

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: P 030/2018

Claim No. CV2016-01737

BETWEEN

WATER AND SEWERAGE AUTHORITY OF TRINIDAD AND TOBAGO

Appellant

AND

DARWIN AZAD SAHADATH

AND

KAMALAR MOHAMMED SAHADATH

Respondents

PANEL: A. Mendonça J.A.  
G. Smith J.A.  
P. Moosai J.A.

Date of Delivery: November 23, 2018

APPEARANCES:

Mr. K. Mc Quilkin and Ms. S. Ragoobar on behalf of the Appellant

Mr. L. Lalla for the Respondents

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

/s/ G. Smith J.A.

I have read the judgment of Mendonça J.A. I also agree with it and have nothing to add.

/s/ P. Moosai J.A.

## JUDGMENT

Delivered by Mendonça J.A.

1. The Appellant is the Water and Sewerage Authority of Trinidad and Tobago and is responsible for the supply of water in Trinidad and Tobago and matters incidental thereto. The Respondents commenced these proceedings against the Appellant claiming, *inter alia*, damages for damage done to their home at L.P. 52 Iere Village, Branch Road, Princes Town. They claimed the damage was caused by the Appellant's breach of statutory duty and/or its negligence and/or nuisance. The factual foundation of the Respondents' claim was essentially that the damage to their home was caused by a leaking pipeline of the Appellant, which was located under the road immediately in front of their home.

2. The Respondents alleged that the Appellant had a duty to ensure that its pipeline was inspected on a regular basis, was in a proper state of repair and condition, and was properly and promptly repaired in the event of any leakage.
3. The Respondents case in a nutshell is that the home was built on the western side of the Iere Village Branch Road where the land slopes downward. The pipeline of the Appellant began to leak in 2012 and was not repaired until March 2014 when it was removed from under the road and placed above the ground in an adjacent drain. As a consequence of the leaking pipeline, the soil in the vicinity of the Respondents' home became saturated. This induced a landslide causing the slope on which the Respondents' home was built to fail, which in turn caused the Respondents' home to slip down the slope. The end result was that there was extensive damage to the Respondents' home such that it is uninhabitable and in danger of imminent collapse.
4. The Appellant filed a defence in which it denied that it neglected to repair its water line until March 2014 as alleged. It accepts that the damage to the Respondents' home was caused by a landslide, but says that landslides are common in the area where the Respondents' home was constructed due to the nature of the soil and specifically denies that the landslide was solely caused or caused at all by its leaking pipeline.
5. It is common ground that the damage to the Respondents' home was caused by a landslide. The question before the Trial Judge was whether the Appellant had any liability in law to the Respondents for the cause of the landslide. The Trial Judge found that the Appellant's pipeline immediately in front of the Respondents' home was leaking between 2012 and 2014 when it was eventually repaired. In his written submissions, counsel for the Appellant sought to challenge the Trial Judge's finding that the Appellant's pipeline was leaking. However, that was not pursued at the hearing of the Appeal. In my view, that was a well advised course to adopt as there was an abundance of evidence on which the Trial Judge could find as he did that the pipeline

leaked from 2012 to March 2014. Further the Trial Judge found that the only pipeline in front of the Respondents' home was that of the Appellant. This is common ground between the parties. The Trial Judge also found that it was the leaking pipeline of the Appellant that caused the landslide and consequently the damage to the Respondents' home. He gave judgment for the Respondents for damages in the total amount of \$2,218,960.20. This sum included an award of \$2,002,000.00 for the reinstatement of the Respondents' home.

6. The basis in law on which the Trial Judge found the Appellant liable, i.e. whether it was in negligence, breach of statutory duty or nuisance, I do not think has been clearly identified in the Trial Judge's judgment. It seems that the Trial Judge may have found that the Appellant is liable under all heads. However, there has been no point taken before this Court as to the legal basis on which the Trial Judge's finding of liability was based.
7. In addressing the issue whether the leaking pipeline caused the damage, the Trial Judge noted that the starting point is the "but for" test and that generally speaking, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. He further stated that the Court must be alive to any act that may break the chain of causation but no such act had been pleaded in this case. He also referred to para 6-71 of **Charlesworth and Percy on Negligence 13<sup>th</sup> Edition** which speaks of a "scope of risk analysis" and noted that the scope of risk created by a leaking pipeline is water damage to the surrounding properties. In the end the Trial Judge found that the Respondents satisfied this test and found that but for the Appellant's leaking pipeline, the damage to the Respondents' home would not have been caused. No challenge has been mounted to the Trial Judge's approach in law to the issue of causation.
8. The Appellant in this Appeal, however, argued that the Trial Judge erred in finding as a matter of fact that the Appellant's pipeline caused the landslide as he did not have sufficient evidence before him in order to come to that finding. The Appellant's Appeal

is therefore essentially a challenge to the Trial Judge's finding of fact that the cause of the landslide and so the damage to the Respondents' home was the Appellants' leaking pipeline.

9. The Appellant also appeals from the award of damages on a number of bases which I shall refer to in detail later in this judgment. I will, however, first consider the appeal in relation to the issue of causation.
10. The focus of the Appellant's appeal was on the expert evidence led on behalf of the Respondents. The Appellant contends that the expert evidence by which it was necessary to prove the cause of the landslide was simply not sufficient to allow a finding that the leaking pipeline caused the landslide. The Trial Judge, it was submitted, therefore erred in relying on the experts' evidence to come to the finding as to the cause of the landslide.
11. I will refer in greater detail to the Appellant's submissions but it is first necessary to refer to the evidence before the Trial Judge including the expert evidence, as the challenge to the Trial Judge's findings must be assessed on the whole of the evidence. I will also refer in greater detail to the Trial Judge's findings.
12. The witnesses for the Respondents were Mr. Sahadath, the First Respondent, and their expert witnesses namely Mr. Wharton, Mr. Salandy and Ms. Welch. Ms. Welch's evidence related to the issue of damages. I will come to her evidence when I treat with the issue of damages later in this judgment.
13. Mr. Sahadath provided a witness statement, which stood as his evidence-in-chief and he was cross-examined.
14. Mr. Sahadath in his witness statement said that he began construction of his home in 2004 and it was virtually completed in 2010. He and his wife moved in shortly thereafter. Between 2004 and up until June 2012 he did not notice any problem with

the stability of his property and the land in its immediate vicinity. In June 2012 he noticed that the road in front of his home began to crack and he also saw that sink holes were developing in the road. He stated it was at that time he discovered that the Appellant's pipeline in front of his home under the road was leaking. He noticed water flowing up from the cracks in the road and collecting in the sink holes which had developed.

