

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1 of 2007

BETWEEN:

PEOPLES INCORPORATED

Claimant

AND

ATTORNEY-GENERAL

Defendant

**Before: Dr. The Honourable Madam Justice Sonia Richards, Judge of the
High Court**

2012: April 19

June 08, 11, 12, 14

August 31

October 03

2014: February 20

**Mr. Dale Marshall Q.C., Mrs. Esther Arthur and Ms. Diana Douglin for the
Claimant**

**Ms. Donna Brathwaite Q.C. and Ms. Sandra Rawlins for the
Defendant**

DECISION

Background

- [1] Sometime in December 2005, the Ministry of Health demolished a building at Tichbourne owned by the Claimant. The building was situated on a parcel

of land of approximately 2,781 square feet. The land is also owned by the Claimant. The Ministry of Health purported to demolish the building pursuant to Section 11 (1) of the Health Services Act, Cap. 44.

[2] The Claimant filed a Writ of Summons and a Statement of Claim on 02 January, 2007. An Amended Statement of Claim was filed on 29 September, 2008; and a Re-Amended Statement of Claim filed on 03 February, 2010. The claim is for:

- (1) the sum of \$384,805.00 (comprising \$279,300.00 as the market value of the building, and \$105,505.00 as the value of goods and materials stored in the building);
- (2) damages for trespass;
- (3) interest;
- (4) costs; and
- (5) further or other relief.

[3] On 08 June, 2012, prior to the evidence of first witness for the Claimant, the Defendant conceded liability for the wrongful demolition of the building. The Court proceeded to hear the evidence on both sides, in order to assess the Claimant's damages for loss of the building and its contents. The Claimant later abandoned its claim for the loss of chattels allegedly stored in the building when it was demolished.

[4] Each side provided three witnesses to the Court. For the Claimant the Court heard Mr. Edwin Worrell, a director; Mr. Ralph Jones, a former employee; and Mr. Shawn Franklyn, a valuer. Ms. Valcia Stoute, a Supervising Valuer

at the Land Tax Department; Mr. Daniel Forde, an Environmental Inspector; and Mr. Basil Seale, the contractor who demolished the building, gave evidence on behalf of the Defendant.

Findings of Fact

(1) The Floor Area

[5] There was some confusion regarding the floor area of the building. None of the persons who gave evidence had personally measured the building. Mr. Franklyn's valuation was based on information provided by a junior appraiser in his office. Mr. Franklyn resiled from his original valuation, because it was based on an incorrect measurement. He told the Court that:

“the junior valuer made a mistake of over one thousand square feet. The building was 1000 sq.ft. less than he assessed it.”.

[6] According to Mr. Franklyn, this was a significant mistake. The area provided by the junior appraiser was double the actual area. Mr. Franklyn assumed that the junior actually visited the site when the Claimant requested a valuation in April 2005. Having realized the error, Mr. Franklyn visited the site on 25 October, 2010, nearly five years after the demolition. His post-demolition measurements showed the actual building footprint to be approximately 25 ft x 40 ft or 1,000 square feet.

[7] Mr. Edwin Worrell disputed the measurement provided by Mr. Franklyn.

He testified that:

“I don’t agree with what Mr. Franklyn said about the dimensions of the building. The building was larger than this court room and more than 1,000 sq. ft... .. Mr. Frankly was wrong on the estimate.”.

But Mr. Worrell produced no measurements or plan to assist the Court in arriving at an accurate floor area.

[8] Mr. Daniel Forde, who initiated the proceedings that eventually led to the demolition, visited the site prior to and during the demolition. He too took no measurements. Ms. Valcia Stoute relied on Google in order to provide dimensions of 39 ft x 26 ft, or approximately 1014 square feet.

[9] The Court is guided by the evidence of the two valuers, with respect to the dimensions of the building, secondary evidence though it may be. The Court finds that the approximate floor area of the building was 1,000 square feet.

(2) The Condition of the Building

[10] Another area of dispute was the actual condition of the building at the time of demolition. This was a former Closed Bretheren Church, built over fifty years ago. It was constructed of 24 inch coral stone blocks, with no steel in the block work. The blocks were described by Mr. Franklyn as:

“... ..probably the most expensive means of constructing

a building [and] stronger than hardcore block construction.”.

[11] The building faced on to the road, with a wooden front and rear door, and wooden louvred windows. There were no internal walls except for a washroom with a door. The building comprised a suspended greenheart floor, with a roof constructed from corrugated asbestos sheets. The evidence of Messrs. Worrell and Jones in this regard was not challenged by the Defendant.

