him saying that he was relying on

his experience. The court therefore gives no weight to the evidence of Ramrattan in this respect.

35. Be that as it may, the court finds that the evidence of the defence witness Chatergoon is highly supportive of the contention that whatever damage may have existed to the house of the Claimant prior to construction was exacerbated thereafter by the vibrations associated with the construction.

Whether there existed adequate drainage to channel run-off water prior to the start of construction in 2004.

36. The evidence of the Claimant is that when he constructed his house some 20 years before 2004, he built concrete drains eight inches in depth and twelve inches in width around the house. One of those drains measured sixty feet in length and another forty feet in length. The drains channeled water to the back of the house. The water then flowed further north into a large drain at the back of his house.

37. In his report, Ramrattan makes no mention of drainage. However, the witness Nicholas Narine testified that there was an earthed drain running alongside the road which provided access from the main road. Narine does not speak of drainage around the Claimant's house. Further, the expert Anil Gosine stated in his report that at the time of his visit in 2007, there was no defined drainage system leading to the dwelling from the main road.

38. The defence witness Chatergoon is of assistance in this regard. This witness testified that when he conducted the survey prior to construction he observed that the Claimant had no proper drainage at all around his property and no drainage to divert the flow of rain water and excess water from the property. As a consequence, before undertaking the construction the Defendant built drains to ensure that there was the proper flow of run-off water thereby preventing flooding. Drains were built on both sides of the construction area.

39. The court finds the evidence of Mr. Chatergoon to be highly plausible. It does not necessarily mean though, that the Claimant is being untruthful on this issue. It may well be that the Claimant built drains when he renovated his house some twenty years prior, but the evidence of the witness Chatergoon makes it quite clear that by the time of construction in the year 2004, there were no drains or no adequate drainage. It may well be and the court so finds that whatever drainage which had existed some twenty years before was in such a state of disrepair having regard to the non maintenance by the Claimant and the constant movement of the land over the period that in 2004 those drains were either destroyed or wholly unsuitable for purpose.

Whether the driving of the steel beams into the earth produced significant vibrations.

40. It would be disingenuous to argue that there would not have been significant vibrations caused by the driving of the steel beams into the earth. The evidence of the defence expert Anil Gosine, is that the excavator used in the process would have been about fifteen tonnes in weight. As a matter of common sense, it would take several hits with the excavator bucket to drive the beam to the required depth. While the driving of one of these beams may not have resulted in vibrations significant enough to exacerbate the condition of the house of the Claimant, certainly the driving of ninety such beams on soil of the type specified would give rise to significant vibrations. This evidence when taken together with the evidence of defence witness Chatergoon that the house of the Claimant appeared to be in a greater state of disrepair by the time the project ended, leads the court to the reasonable inference that the driving into the earth of the steel beams in the manner chosen by the Defendant, exacerbated the damage to the Claimant's house.

Whether there existed an alternate method which would have produced less vibration.

41. Both expert witnesses were questioned in relation to this issue. The witness Ramrattan proffered an alternative to the method of driving used by the Defendant. He was of the opinion that having regard to the soil composition, this method would have been the preferred one. His evidence is that the method employed by the Defendant was ill advised as it would have contributed to significant vibrations. The alternative according to this witness, involved the drilling of a hole with the auger to the full depth required, placing

the beam therein and casting it in concrete. He testified that this method would produce less vibration.

42. The expert witness called by the defence, Anil Gosine when questioned specifically in relation to the method suggested by the witness Ramrattan testified that he was not in a position to say whether such a method would have produced less vibrations. He further testified that the alternate method suggested was not, to use his words, “a normal construction method”.

43. The court was not impressed with the evidence of this witness on this issue. It appeared initially that the witness had some difficulty understanding the alternate method. Further, having regard to the description of both methods, as a matter of common sense, it is clear that the alternate method suggested involved no pounding with excavator buckets and would have produced certainly less vibration in that respect. There would necessarily have been vibration associated with the boring of the holes but the court finds that this would have been considerably less than that caused by pounding.