15. Between June 2012 and January 2013 he observed that water continued to flow from the cracks in the road. He observed that the cracks had started to widen and that the sink holes began to enlarge. He further stated:

*"The slipper drain, which channels water runoff from the road to a larger drain south of my property, began to separate from the road. The water from the [Appellant's] leaking pipeline began to pool on the road and then flow through cracks on the road and drains. The soil directly at the front of my property became waterlogged."*

16. He said that in January 2013 he noticed that the basement floor of his home began to raise and that cracks began appearing in the walls and on the concrete posts which supported his home. It became apparent to him that his home was shifting and sliding downhill. He also stated that between January 2013 and March 2013 he continued to see water flowing from the cracks in the road.

17. With the assistance of a neighbour, Mr. Sahadath dug a hole on the eastern side of the road in front of his home in the area near to the Appellant's pipeline and immediately after digging the hole, water began to pool at the surface.

18. Mr. Sahadath also in his witness statement referred to reports of the leaking pipeline that he made to the Appellant and said that although the Appellant's personnel came and did repairs, no repairs were done to the pipeline. He said it was not until March 2014 that the Appellant repaired the pipeline when the pipeline directly in front of his

home was removed and then installed above ground in a drain which ran along the eastern side of the road. He stated that it was only after the pipeline was removed that he noticed water stopped coming up from the surface of the road. However there was considerable damage to the road surface and the public drainage in front of his home which allowed rain water to run off and to continue to penetrate the soil which caused his home to slip further downhill.

19. Mr. Sahadath also said that he commissioned Geoengineering Consultants Limited (Geoengineering) to carry out a survey of the landslide affecting his home. Geoengineering carried out a survey and prepared a report. He also commissioned APR Associates Limited (APR) to examine the cause and extent of the damage to his home and to recommend possible solutions. Mr. Sahadath referred to the findings of Geoengineering and APR. I will refer to them when I come to the evidence of Mr. Wharton and Mr. Salandy.
20. Mr. Sahadath also in his witness statement referred to complaints he made to the Member of Parliament for the area and that he received a response indicating that the matter had been referred to the Princes Town Regional Corporation requesting that its technical officers ascertain what can be done to remedy the situation. He stated further that he received a response from the Princes Town Regional Corporation stating that it had referred the matter to the Appellant "as investigations revealed that the damages caused were due to [the Appellant's] damaged main lines."
21. Mr. Sahadath also referred to the Appellant's "job cards" which he said confirmed that the Appellant's repairs did not include repairs to the pipelines.
22. In cross examination Mr. Sahadath accepted that he did not see water flowing directly from the pipeline and it was an assumption he made. He also accepted that the assertion that the Appellant did not repair the pipeline was also based on an assumption. He further said that the water he saw on his property could have included

rain water. He stated that he did not alter the slope of the land during the course of the construction of his home.

23. Mr. Wharton also provided a witness statement which stood as his evidence-in-chief. He also prepared a report which was received in evidence. He was cross-examined.

24. In his witness statement he stated that he is a geophysicist and a director of Geoengineering. In July 2015 the Respondents requested Geoengineering to conduct a survey of a landslip affecting their residence. The objectives of the survey were to map the subsurface layers of the land in the vicinity of and under the Respondents' home with a view to determining possible causes of and remedies to the landslide. He stated that field work was carried out on July 27<sup>th</sup> 2015, August 7<sup>th</sup> 2015 and September 4<sup>th</sup> 2015.

25. Mr. Wharton explained the techniques that were used by Geoengineering to investigate the landslide which he described as (a) Two-dimensional resistivity tomography (2-D resistivity) and (b) one-dimensional multichannel analysis of seismic surface waves (1-D MASW). He provided an explanation of the techniques and how their application would provide relevant data.

26. Mr. Wharton subsequently prepared a report dated September 30<sup>th</sup> 2015 on his investigations which was received in evidence.

27. Mr. Wharton stated that data obtained from the 2-D resistivity test indicated resistivity of the soil in the area of the Respondents' home to be very low even at 17 meters. This indicated the presence of soft moist material like clay, which meant the soil was saturated or inundated with water, but the test gave no indication of the stiffness of the soil. With respect of the results of the 1-DMASW test, he indicated that they showed "there was the presence of stiff clay at 4 to 5 metres. It is noted that the cross-section results show approximately the same layer of thickness on the Western side of



lere Branch Road, (where the [Respondents'] house is located) and the Eastern side though there is a harder lower layer on the Eastern side. However this would not have affected the chances of a landslide occurring on the two sides.”

28. Mr. Wharton then went on to refer to the causes of a landslide and said this:

*“14 Landslips may be caused either by nature or by human activity or by a combination of both. I considered the topography of the land in the vicinity of the landslips; based on the 1975 Ordinance Survey Map it does not suggest that rain water was being conducted to the landslip site to any significant extent. It is much more likely that domestic activity, such as might be associated with a supply leak was the cause.”*

29. This is elaborated on in his report where he said:

*Landslips may be caused either by nature and or by human activity or by a combination of the two. Primary among natural causes are earthquakes, intense rain fall or changes in ground water levels. Primary among anthropogenic causes are deforestation, excavation, mining and quarrying, construction of roads and houses, waste water and water leakage. Often, several of these conditions can co-exist without a landslip occurring. Then, when the appropriate trigger is applied, the landslip occurs. In this case the geology of the area suggests that landslips erosions have occurred in the past, probably induced by heavy rains. However, the topography showed on the 1975 Ordinance Survey Map (3) does not suggest that rain water is being conducted to the landslip site to any significant extent. It is much more likely that domestic activity, such as might be associated with a supply leak was the cause.”*

30. In cross-examination, Mr. Wharton admitted that he did not review the rainfall statistics for 2012, 2013, 2014 or 2015 before preparing his report. But he did not think

it was necessarily important to do so. He said that the 1975 Ordinance Survey Map he referred to would have been accurate in 1975 when it was published but not in 2012 or 2013. He accepted that landslides could be caused by rainfall and also by construction activity. In relation to rainfall as a cause of the landslide, he noted that rainfall would be “spread over a wider area and not too concentrated”. He did not accept that rainfall could be the cause of the saturated soil which his tests revealed. He however accepted that the tests he conducted could not say when the soil became saturated. His findings were in essence a snapshot of the soil in 2015 and he could not say whether the water in the soil was there at any time prior to that.

31. Mr. Salandy also provided a witness statement which stood as evidence-in-chief and prepared a report which was received in evidence. He too was cross-examined.