44. Further, the fact that the alternate method is not, according to the witness Gosine, a normal construction method is of no significance. This witness under cross examination testified that he was in fact a consultant on the very project although he had not so stated in his report. The evidence of this witness in this regard may well betray the inappropriateness of the approach to this project which was adopted by the Defendant ab initio. This was certainly not a normal construction project. It was a construction project plagued by volatile soil. To add to this, there were houses within at least one hundred and

sixty feet away from the construction site. Further, these houses were situated on slopes which were within the landslip area. It would therefore mean that non-traditional measures in construction, such as an alternate method of driving beams, may have had to be employed. This may well have been one of those projects where *normal* construction methods would have been ill advised and the court so finds.

45. The court therefore finds that there existed a suitable alternative to the method of driving employed by the Defendant and that this alternate method would have produced less noise and vibration.

The stockpile

46. It is the evidence of both the Claimant and his witness Basdeo Bocal that the excavated soil was stockpiled on the existing land between the house of the Claimant and the main road. This stockpile according to these witnesses was about thirty feet high, forming the shape of a cone. All the defence witnesses deny that there was any stockpile. They however accept that the excavated soil was placed behind the wall. This would necessarily mean that the soil was placed between the wall being constructed at the main road and the house of the Claimant. Where the witnesses differ, is in respect of the size of the deposit of the soil. There is also a dispute in relation to the length of time that the soil remained deposited at that place.

47. In proof of his contention, the Claimant produced a photograph taken in the year 2005, which purports to show a teak tree at the front of his house. The bark of this tree,

according to the Claimant and his witness Bocal, contains a dirt mark on its upper portion. This dirt mark according to the Claimant, represented the highest point at which the soil was stockpiled.

48. The word ‘stockpile’ is defined by the *Concise Oxford English Dictionary, eleventh edition*, as “a large accumulated stock of goods or material”. While there is contention between the parties in relation to the use of the word ‘stockpile’, the court finds that regardless of nomenclature, the issue of fact for the court’s determination is whether excavated material was deposited on the slope between the main road and the house of the Claimant.

49. The defence witness Chatergoon testified that this was indeed the case and the court accepts his testimony in this regard. The witness testified that the trench which was dug for the wall was ten feet in width and fifteen feet in depth. This would have yielded a significant quantity of soil even after back filling. The court is however not satisfied that the height of the soil so deposited was that as pointed out on the bark of the teak tree by the Claimant. The photograph appears to be unclear in this regard. The photograph does however assist in relation to the area of deposit, as the teak tree appears to clearly fall within the area to the front of the house of the Claimant.

The effect of depositing soil to the front of and upslope of the house of the Claimant

50. The Claimant testified that the run-off water from the main road was obstructed by the deposit of soil resulting in the water logging of his home when the rain fell in April 2004. The Defendant avers that the rainfall at that time was unconventionally heavy and as such any resultant damage to the house of the Claimant was an act of god and unavoidable. As a consequence the defence argues that the Defendant is not liable for such damage.

51. The court is not satisfied that the rainfall that year was unusual. Had there been some evidence emanating from the Meteorological Office or like authority to that effect the court may have been more inclined to so find. The evidence being what it is though, whether rainfall is heavy or unusually heavy is a matter of speculation driven by perception in the absence of scientific evidence. The court therefore does not agree with the argument put forward by the defence in this regard.

52. Further, the witness Chatergoon testified that prior to the start of construction, two drains were built to channel water away and thereby avoid flooding. According to this witness, when the construction was completed, these drains were covered over as there was no longer a need for them. He admitted that no further drains leading to and taking water away from the Claimant's house down slope were constructed.