32. In his witness statement Mr. Salandy indicated that he is a civil structural engineer and is employed with APR. In March 2014 the Respondents approached APR to assess the damage to their four storey residence which the Respondents attributed to a leaking pipeline under the control of the Appellant. He stated that the soil in the area of the Respondents' home is known as “Talparo Clays” and is prone to swelling when exposed to water. He visited the Respondents' home on three occasions between March 2014 and November 2015 and took photographs and measurements and gathered information which he used to assess the damage. He also obtained information from the Respondents who then informed him that the “leak began in and around July 2012 and at that time they began observing subsidence of the roadway located at the front of their house.” Mr. Salandy stated that based on that information and his observations between March 2014 and November 2015, the subsiding roadway “evolved into a landslide which progressed under the [Respondents'] house by the date of his last visit”. He further stated that “from his examination of the topography, soil properties and location of the landslide, he determined that the landslide could not have been produced by natural processes. He said that the landslide could not have been caused

by the ingress of water of surface runoff produced by rainfall. At the time of his initial visit he observed that the road and driveway were covered with asphalt and concrete and there was evidence of damaged roadside drainage features which suggested to him that the drainage in the area prior to the landslip was adequate. These features meant that the surface runoff would not have been able to flow and to seep into the earth.

33. He further stated:

*“9. Upon the initial subsidence of the roadway in front of the Claimants’ house in June 2012 the drainage infrastructure was damaged resulting in unrestricted flow of surface runoff into the landslide’s zone of depletion. The zone of depletion is the section of the landslide which is below the original ground surface due to movement of the soil.*

*10. Due to the development of this landslide from 2012 to 2015, I deduced that it occurred due to the soil becoming saturated by the percolation of water into the soil. The crown of the landslide, which is the area where the soil is not disturbed is in the vicinity of the reported leak. Due to the location of the landslide on the slope, the type of soil and the topography, it is unlikely that rainwater or surface runoff could have triggered the landslide, especially as the road drainage infrastructure was adequate before the subsidence of the roadway.*

*11. Due to the initial subsidence of the roadway, the resulting topography was not able to facilitate overland flow due to its sunken shape. It was impossible to prevent water from entering the landslide without undertaking major works. Surface runoff flowed unrestricted into the landslide “zone of depletion” and percolated downwards. This further exacerbated the landslide.*

*12. It is reasonable to accept that a leaking pipeline was the initial source of the water. At the time of my first visit in April 2014, I observed that a water supply pipeline was recently constructed along the roadside drains suggesting that the line within the roadway was faulty. However, it is uncertain whether the pipeline was leaking and hence triggered the landslide or whether the initial subsiding road damaged the pipeline and the resulting leak exacerbated the landslide.*

*13. I concluded that the Claimants' residence experienced significant movement due to the landslide leading to multiple signs of structural failure in the lower columns. As a result, this building is deemed unfit for occupancy. Due to the extent of the damage, retrofitting works would be uneconomical and unfeasible".*

34. Mr. Salandy said that the Respondents' home comprised four storeys. The foundation used in the construction of the home is known to perform adequately in buildings situated on expansive soils such as clay. He noted that 3-6 metre long piles were used and this would have transferred the building load to the stiffer soil identified by Geoengineering. From the observations of Mr. Salandy and from measurements he took as at November 2015, he noted the following in relation to the damage to the Respondents' home:

*"The [Respondents'] house sank approximately 12 – 15 feet; the building moved laterally by approximately 15 – 20 feet; at the time of the construction approximately two storeys of the residential building were above road level, but as a result of the landslide, now one storey is above road level; the [Respondents'] driveway sunk approximately 12 feet; there were numerous*

*signs of distress observed in the columns located at the basement level; the house rotated towards the road. Due to the observed failures, the [Respondents'] house is at the risk of further movement and imminent collapse and therefore is unfit for occupancy; that the cause of the landslide was the inundation of the soil with water."*

35. In cross-examination Mr. Salandy said he was hired to conduct a damage assessment of the Respondents' home and not to determine the cause of the landslide. He also stated that the geology of the area is such that there may have been previous landslips and that the general area is prone to landslips. As he said in his report, Mr. Salandy accepted that a landslide may be caused by more than one event. He identified one of them as an application of a vertical load and accepted "that would be part of the construction process". He admitted that he did not analyse in his report whether construction may have been responsible for the landslide. He also identified as a possible cause of the landslide a "lateral load" such as an earthquake. He also accepted that in his report he did not analyse whether "seismic activity like an earthquake" may have been responsible for the landslide. He further accepted that "saturation of the soil caused by excessive rainfall is a possible cause of a landslide but deduced in relation to the subject landslide that the landslide was not caused by excessive rainfall.

36. Mr. Salandy further stated, as he said in his report, that he was uncertain whether the pipeline was leaking and that triggered the landslide or if the initial subsiding road damaged the pipeline, which exacerbated the leak that caused the landslide.

37. The Appellant called two witnesses namely Mr. Frederick Harris and Mr. Raymond Gittens. The purport of the evidence was with a view to establishing that the saturation of the soil in the location of the Respondents' home could not have been caused by

water emanating from the Appellant's water supply. They both provided witness statements which stood as their evidence-in-chief and they were cross-examined.

38. According to Mr. Harris, he stated in his witness statement that "on or about 2013" he received a request from an engineering technician in the employ of the Appellant for "source determination" of the water on the Respondents' premises. At the time Mr. Harris was an employee of the Appellant. He said that he went to the Respondents' home on a date that he cannot recall. He walked around the premises and saw no signs of water leaks. He saw a hole in the lower floor of the Respondents' home which seemed to have been dug in the middle of the flooring and noticed clear water in the hole. He took samples of that water and took a sample from the "yard tap" on the Respondents' property. He checked the PH and chlorine levels of the water samples and noted that the PH reading were different in the two sample. He also noted the "residual free chlorine in the 'leak sample' was nil". Based on his experience he stated these results indicated that "the leak was not arising from the [Appellants'] supply". He secured the samples and sent them to the Appellant's laboratory for further testing. A report of the tests on the samples conducted by the Appellant was tendered in evidence through Mr. Gittens. The report stated that there were differences in the two samples and concluded that the results suggest that the leak is not from [Appellant's] supply to the area."

39. As I mentioned earlier, the Trial Judge found that the Appellant's waterline was the only underground pipeline in front of the Respondents' home. He further found that the pipeline was leaking from June 2012 to March 2014 and that the Appellant was either unresponsive or unreasonably slow in responding to the Respondents' complaints. These findings have not been challenged on this appeal.