53. The photograph marked 1, annexed to the report of Bill Ramrattan via Appendix II shows what appears to be and what has been accepted by at least one defence witness to be, water channels in the soil where the excavated soil was earlier deposited, made by run-off

water emanating from the main road. Therefore the propriety of covering over the drains built for the purpose of channeling water away is questionable. This is particularly so in this case where there are houses located down slope from the main road, in the direction in which all run-off water is likely to flow. It is therefore highly likely that such run-off water would water log the house of the Claimant.

54. The witness Ramrattan testified that should this occur, there would likely be degradation of the base of the concrete columns which support the house of the Claimant and sought by way of example to point out one such column in photograph number ten in Appendix II to his report. This photograph shows what appears to be the buildup of mould at the base of the pillar and exposure of steel within the pillar.

55. In addition to the water logging, loading the slope with a large quantity of excavated soil may have had another effect. It is the testimony of the witness Ramrattan that the stockpiling, as he put it, would have contributed to the weight of the slope and would have contributed to land slippage of already unstable soil. He testified that the standard practice on a construction site such as this one was the removal of the soil as soon as same was excavated. According to Ramrattan, “you don’t go loading the slip plane”.

56. Even the Defendant’s expert Gosine agreed under cross examination that stockpiling on the slope could have contributed in some measure to the initiation of secondary landslips.

57. The effect of this witness’ testimony is that the loading of the slip plane would have contributed in the round to the vibration which resulted in damage to the walls and

columns of the house of the Claimant. The court accepts this evidence. This finding shall also be considered in the context of the court's finding that it is more likely than not that there was some damage to the house of the Claimant prior to the start of construction in 2004.

58. Having regard to the findings of fact made by the court as set out above, the court rules on the relevant issue as follows:

Claim for Loss of support

59. The Defendant has argued as follows;

- a. Although the Claimant made several alternative claims based on negligence, nuisance and *Rylands v Fletcher*, that the Claimant's expert evidence only supported a claim for nuisance and negligence by virtue of loss of support of land.
- b. The claim for loss of support of the land (which is a natural incident of ownership) could only have been made by the *owner of the land*.
- c. Further the claim for alleged loss of support to the Claimant's house (which is not a natural right) could only have been made by the *owner of the land* (who also proves that he is entitled to an easement of the right of support by way of prescription pursuant to **section 2** of the *Prescription Ordinance* Chap. 5 No. 8 (1950 Revised Laws) which

provides for the creation of such an easement where it is enjoyed for a period of 16 years or more).

- d. The evidence in this claim shows that the Claimant was not the owner of the land and therefore he did not have the *locus standi* to bring a claim for nuisance (or negligence) for loss of support of the land (or his house).

60. In this regard the Defendant relied extensively on two authorities, one of which is relatively more recent than the other.

The first was that of the *House of Lords* decision in *Dalton v Angus* [1881] UKHL 1 where Selbourne LJ stated as follows:

“In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This support is natural, and is necessary, as long as the status quo of the land is maintained; and, therefore, if one parcel of land be conveyed, so as to be divided in point of title from another contiguousit, or (as in the case of mines) below it, the status quo of support passes with the property in the land, not as an easement held by a distinct title, but as an incident to the land itself, sine quo res ipsa haberi non debet. All existing divisions of properly in land must have been attended with this incident, when not excluded by contract; and it is for that reason often spoken of as a right by law; a right of the owner to the enjoyment of his own property, as distinguished from an easement supposed to be gained by grant; a right for injury to which an adjoining proprietor is responsible, upon the principle ... the doctrine laid down must, in my opinion, be understood of land without reference to buildings.”

Support to that which is artificially imposed upon land cannot exist, because the thing supported does not itself so exist; it must in each particular case be acquired by grant, or by some means equivalent in law to grant, in order to make it a burden upon the neighbour's land, which (naturally) would be free from it. This distinction (and, at the same time, its proper limit) was pointed out by Willes, J., in *Bonomi v. Backhouse*, where he said, "The right to support of land and the right to support of buildings stand upon different footings, the former being prima facie a right of property analogous to the flow of a natural river, or of air, though there may be cases in which it would be sustained as matter of grant (see *Caledonian Railway Company v. Sprot*): whilst the latter must be founded upon prescription or grant, express or implied..." Land which affords support to land is affected by the superincumbent or lateral weight, as by an easement or servitude; the owner is restricted in the use of his own property, in precisely the same way as when he has granted a right of support to buildings. The right, therefore, in my opinion, is properly called an easement, as it was by Lord Campbell in *Humphries v. Brogden*; though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water, the easement of the riparian landowner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, i.e., it must be established by prescription or grant. If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would then be an implied grant of such support as the actual state or the contemplated

use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or "flats" separately owned (an illustration which occurs in many of the authorities), the owner of each upper floor or "flat" is entitled, upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself: Caledonian Railway Company v. Sprot. I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with Lindley, J., and Bowen, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight."

61. The court is of the opinion that the following passage taken from that set out above must be paid particular attention;

*“The right, therefore, in my opinion, is properly called an easement, as it was by Lord Campbell in Humphries v. Brogden; though when the land is in its natural state the easement is natural and not conventional. The same distinction exists as to rights in respect of running water, the easement of the riparian landowner is natural; that of the mill-owner on the stream, so far as it exceeds that of an ordinary riparian proprietor, is conventional, i.e., it must be established by prescription or grant. If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, **or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary**, there would then be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural.”*

62. The court observes here that there is no evidence from the Claimant’s case as to whether, (assuming there was a conveyance to the Claimant’s father in law, of the land upon which the Claimant’s house stood at the time of such conveyance), a dwelling house already existed on the said land or if not, that the land was conveyed expressly with a view to the erection of such a house. If this was the case then the support would have been

considered natural and that right of support would have passed upon conveyance to the father in law of the Claimant.

63. Further, the Defendant relied on the *Court of Appeal* decision in **Toy Loy v Duncan** Civ App. 49/83 dd. 3/07/90 per Mc Millan JA at **pp. 14-15** as follows:

“Now, the right to support for super structures which give added weight to the soil not being a natural right, a plaintiff ... must allege and show a title to such support. A mere general averment to such support is not sufficient, and he must show how he claims to be entitled, whether by long enjoyment or by grant or by statute etc ... In the instant case, no such plea was made and no attempt to show title ...”

64. While this case appears somewhat distinguishable from the present case as it deals with the issue of support for superstructures, the principle remains the same.

65. The court therefore finds that the right to support for both the land and dwelling house in this case which gave added weight to the soil was not a natural right. Therefore it is up to the Claimant to prove an entitlement to such support either by way of title to the land or by way of long enjoyment pursuant to statute, namely section 2 of the Prescription Ordinance. In this case, while the Claimant has not proven title it is clear that he nevertheless would have had an equitable interest in the land, to say the least, at the time of accrual of the right of action he having testified that he purchased the land but no deed was executed.

66. But the issue does not end there. The Claimant is entitled to maintain his claim once he has actually enjoyed that right without interruption for the full period of sixteen years. In such a case such a right shall be deemed absolute and indefeasible pursuant to section 2 of the Prescription Ordinance.

Long Enjoyment

67. There is an abundance of evidence in this case that the Claimant has enjoyed such a right for more than sixteen years prior to the accrual of the right of action. The Claimant testified that the land and house thereon were purchased by him from his father-in-law, in or around 1980. Shortly thereafter, he renovated the entire structure between 1980 and 1984 and has lived there ever since. He also testified that he constructed drains around his house so that as a consequence, water from the road way would run off, away from his house. The court therefore finds that the Claimant is entitled to maintain his claim as he has actually enjoyed the right of support for over sixteen years.

The Rule in Rylands v Fletcher

68. The Claimant alleges that the stockpiling of material between his house and the main road was a non-natural use of the land. The injudicious positioning of this stockpile resulted in run-off water flowing into the base of his structure and thereby causing damage.