40. In relation to the evidence of the Appellant's witnesses, the Judge found that he could not accept that evidence as proving that the source of the water was not from the Appellant's supply for reasons he outlined in his judgement (see para. 103 of the Trial Judge's judgment). There has been no attempt by counsel for the Appellant to persuade the Court that the Trial Judge was wrong to reject the evidence of the Appellant as providing any support for the contention that the saturation of the soil was not caused by water from the Appellant's water supply.

41. I have already referred to the Trial Judge's approach in law as to the cause of the landslide to which there was no point taken in this appeal. In assessing the evidence whether the landslide was caused by the leaking pipeline, the Trial Judge had regard to the totality of the evidence. He said "there is a causal link between the leaking pipeline and the [Respondents'] loss based on the evidence of the [Respondents] corroborated by [the Appellant's] job cards, the contemporaneous letter from the Princes Town Reginal Co-operation and the expert evidence". He said that "the job cards and the correspondence from the Princes Town Reginal Corporation all raised red flags and alarm bells for [the Appellant] of the nature of the damage by the escape of water and they simply failed to repair the leak in a proper or timely manner".

42. The Trial Judge then turned his attention to the criticism of the expert evidence made by the Appellant that the evidence did not assist the Court in determining causation. The Trial Judge correctly noted that experts cannot usurp the function of the Trial Judge as the ultimate arbiter of fact and it is the role of the Judge to determine the issue of causation and loss based on the totality of the evidence. He stated:

*Experts cannot usurp the function of the Judge as the ultimate arbiter of fact. It is for the Court to determine the issue of causation and loss based upon the totality of the evidence. Experts usefully provide assistance to the Court to arrive at its conclusion. They do so by providing the necessary scientific data*

*to assist the Court in arriving at its conclusions. The unsupported scientific opinion of an expert is insufficient to assist a Court in this exercise. The expert evidence must be characterised by reason, logic and impartiality.*

There has been no criticism of this general approach to the assessment of the expert evidence.

43. The Trial Judge then referred to **The Ikarian Reefer [1993] F.S.R. 563** which sets out the duties and responsibilities of expert evidence in civil cases as follows:

*“1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: see Whitehouse v. Jordan [1981] 1 W.L.R. 246, 256) per Lord Wilberforce.*

*2. Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness; see Polivitte Ltd. v. Commercial Union Assurance Co plc ([1987] 1 Lloyd's Rep. 379, 386) per Mr. Justice Garland, and Re J ([1990] F.C.R. 193) per Mr. Justice Cazalet. An expert witness in the High Court should never assume the role of an advocate.*

*3. Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion.*

*4. An expert witness should make it clear when a question or issue fell outside his expertise.*

*5. If the opinion was not properly researched because it was considered that insufficient data was available then that had to be stated with an indication*



*that the opinion was provisional (see Re J). If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report: see Derby & Co. Ltd. and Others v. Weldon and Others (No 9) (The Times, November 9, 1990) per Lord Justice Staughton.*

*6. If, after exchange of reports, an expert witness changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court.*

*7. Photographs, plans, survey reports and other documents referred to in the expert evidence had to be provided to the other side at the same time as the exchange of reports.”*

44. The Trial Judge stated that he did not agree that the expert evidence led on behalf of the Respondents was lacking in value. He noted:

*“97. It is important to note that during the management of this case I had raised the issue of expert evidence and there was no application to appoint any independent expert under Part 33 of the [Civil Proceedings Rules 1998] to address any specific scientific issue which the [Appellant] is now asserting as lacking in the reports. It was made clear that the reports were commissioned by the [Respondents] when the damage occurred and they were preparing their case. It was openly shared with the [Appellant]. The [Appellant] elected not to call any experts of their own. The “so called” experts that they did call were employees of the [Appellant] and were as discussed below hardly of any assistance to this Court. In those circumstances to insist on strict compliance with the Part 33 rules would be pedantic. The Court must be satisfied by the evidence that it is truly an independent product uninfluenced by the shape of the litigation and that the*

evidence satisfied the **[Kelsick v. Kuruvilla and others Civil Appeal No. P277 of 2012]** principles.

98. I am also satisfied and the extent to which both [Mr. Wharton and Mr. Salandy] were prepared to say that they cannot conclude that the leaking pipeline caused this damage can only be consistent with the inescapable fact that the investigations were done after the leaks had stopped. This does not affect their credibility nor weight of their evidence. What it does, however, is to put their evidence in the context of the possibilities that existed to cause the water damage and their professional opinion eliminating any possible causes and pointing to leaking water line as the most probable cause.

99. I had earlier set out the nature of the expert evidence and I am satisfied from their evidence that they were prepared, despite their accepted limitations of their observations, that they could not fairly attribute the loss to any cause but pipe borne water. In other words from a fair reasoning of their cross examination and their reports it is likely that a leaking pipe caused this damage.”

45. The Trial Judge concluded:

“104. In my view, from the totality of the evidence led by the [Respondents] and the corroborating evidence of the [Appellant], the leak from the [Appellant’s] pipeline caused the damage to the road and the land slippage and the caving-in of the [Respondents’]’ home. The damage to the roadway, landslide and damage to the neighbouring home was foreseeable consequences of an uncontrolled leak in Talparo soil in that area.”

46. Before this Court counsel for the Appellant submitted that the Judge erred in coming to the conclusion that the Appellant’s leaking pipeline was the sole cause of the

landslide which caused the damage to the Respondents' home. He contended that the Trial Judge did not have sufficient evidence before him to come to that finding. His focus was on the expert evidence and he submitted as follows:

*"1. The Geoengineering report prepared by Mr. Wharton did not assist the trial Judge in determining whether the soil was saturated in 2012, 2013 or 2014. The most Mr. Wharton's evidence showed was the condition of the soil in 2015. Since it was accepted that the Appellant's leaking pipeline was repaired in 2014 and ceased to leak thereafter, Mr. Wharton's evidence could provide no assistance to the Court in determining whether the Appellant's leaking pipeline was the cause of the saturated soil and consequently the cause of the landslide.*

*2. The purpose of Mr. Salandy's report was not to determine the cause of the landslide but to do an assessment of the damage to the Respondents' home. That is a factor which the trial Judge ought to have taken into account but did not in assessing Mr. Salandy's evidence since it affected the credibility of the report and whether Mr. Salandy can express an opinion on the cause of the landslide.*

*3. While both Mr. Wharton and Mr. Salandy agreed that the geology of the area could have contributed to the landslide neither considered appropriately or at all whether the geology could have contributed to the landslide.*

*4. Both Mr. Wharton and Mr. Salandy failed to properly consider whether the landslide could have been caused by events other than the saturation of the soil.*

5. *In his report Mr. Salandy in coming to the opinion that the saturation of the soil could have been caused by rainfall relied on the topography of the area as shown in the 1975 Ordinance Survey Map which he accepted which was not accurate in 2012 or 2013.*

6. *Mr. Salandy's opinion was unsupported by any testing and contains no scientific criteria and does not set out material facts which could detract from his concluded opinion.*

In the circumstances, it was submitted that the Trial Judge erred in accepting and attributing any weight to the evidence of Mr. Wharton and Mr. Salandy and consequently erred in finding that the Appellant's pipeline caused the landslide and accordingly the damage to the Respondents' home.