69. In the case of **Rylands v Fletcher** (1866) L.R. 1 Ex. 265, Blackburn J. stated:

“... the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

70. In **Transco plc v Stockport Metropolitan Borough Council** [2004] UKHL 61, Bingham LJ stated that in order to establish a claim under this Rule, the claimant must prove that:

“.....the Defendant has done something which he recognised, or judged by the standard appropriate at the relevant place and time, he ought reasonably to have recognised, as giving rise to an exceptionally high risk of danger or mischief if there should be escape.”

Bingham LJ further stated at that *“the question is whether the Defendant has done something which he recognises, or ought to recognise, as being quite out of the ordinary in the place and at the time when he does it.”*

71. The court finds that in these circumstances, the stockpiling of construction material does not constitute a use of the land which was out of the ordinary and could not be said to be non-natural. It may have been inadvisable given the nature of the soil but that is a far thing from saying that the use of the land was non-natural. It follows that the use of the land did not in any way breach the standard laid down by Bingham LJ.

72. Having regard to this finding it is unnecessary to consider whether run-off water would, in circumstances suffice for such a claim as it was not the thing kept on the land likely to do mischief if it escaped.

73. The claim pursuant to the rule in Rylands v Fletcher appears therefore to be misconceived and fails.

Nuisance

74. The relevant principles are set out in **Clerk & Lindsell on Torts** 19th edition paragraph 20-11 under the rubric standard of comfort as follows :-

“A nuisance of this kind, to be actionable, must be such as to be a real interference with the comfort or convenience of living according to the standards of the average man. (An interference which alone causes harm to something of abnormal sensitiveness does not of itself constitute a nuisance. In practice the general application of the concepts of foreseeability and reasonable user may have rendered the notion of abnormal sensitivity less significant in modern law, although it is submitted that it remains useful as a guideline when applying those broad concepts in particular cases. ...When it is said that a householder is entitled to have the air in his house untainted and unpolluted by any acts of his neighbour, that means that he is entitled to have "not necessarily air as fresh, free and pure as at the time of building the plaintiff's house the atmosphere then was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence". Moreover, the discomfort

must be substantial not merely with reference to the claimant; it must be of such a degree that it would be substantial to any person occupying the claimant's premises, irrespective of his position in life, age, or state of health; it must be "an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people". ...It is not necessary to prove injury to health. Indeed, it seems that no regard should be had to the needs of insomniacs or invalids."

75. In this regard, the evidence from the Claimant and at least one of his supporting witnesses, Basdeo Bocal was that the vibrations caused by the piling were significant, resulting in the vibration of the entire house and the movement of furniture, wares, pictures and ornaments. There was also some breakage of glass as a consequence. Not only did this occur during the daytime but also during the night. According to Bocal, the piling went late into the night at times and it affected his ability to sleep. It is to be noted that the Claimant was in the later part of his years at the time. So that there was significant vibration from the planting of ninety beams over at least a five day period according to the evidence of the defence witness Chatergoon.

76. This amounts, in the view of this court, to an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living.

77. Further, this type of damage or result would certainly have been reasonably foreseeable by the Defendant having regard to all the circumstances in which this construction was taking place and the close proximity of the houses.

78. In the result the court finds that the Claimant is entitled to be compensated under the head of Nuisance for the excessive noise and vibration to his property.

Negligence

79. In order to prove that the Defendant was in fact negligent the three elements of the tort of negligence must be established, namely, the existence of a duty of care owed by the Defendant, breach of that duty by the Defendant, and resulting damage caused to the Claimants due to this breach of duty.

Duty

80. It cannot be seriously argued and indeed it appears not to be, that a construction company which undertakes rehabilitation works on a slope which is prone to land slippage does not owe a duty of care to the owners and/or occupiers of homes adjacent to and down slope of the work area. That duty *inter alia* would have been to ensure that the process of conducting rehabilitative works did not (save and except to the extent that it was unavoidable) exacerbate the already fragile composure of the soil resulting in further slippage and damage to those houses. Further, the duty would have extended to the

execution of the works in a competent manner in keeping with recognised and recommended practice in the given circumstances of nearby residential dwellings. Such a duty would also necessarily have extended in this case to the proper storage of excavated material post construction. It would certainly have been foreseeable to the Defendant that the house which was down slope on the slip plain was likely to sustain damage as a consequence of their actions.

Breach of Duty and Damage

81. Having regard to the findings (supra), the court is of the opinion that the Defendant breached its duty when it:

- a. Proceeded to use a method of piling which was the cause of substantial vibrations which (when combined with other factors) ultimately resulted in the development of secondary landslips which caused cracks to develop on the house. This is particularly so in light of the finding of this court that on the evidence there existed an alternate method of piling which would more likely than not have produced considerably less vibrations.
- b. Proceeded to load an already unstable slip plain between the roadway and the residence, with a considerable amount of excavated soil and compounded the matter by compressing same with a tractor. The loading of this slip plain resulted in damage to the house in that the added weight on the slip plain was instrumental in causing secondary land slippage.

- c. Having loaded the already unstable slip plain, the Defendant failed to provide adequate drainage to channel water running off of the excavated material, away from the house of the Claimant, resulting in waterlogging of the lower level of the Claimant's house and consequential degradation of the concrete structure. In the words of Justice Besson in the matter of **Monica Cudjoe v A.G.** HCA 683 of 1972 delivered on the 16th April 1982, at page 12, a case in which the facts appear strikingly similar to the instant case;

“The Highway Authority, through its officers knew or ought to have known the nature of the soil in the Naparima-Mayaro district, it was in occupation of the road when it was being repaired but in seeking to protect the road it chose to drain surplus water on to the plaintiff's property and in my opinion did so negligently so that even if the rainfall was excessive in the month of October, 1971, such an occurrence cannot come to the Defendant's rescue.”

- d. Failed to take any action whatsoever to either remedy or mitigate the damage in progress despite several complaints being lodged by the Claimant.

82. The Court therefore finds for the Claimant in respect of particulars (E), (F), (G), (K), (L), (M), (O), (P), (Q), and (R) of the Particulars of Negligence as set out in the Statement of Case (supra).

Contributory Negligence

83. But the matter does not end there. It is clear from the evidence of the Claimant that he was fully aware at the time he moved to those premises that the nature of the soil was prone to land slippage. This is the reason, it appears, that the Claimant constructed at least two retaining walls around his premises. These walls were pointed out by the Claimant as depicted in the photographs marked as exhibit 13. These walls appear though, to have separated from the foundation or skirting of the house by the date the photograph was taken. Indeed the evidence of the Claimant in cross examination was as follows;

“Some of the work I did on the house between 1980 and 1984 was to cater for the slippage of the land. In 1980 I knew the land was slipping slowly. Some of the work was to shore up the house from being damaged and falling down. The house had not suffered damage because of slippage to my knowing before I started renovations....

Between 1980 and 2004 when works on the road started there were no landslips in the area. There was a slow slip but it came down after the project started...

I know that the land slippage could have caused problems to my home as early as when we moved in 1980.”

84. From the evidence the Claimant was aware not only that the area was prone to land slippage but that there was, according to him, a “slow slip” in progress. It is for this reason that he chose to install suitable infrastructure at the time of construction to prevent such slippage. Having initially done so however, it appears that the Claimant took no

further steps to either construct or maintain that which he had already constructed for the purpose.

85. Further, as the court has found (*supra*), it is more likely than not that the drains which had been built by the Claimant when he initially renovated in the 1980's would have been either in a substantially dilapidated state or nonexistent by the time the work started on the main road in 2004. It follows that the Claimant failed to maintain these drains so that they would continue to serve the purpose for which he had originally constructed them.