47. Neither party addressed the Court on the approach of an appellate court where it is asked to reverse the findings of fact made by the Trial Judge. But I do not believe that there is any doubt as to the correct approach. Before the appellate court will interfere with the Trial Judge's findings of fact it must be satisfied that the Judge has gone "plainly wrong". What this means was explained in **Beacon Insurance Company Limited v. Maharaj Bookstore Limited [2014] UKPC 21** (at paragraph 12) in these terms:

*"This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: Piggott Brothers & Co Ltd v Jackson [1991] IRLR 309 at 312, [1992] ICR 85 at 92 (Lord Donaldson of Lynington MR). Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in*

*the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions."*

48. With respect to the first submission, Mr. Wharton admitted that he could not say when the extensive saturation of the soil, which his tests revealed, occurred. He could not say whether it occurred at any time prior to 2015 when he conducted the tests. This I think is clear from the following questions and answers in the cross-examination of Mr. Wharton:

*"Q: Now, in conjunction with the questions that I would have asked you earlier in cross-examination, that extensive saturation that you would have seen there, this would have been in 2015, not so?"*

*A: That is correct.*

*Q: That can't give you a picture in terms of whether the water got there in 2012 or 2013?"*

*A: No.*

*Q: That's a photograph that you are taking in relation to the soil at that particular time in 2015?"*

*A: That is correct. Absolutely."*

49. As Mr. Wharton could not say that the soil was saturated prior to 2015 when the Appellant's pipeline was leaking, he could not assist in determining whether the cause of the saturation of the soil, which he observed and which may have been the cause of the landslide, was the Appellant's leaking pipeline. But the Trial Judge did not place specific or sole reliance on Mr. Wharton's evidence to conclude that there was saturation of the soil at the relevant time. As the Trial Judge stated, he came to his conclusion that the landslide was caused by the leaking pipeline on the totality of the

evidence. There was indeed other evidence as to the saturation of the soil beginning in 2012. I have earlier referred to the evidence of Mr. Sahadath. He stated that he saw cracks in the road in front of his home and water flowing through the cracks. He noted that the soil directly in front of his property was waterlogged. He also noted that the basement floor of his home began to raise and cracks appeared in walls and in concrete posts which supported his home. According to Mr. Salandy, Mr. Sahadath told him that in 2012 he observed “raising and cracking of the floor slab in the basement level”. This was indicative of “the swelling of clay soil which caused heaving of the floor slab”. According to Mr. Salandy the swelling of the clay soil suggested that the soil was saturated. There was therefore evidence on which the Trial Judge could find that the soil was saturated beginning in 2012, being the year the Trial Judge found that the Appellant’s pipeline began to leak.

50. In the circumstances, although counsel for the Appellant is correct that Mr. Wharton’s evidence could not determine the leaking pipeline was the cause of the saturation of the soil prior to 2015 when damage to the Respondents’ home started to occur, there was other evidence on which the Court was entitled to conclude that the soil was saturated prior to that year and at a time when the pipeline of the Appellant was leaking.

51. With respect to the second submission, Mr. Salandy did say in cross-examination that what he was hired to do was a damage assessment of the Respondents’ home and not to determine what caused the landslide. This appears from the following in his cross-examination:

*“Q: So regardless of the cause, that would not have affected your report?  
Your report was essentially to determine the extent of the damage done. Is that what you are saying?”*

A: *Correct.*

Q: *All right. So you were not there to determine what caused the landslide?*

A: *Correct.”*

52. The focus of Mr. Salandy in that part of his evidence was on what he was hired to do. He says in his report under the rubric “Introduction” that the services of APR were requested by the Respondents to assess the damage to their home. What he says in cross-examination is entirely consistent with that. However Mr. Salandy’s report also identified its objectives and they were in these terms:

***“2.00 OBJECTIVES OF THE REPORT***

*The objectives of this report are to:*

- 1. Determine the structural damage done to Mr. Sahadath’s house.*
- 2. Provide probable reasons for any observed damaged.*
- 3. Recommend possible solutions/remedial works.”*

53. Mr. Salandy therefore identifies as one of the objectives of the report, being to provide probable reasons for any observed damage. Mr. Salandy in his report does provide probable reasons for the damage observed, which he identifies in the report and his witness statement as the landslide, and gives his opinion as to the cause of the landslide.

54. Mr. Salandy’s curriculum vitae detailing his qualifications, work experience, and projects in which he was involved was filed in support of an application by the Respondents for the appointment of Mr. Salandy as an expert. His qualifications and expertise were therefore disclosed to and known by the Appellant. Mr. Salandy was,

however, not challenged in cross-examination, nor was it submitted before this Court, that he did not have the requisite expertise to express an opinion as to the cause of the landslide or any of the opinions expressed in his report. In the circumstances, I cannot consider that this criticism provides any basis for the Trial Judge to have disregarded Mr. Salandy's report and evidence or place little or no weight on it.

55. In relation to the third submission, both Mr. Salandy and Mr. Wharton stated that a landslide may be caused by several different events. Mr. Salandy identified three events as examples of events that can cause a landslide. These he described as application of a vertical load, application of a lateral load and saturation of the soil. Mr. Wharton stated that landslides may be caused by natural or human activity or a combination of the two. In his report he identified what are the primary causes among natural causes and what are the primary causes among human activity. However neither Mr. Salandy nor Mr. Wharton identified, whether in their reports or in cross-examination, that the geology of the area could be the cause of a landslide. Both considered that even though the general area where the Respondents' home was located may be prone to landslides, that a triggering event was necessary. In respect of Mr. Wharton, he stated very plainly that "a landslide is likely to occur when the bedding plain slopes in the down slope direction. However a trigger is still required such as excessive rain or earthquake." Nothing in Mr. Salandy's report suggests that a landslide may occur without a trigger. He clearly identifies events which may cause a landslide and nowhere in his report does he state that geology may do so. In cross-examination, Mr. Salandy accepts that the area in which the Respondents' house is located is prone to landslips. He concedes that these may not have been caused by a leak in the Appellant's water supply lines. He, however, does not say that a landslide can occur without a trigger nor was it suggested to him that that can happen. The evidence of Mr. Salandy in my view is not to be understood any differently on this aspect from that of Mr. Wharton, that is to say, that notwithstanding the geology of the area, an event was necessary to trigger the landslide. In the circumstances I see no merit in this submission.