86. On the issue of contributory negligence, the court must ask whether the Claimant failed to take reasonable care for the safety of his property. See *Nance v British Colombia Electric Company* [1951] A.C. 601. If the answer to this question is yes then the court must ask whether the Claimant ought reasonably to have foreseen that if he did not maintain the infrastructure which he had put in place for alleviating the effects of the slow slippage (something which a reasonable prudent owner of such premises may have done), he might have incurred damage to his property.

87. The answer to both these questions may only reasonably be yes in the circumstances. Certainly someone who chooses to build his house on land prone to slippage, with the knowledge that the land is prone to slippage, bears the responsibility, to say the least, of ensuring not only that proper infrastructure is put in place to secure the structure but also that such infrastructure is consistently and efficiently maintained so that his property is at all times protected from the effect of continuous slippage.

88. The failure of the Claimant so to do in these circumstances, in the court's view, makes him partially liable for the damage sustained to his property. Put another way, his conduct by way of omitting to maintain the infrastructure including the drainage, has contributed to his damage.

89. The court therefore finds for the Defendant in respect of particulars c, d and e of the Particulars of Contributory Negligence as set out in the Defence (supra).

90. Further, in the circumstances the court finds that the contribution of the Claimant to his damage under the head of contributory negligence is that of 40%.

Disposition

91. The Defendant is liable to the Claimant for damages as follows;

- a. In Nuisance due to the noise and vibrations occasioned by pile driving over the period of seven days.
- b. In Negligence due to;
 - i. The chosen method of pile driving,
 - ii. Loading of the slip plain both in terms of the addition of weight on the slip plane resulting in secondary landslips and the exacerbation of the effects of the vibrations from the pile driving as a consequence of that added weight.

The Ancillary Claim

92. The Agreement concluded between the Defendant/Ancillary Claimant and the Ancillary Defendant on the 19th March, 2008 provided the following:

- a. The Ministry of Works and Transport (MOWT) shall indemnify the Defendant/Ancillary Claimant against all claims, proceedings, damages, costs, charges and expenses in respect of the matters referred to in the exception clause;
- b. The Defendant/Ancillary Claimant shall, except if and in so far as the contract provides otherwise, indemnify the Ministry of Works and Transport (MOWT)/the Government of Trinidad and Tobago against all losses and claims in respect of loss or damage to any property which may arise out of or in consequence of the execution and completion of the works and the remedying of any defects therein, and against all claims, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, subject to the exception clause.
- c. The MOWT would indemnify for damage to property which is the *unavoidable result* of the execution and completion of the work, or the remedying of any defects therein, in accordance with the agreement.

93. The issue for the Court to determine is whether the Defendant/Ancillary Claimant is afforded the protection of the indemnity clause; in particular whether the damage to the Claimant's property falls within the parameters of "unavoidable result" as stated in the exception clause.

94. There is no definition provided for the phrase “unavoidable result” either in the agreement between the parties or in the FIDIC Conditions of Contract for works of Civil Engineering Construction, which formed the basis of the initial agreement between the parties.

95. In *Gillespie Brothers & Co. Ltd. v Roy Bowles Transport Ltd* [1973] 1 All ER 193, Lord Denning stated that the words of an indemnity clause, an exemption clause or limitation clause were to be construed in the same way as any other clause. Such a clause was to be given its ordinary meaning, *i.e.* the meaning which the parties understood by it, and was to be given effect according to that meaning, provided that it was reasonable between the parties and was applied reasonably in the circumstances of the particular case.

96. Therefore, in arriving at a meaning of “unavoidable result” the overall context in which the phrase was used should be scrutinized in conjunction with the agreement.

97. The Ancillary Defendant submitted that Clause 22.1 and 22.2 identify the circumstances where, when damage accrues to property in the course of the execution of the contracted works no liability will be attributed to the contractor; rather the MOWT will be solely liable. However, this seemingly absolute provision is qualified by the exception that any damage outside of the “unavoidable result” of the works would not be covered by the MOWT.