56. In relation to the fourth submission, it was argued by counsel for the Appellant that although Mr. Wharton and Mr. Salandy identified several possible causes of the landslide, they did not seek to analyse the causes other than the saturation of the soil as the cause of the landslide. Counsel for the Appellant made specific reference to the fact that Mr. Salandy failed to explain away the possibility that construction activity, which he described as application of a vertical load, could have caused the landslide. Counsel further argued that there was no explanation from Mr. Salandy as to the cause of the initial subsidence of the road. Mr. Salandy was unsure that the leaking pipeline caused the initial subsidence or whether the initial subsidence may have damaged the pipeline and so caused it to leak. The argument of counsel is that if the saturation of the soil was not responsible for the initial subsidence, then the landslide could have been caused by some other of the events identified by Mr. Wharton and Mr. Salandy and it was therefore imperative that they analyse other possible causes and eliminate them. In the circumstances no reliance should be placed on their evidence as to the cause of the landslide.

57. Counsel is correct to say that the reports of Mr. Wharton and Mr. Salandy do not seek to discuss and rule out the other causes identified by them as possible causes of a landslide. Indeed, in my view Mr. Wharton's report provides little assistance to the Court in determining whether the saturation of the soil was the probable or likely cause of the landslide. He simply says that it was "more likely that domestic activity such as might be associated with a supply leak was the cause". He does not provide any real basis for that opinion.

58. The position however is different, in my judgment, in relation to Mr. Salandy. After stating that landslides can be caused by numerous events and identifying some of them, he focuses on what he considers to be the cause of the landslide, namely saturation of the soil and provides an explanation for it.

59. Mr. Salandy was of the opinion that in 2012 there was “minor soil movement” by which I understand him to be referring to the initial subsidence of the roadway. He stated that that “small failure” progressed into a “larger landslide” which subsequently led to the movement of the house. He referred to the progression of the landslide from a minor soil movement or a small failure into a larger landslide as the development of the landslide from 2012 to 2015. The initial subsidence, in Mr. Salandy’s opinion, however, was not the cause of the development of the landslide. Whether the pipeline started to leak because of the initial subsidence or was responsible for the initial subsidence, in Mr. Salandy’s opinion, the development of the landslide was a consequence of the soil becoming saturated. The saturated soil lost the ability to support its own weight. He attributed the saturation of the soil to two causes. One was the Appellant’s leaking pipeline. The other was the fact that the subsidence of the road damaged the drainage infrastructure and as a result the “surface runoff flowed unrestricted in the landslide zone of depletion and percolated downward. This would have exacerbated the landslide.” According to Mr. Salandy, the underground movement of water was evident as there was ponding in the rooms of the Respondents’ home adjacent to the roadway.

60. Mr. Salandy then considered whether the leaking pipeline was the “initial source of the water”. He stated that it was reasonable to assume that the leaking pipeline was the initial source of the water. However, he expressed uncertainty in that opinion. But for him, it did not matter whether the leaking pipeline was the cause of the initial subsidence of the road or the initial subsidence of the road caused the leak since he was of the opinion that the operative cause of the development of the landslide was the saturation of the soil, which was partly caused by the leaking pipeline and partly by the surface runoff from the damaged the drainage which in that state was no longer able to accommodate the surface runoff. That was a cogent and logical explanation on which the Court could rely in its determination as to the cause of the landslide.

61. In my judgment, given the opinion of Mr. Salandy as to the likely cause of the landslide in this case, there was no requirement for him to rule out other possible causes as it is obvious that he did not consider them the likely cause. Further there was no evidence from the Appellant of any other competing cause. The evidence led by the Appellant through Mr. Gittens and Mr. Harris was not to explain that the landslide may have been caused by something other than the soil becoming saturated but was an attempt to show that the water on the Respondents' premises could not have emanated from the Appellant's leaking pipeline. That attempt failed. Not only was there no evidence of any competing cause, the Appellant in its pleadings, so far as the cause of the landslide was concerned, stated that soil in the area of the Respondents' home has a propensity for movement and slippage "uninfluenced by the alleged inundation of water from the Appellant's waterlines" and that "the movement of the [Respondents'] home was caused by a landslide which is common in the area due to the nature of the soil." These averments in the defence are a reflection of the submissions of counsel for the Appellant suggesting that the landslide could have occurred without a trigger and simply because of the geology of the location of the Respondents' home. There was no evidence led that would support that submission and as I have already discussed above, it is not consistent with the expert evidence led by the Respondents.

62. In light of the above, I do not consider, in the circumstances of this case, that this submission of the Appellant provides a sufficient basis to say that the evidence before the Court was insufficient to determine the probable cause of the landslide. The Trial Judge was not plainly wrong to rely on it.

63. It should be noted that even though on Mr. Salandy's evidence the cause of the development of the landslide was attributable to water from the Appellant's leaking and surface runoff occasioned by the damaged drainage system, that does not relieve the Appellant from liability. The Respondents do not have to prove that the Appellant's

wrongdoing was the sole cause of the damage. Therefore, it does not matter that the Respondents may have a claim say against the Authority that is responsible for repairing the damaged drains. As the Appellant was the sole defendant before the court, it is liable for the whole of the damage if any part of it is caused by its wrongdoing.

64. With respect to the fifth submission, it is correct to say that Mr. Wharton in his report relied on the 1975 Ordinance Survey Map. He stated in his report that the topography as shown in that map does not suggest that the rain water was being conducted to the site of the landslide to any significant extent. The reliance placed by Mr. Wharton on the 1975 Ordinance Survey Map is therefore relevant to his opinion as to the source of the saturation of the soil. During cross-examination Mr. Wharton accepted that the 1975 Ordinance Survey Map, while he would have expected it to have been accurate in 1975, would not be accurate in 2012 and 2013 (and it stands to reason for subsequent years as well.) It would therefore also stand to reason that any conclusion drawn by Mr. Wharton as to the source of the saturation of the soil in 2015, or for that matter possibly for any period after 1975, would not be accurate. In my judgment therefore it would not be prudent to rely on Mr. Wharton's evidence as to the source of the saturation of the soil. However it appears that the Trial Judge did place reliance on it. He said from a fair reading of Mr. Wharton's and Mr. Salandy's cross-examination and their reports, it is likely that the leaking pipeline caused the damage.

65. There was, however, apart from Mr. Wharton's evidence, other evidence as to the source of the water. I have already referred to the evidence of Mr. Sahadath that in June 2012, he noticed that the road in front of his property began to crack and sinkholes began to develop. This was concurrent with Mr. Sahadath observing that the Appellant's pipeline in front of his home was leaking and water was flowing up from the cracks in the road and collecting in the sinkholes. Between June 2012 and January 2013, according to Mr. Sahadath, the water continued to flow from the cracks in the

road, the cracks began to widen, the sinkholes began to enlarge and the slipper drain began to separate from the road. He saw the water from the leaking pipeline beginning to pool in the road, then flow through cracks in the road and in the drains. And he said the water in front of his property became waterlogged. It is significant to note that Mr. Sahadath's observations of water in the road and in the sinkholes and flowing up through the cracks in the road were all before the damage to the drainage. It is not disputed that there were no other underground pipelines in the road in front of the Respondents' home. Further, it was Mr. Sahadath's evidence (which is not disputed) that after the Appellant's pipeline was repaired in 2014, the water stopped coming up from under the surface of the road. Of course, after the pipeline was repaired, water continued to get into the site where the Respondents' home was located through the damaged drains. In my judgment there was evidence before the Trial Judge from which he was entitled to conclude that a source of the water that caused the development of landslide was the Appellant's leaking pipeline.

66. Counsel for the Appellant further criticised Mr. Wharton's report for the absence of any borehole testing and that he did not seek to correlate the Appellant's pipeline with the level at which he observed water in the soil. However, in view of what I have said in relation to Mr. Wharton's evidence as to its value in determining the cause of the landslide and the source of the saturation of the water, I do not think it necessary to discuss these other criticisms. However, I would briefly add that enough was said in the course of the cross examination of the expert witness to conclude that borehole testing in this case was not necessary and its absence did not render the results of the tests conducted by Mr. Wharton unreliable.

67. In relation to the sixth submission, so far as the criticism of counsel for the Appellant that Mr. Salandy failed to do any testing, there is no evidence of what tests Mr. Salandy should have done to be able to express the opinions he did in his report but did not do.

He set out in his report his methodology and he was not challenged in cross-examination on its effectiveness. This criticism in the circumstances appears to be without merit and takes the Appellant's case nowhere.

68. In respect of the submission that the report did not contain any scientific criteria, it was said in *Davie v The Lord Provost, Magistrates and Councillors of the city of Edinburgh* 1953 SC 34, 39 – 40 (cited in *Makita (Australia) Pty Ltd. v Sprowles* [2001] NSWCA 305 at para 59) that as it is the function of the trial Judge to come to his own independent judgment the duty of expert witnesses is to “furnish the Judge...with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge....to form [his] own independent judgment by the application of these criteria to the facts proved in evidence.” In my judgment, Mr. Salandy does provide sufficient scientific criteria to enable the Court to come to its own independent judgment on the basis of the evidence it accepted. Mr. Salandy advanced what seems to me to be an uncontroversial explanation as to the cause of landslides and one which in this case was common ground between the expert witnesses, and that is that a landslide may be caused by the soil becoming saturated. He explained that in this case the development of the landslide was caused by the soil becoming saturated as the saturation of the soil caused the soil to lose its ability to support its own weight. This seems to me to be entirely logical. He explained where the location of the landslide was, where it began and identified by a diagram in his report the landslide failure plain and also identified the Respondents' home as being in that failure plain. He further identified the direction in which landslide moved, which as one would expect is down the slope on which the Respondents' home is located and stated that “hence the house moved in the direction of the landslide”. This all appears to be entirely reasonable and logical. His opinion of the development of the landslide as it progressed from a small failure to a large landslide was based on observations he made and information he obtained from Mr. Sahadath, which evidence the Trial Judge was free to accept and which supported the opinion of Mr. Salandy. So far as the saturation of the soil and the source of the water

is concerned, there is evidence to which reference has already been made, which the Trial Judge was entitled to accept and which also supported Mr. Salandy's opinion, that the soil was saturated and that a source of the water was the Appellant's leaking pipeline. All of this would have enabled the Court to come to its own assess as to the probable cause of the landslide and the damage it caused. In the circumstances this criticism is not made out.

69. With respect to the submission that Mr. Salandy failed to identify material facts which could detract from his findings, in **The Ikarian Reefer (supra)** the responsibility of the expert witness in this regard is described in the following terms: "he should not omit to consider material facts which would detract from his concluded opinion". The submission was that Mr. Salandy failed to identify as material facts that could detract from his opinion the geology of the area and construction activity. However, as I have mentioned earlier, it is obvious that Mr. Salandy did not consider either as facts which could detract from his opinion. In relation to the geology of the area, he did not think that to be a cause of a landslide without the necessary trigger and the necessary trigger was the focus of his report. Similarly with respect to construction activity, although Mr. Salandy recognises that the application of vertical load such as construction could be the cause of a landslide, it is obvious from his report that he did not consider it to be the likely cause of the landslide in this case. The omission to explain or analyse or exclude construction as a cause of the landslide cannot in my judgment in the circumstances of this case, as I have mentioned earlier, be sufficient to say that there was not sufficient evidence before the Trial Judge for him to come to the conclusion that the cause of the landslide was the Appellant's leaking pipeline.

70. In the circumstances, in my view the criticisms of the expert evidence by the Appellant do not provide a sufficient basis for this Court to interfere with the Trial Judge's conclusion that the cause of the damage to the Respondents' home was the Appellant's

leaking pipeline. In my judgment, the Trial Judge was not plainly wrong in coming to the conclusion that, as a matter of fact, that was the cause of the damage to the Respondents' home.

71. I now turn to the issue of damages. The trial Judge awarded the sum of \$2,208,412.50. This sum was made up of the cost of obtaining the reports of the expert witnesses, the rental of alternative accommodation and the costs to reinstate the Respondents' home. The cost to reinstate the home was assessed by the Trial Judge in the sum of \$2,002,000.00.

72. In relation to the damage to the Respondents' home the evidence of Mr. Salandy and Ms. Welch is relevant.

73. I have already referred to the description of the Respondents' home given by Mr. Salandy (see para 34 of this judgment). It is to be noted that according to Mr. Salandy the Respondents' home is unfit for occupancy, at risk for further movement and in danger of imminent collapse. Mr. Salandy's opinion consequently was that the Respondents' home should be demolished and the slope on which it was built stabilized before any new structure is constructed on it.

74. Ms. Candice Welch, who is a chartered quantity surveyor and a director of Welch, Morris and Associates, which carries on the business of, *inter alia*, chartered quantity surveyors and construction cost consultants, provided a witness statement which stood as her evidence-in-chief. She also prepared a valuation report of the home which was received in evidence.