98. The Ancillary Defendant proffers that the phrase “unavoidable result” relates to circumstances where there has been some form of negligence by the Defendant/Ancillary Claimant in the performance or execution of the works. Since the word ‘negligence’ or a synonym thereof did not appear in the agreement, the Ancillary Defendant contends that the Defendant/Ancillary Claimant cannot be indemnified.

99. In *Smith and Others v South Wales Switchgear Ltd* [1978] 1 W.L.R 165, the court held that a clause does not protect a proferens against his own servant’s negligence unless it contained the word negligence or some synonym of negligence.

100. The court accepts that in the ordinary sense “unavoidable result” in the context means the inevitable loss or damage to any property which was the consequence of prudent construction practice. Therefore, “unavoidable result” will not include the case where negligence has been attributed to the Defendant/Ancillary Claimant as is the case herein. This phrase gives effect to the exception provision limiting the Ancillary Defendant’s liability which was based on the understanding that it was the duty of the Defendant/Ancillary Claimant to ensure that all methods adopted in the road works were to cause, if any, minimal damage to surrounding areas and structures.

101. Therefore, the Defendant/Ancillary Claimant is to be indemnified by the Ancillary Defendant but only to the extent that the damage and/or loss caused was unavoidable. However, in light of the Court’s findings, there is no proof that the damage caused to the Claimant’s property was unavoidable rather the evidence suggests that

alternative methods could have been employed to significantly reduce the impact of the construction works in the vicinity.

Quantum

102. Genarally where property has been damaged the normal measure of damages is the amount by which its value has been diminished. In the case of lands and buildings the measure would be that which it would take to repair the property bearing in mind the maxim *restitutio in integrum*. The measure of compensatory damages is to be found in the estimates for repairs provided by the witness Bill Ramrattan. Two estimates were admitted into evidence. The first, which was filed on the 28th July 2006, estimates the cost of repair to be the sum of \$192,292.65. This figure however includes what purports to be a 10% sum for contingency in the amount of \$15,010.00.

103. The updated estimate filed on the 10th January 2011 with leave, gives a total estimate of \$267,157.38 with the corresponding contingency being 10% in the amount of \$21,119.20. Both estimates are VAT inclusive. While the court accepts the sub total of the most recent estimate, the witness having given evidence that the update was done factoring in recent price increases which are reflected in the column appropriately entitled “Rates”, the court does not accept the sum claimed as contingency there being no evidence to explain this head of claim. The said sum is therefore disallowed.

104. As a consequence the court finds that special damages ought to be awarded for Negligence in the sum of 60% of the balance remaining after the disallowance on the estimate filed on the 10th January 201.

105. As regards damages for Nuisance there has been no proof of special damages. In relation to general damages the court notes that the evidence shows that the Claimant was age 56 years at the time. The court also considers that there would also have been annoyance, discomfort and inconvenience as a result of the noise and vibrations from the pile driving over a period of seven days at the most, sometimes at night. In the circumstances, the court considers that an award of \$12,000.00 is a reasonable figure for general damages.

Judgment

106. As between the **Claimant** and **the Defendant/Ancillary Claimant**;

- a. Damages for Negligence reduced by 40% for contributory negligence, to be paid by the Defendant/Ancillary Claimant to the Claimant in the sum of **\$145,722.48**.
- b. General damages for Nuisance to be paid by the Defendant/Ancillary Claimant to the Claimant in the sum of **\$12,000.00**.
- c. Prescribed costs in the sum of **\$32,685.37** to be paid by the Defendant/Ancillary Claimant to the Claimant.

107. As between **the Defendant/Ancillary Claimant** and **the Ancillary Defendant**;

- a. The Claim of the Defendant/Ancillary Claimant against the Ancillary Defendant is dismissed.
- b. The Defendant/Ancillary Claimant is to pay to the Ancillary Defendant prescribed costs in the sum of **\$14,000.00.**

Dated this 6th day of May 2011

.....
Ricky Rahim
Judge