75. Ms. Candice Welch in her witness statement identified the approach taken in the preparation of her report, which included the taking of photographs and measurements at a site visit to the Respondents' home. She, however, indicated that at the time of



the site visit, due to the unsafe on-site conditions, by which she means the condition of the home being in danger of the imminent collapse, the measurements and photographs were restricted. She estimated the cost to reconstruct the Respondents' home including external works and demolition to be \$2,002,000.00. Ms. Welch in her witness statement indicated that the estimate was derived by applying current rates of labour, plant and material specific to the demolition and reconstruction of the Respondents' home at the time of the evaluation report which was done on April 12, 2016.

76. In cross-examination Ms. Welch agreed with counsel for the Appellant that there would be aspects of the Respondents' home that would be salvageable if it had to be reconstructed but she did not do an estimate of what was salvageable.

77. Counsel for the Appellant advanced essentially four submissions in relation to the award of damages with respect to the reinstatement of the Respondents' home and these are:

*“1. Ms. Welch’s report fails to identify the basis on which the evaluation of the cost of \$2,002,000.00 is premised and fails to properly set out how she arrived at the estimate. Her conclusion as to the estimate is therefore weightless and should not be considered.*

*2. Ms. Welch although accepting that parts of the building are salvageable, made no estimate of what was salvageable and that omission would impact the cost of the reinstatement of the Respondents’ home.*

*3. The Respondents are entitled to either the diminution in value of their home or the cost of reinstatement of the home. There is however no evidence of diminution in value and the report of Ms. Welch does not refer to the cost of reinstatement but the value of the Respondents' home. The Judge was therefore wrong to pay any regard to the evidence of Ms. Welch.*

*4. According to the evidence before the Court, if further investigation and a feasibility study are conducted they might demonstrate that it is possible to retrofit the Respondents' home so as to save the home rather than demolish it and replace it. However the Respondents did not undertake any such investigation or study and accordingly failed to act reasonably or to take steps in mitigation."*

78. Counsel for the Appellant at the hearing of this Appeal, however, chose not to pursue the fourth submission. I will therefore say no more in relation to it.

79. With respect to the first submission there is no merit in it. As is evident from the above summary of Ms. Welch's evidence, she explained the approach to the valuation and that her estimate was based on the rates current at the time of her report of labour, plant and material. In her report she gives a detailed description of the Respondents' home and its dimensions. She provides an estimate of what each part of the home would cost to reinstate such as the retaining walls, the roof, the plumbing, the electricals and so on.

80. Counsel complained of the fact that Ms. Welch did not provide separate costs for labour and material but provided costs that included labour and materials. But while that is so, I do not regard that as a basis on which the Court should attach no weight to the evidence. There was no evidence to rebut any of the costs identified by Ms. Welch and nothing to suggest that they were exorbitant or unreasonable. It was open to the Trial Judge to accept the evidence as to the cost of reinstatement, which he did.

81. In relation to the second submission, counsel is correct to say that if there are parts of the home that are salvageable that would impact on the cost of rebuilding or reinstating

the home, since it is reasonable to assume that one can reuse the salvageable parts and save the cost of new or replacement material. But no estimate was made of what is salvageable and its cost. However it is necessary to consider that submission in the context of this case.

82. It is not a disputed fact that the building that was once the Respondents' home is not fit for occupation. It is in danger of imminent collapse. Because of the danger inherent in such a condition Ms. Welch indicated that her measurements and notes and photographs of the premises were restricted. If that is the condition of the premises, which was not disputed, the Respondents cannot be reasonably criticised for not being able to assess what is salvageable and so determine the cost of same.

83. Further, it is one thing to say that there are things that may be salvaged but actually salvaging them is altogether different. If the task of ascertaining what items may be salvageable is a perilous exercise, the task of actually salvaging them would be more so. In those circumstances it would not be reasonable to expect that items could be actually salvaged. So even though it might be possible to make assumptions of what might be salvageable and attach some value to them, in this case it seems to me that would be a meaningless or essentially an academic exercise. In the circumstances of this case, in my judgment it is not appropriate to take into account the consideration that there may be salvageable items and the Trial Judge should not be faulted for failing to pay regard to that.

84. In relation to the third submission, the evidence in this case is that the Respondents' home is no longer fit for occupancy and is in danger of imminent collapse. Those facts were not disputed. The question of diminution in value therefore does not arise in this case. What is relevant is the cost of reinstatement of the home. Ms. Welch in her witness statement said that she determined what it would cost to rebuild the Respondents' home at the rates of labour, plant and material specific to the demolition

and reconstruction of the Respondents' home at the time of the preparation of her report. If that is what was done, there can be no objection to it since the Respondents would be entitled to the cost of reinstating their home at the time of the assessment of damages and not when the home was originally built or damaged. And since the home needed to be reconstructed, it is reasonable to include in the damages to which the Respondents are entitled, the cost of demolishing the existing structure.

85. In cross-examination however, Ms. Welch appears to give a different description of what was done. In answer to counsel for the Appellant she said that her objective and her instructions were to value the Respondents' home "as is" and to do a valuation of the home based on the report of Mr. Salandy, which was provided to her and she added to that value the cost of the demolition of the existing structure.

86. I however do not believe that there is any ambiguity or uncertainty in what Ms. Welch did. In addition to the cost of demolition, she ascertained the cost to reinstate the home of the Respondents as the Respondents had built it using the prices of plant and material at the date of the preparation of her report. It was in that sense she described what she was doing as valuing the Respondents' home. She was, in essence, determining the cost to rebuild or reinstate the Respondents' home as it had been built. It cannot be reasonably suggested that the Respondents are not entitled to that cost in addition to cost of the demolition of the existing structure. It seems clear to me that that is the way the evidence was interpreted by the Trial Judge and in my judgment he was plainly correct to do so. In my view there can be no objection to the Respondents being awarded the cost as determined by Ms. Welch.

87. In the circumstances, there is no merit in the submission that the Trial Judge was wrong to pay any regard to the evidence of Ms. Welch.

88. It is also relevant to note that according to Mr. Sahadath's evidence he spent well over two million dollars to construct his home. This evidence is not challenged. Even if the Trial Judge was not inclined to accept the valuation of Ms. Welch or was wrong to do so or to pay any regard to it, the evidence of Mr. Sahadath would have provided some evidence on which he could have based his award.

89. In view of the above, I would dismiss the appeal and hear the parties on the costs of the appeal.

**A. Mendonça**

**Justice of Appeal**