[12] The Defendant alleged that, at the time of demolition, the building was abandoned, derelict, and structurally unsound, with rodent and termite infestation. In his witness statement filed on 19 March, 2010, Daniel Forde alleged as follows:

- “7. I visited the building complained about. I did this because as part of my job I am expected to do a site visit and evaluate the property complained about.
8. On my visit I found a building in poor condition. It was made of coral stone which had started to deteriorate. I could see the open joints between each block of coral stone.
9. I could see that the roof which was made of bonded asbestos was damaged. Part of the roof was destroyed by a fallen tree. There was also damage to the side of the building and a window because of the fallen tree. This damage was on the side of the building which rain normally comes in from.

10. I saw that the inside of the building was infested with rodents and termites, there were pieces of cardboard on the floor; there was no evidence of squatters and the utilities were disconnected.
11. My findings were reported to the Department. The conditions of the buildings supported a decision that in the interest of public health the building should be demolished. Exposure to asbestos fibres poses a serious health hazard.”.

[13] In his oral evidence Mr. Forde expanded on his witness statement. He said that the asbestos roof was damaged by a fallen branch from a nearby tree. In his own words:

“....On entering the building which had no ceiling you could see a big open crack.....A big open crack was in the roof. The width of a corrugated asbestos sheet is almost three (3) feet. The crack was about 1½ feet in width. ...I saw a wooden floor with missing pieces of board and rotten. There were two visible dead rats. I saw termite trails. I punched the trails to see if they were living termites and they were.

The presence of two dead rats constitutes an infestation. I didn't see any living ones. Infestation means that the building had dead rats. From experience I knew that if there were two dead ones there had to be living ones somewhere.... This particular building with pieces of cardboard boxes and bush around the building is the ideal environment for the breeding of rodents and rats... ..

On departmental policy, a building like that is considered derelict and should be demolished... ..Poor condition is the same thing as derelict in this instance. The coral stone joints were visibly open. Old coral stone buildings do not have in steel to hold them

together, so it would be very dangerous. I have no training as an engineer.

Close to the east front of the building the walls had already started to cave in. These walls were close to the tree. Blocks had fallen to the ground. There were blocks up under the window on the eastern side. You could see it from the outside... ..Blocks had fallen from under the window. There was a visible hole in the wall... ..

Coral stone blocks are kept together with cement. The joint is not the actual cement, but the pieces of the block that make the combination for the joint. I can't determine how wide the space between the blocks was. What I saw on the ground was what was in the space between the blocks.”.

- [14] Basil Seale was the private contractor who supervised the demolition. His evidence is that he visited the property on two occasions prior to demolition. In his witness statement filed on 19 March, 2010, Mr. Seale said that on his first visit he observed that:

“... ..the building was of coral stone. The coral stone was in bad condition with the plastering on the outside of the coral stone gone. I saw a gable roof on wooden trusses. The roof of the building was made of asbestos some of which had been damaged by a fallen tree. There was also damage to a window and to the side of the building. The building did not appear structurally sound.”. (Paragraph 4).

- [15] During his second visit Mr. Seale entered the building, where he found that:

“....it was empty and was infested with rodents and termites. The utilities had been disconnected. There were pieces of cardboard scattered about the floor of the

building. I found that the building was not suitable for storage purposes.”. (Paragraph 8).

[16] Like Mr. Forde, Mr. Seale’s oral evidence amplified his witness statement.

He told the Court that:

“It was part of the plastering of the building that was missing.... The entire building was coral stone. It was cement form on the outside to make it smooth. About 75 percent of the plastering was no longer there. The damage to the eastern side of the building and the plastering is what I meant by the building [being] in bad condition....Part of a tree had broken off and damaged the roof to the eastern side. Also the walls to the eastern side of the building were damaged. I saw part of the window on that same side damaged, and a wall was burst. Part of the tree went through the window and damaged the wall below the window

The wall was broken away....I think [the burst] was approximately 10 feet away from the corner of the front section....The wall was pushed in. Blocks would have fallen to the floor on the inside of the building. I am not sure how many blocks would have fallen on to the floor

My inspection would be a careful inspection of the building. More than one coral stone block had fallen into the building on to the ground...When coral stone blocks start to fall out there would be a big hole in the wall. I did mention in my witness statement that part of the building was damaged. It was probably an oversight that I did not mention the hole, but that is what I meant

I based the building as not structurally sound on the damage to the side, the softstone and the roof....The asbestos was broken in small pieces....The whole area of the damage to the roof was 5 to 6 feet wide. It was

oblong, and about 6 feet in the other direction. It was a hole... The hole was very close to the edge of the roof....

I can't recall if I saw open joints in the coral stone. I would not have necessarily checked for this in my inspection. I did not check the joints of the coral stone blocks. If the joints were open it would not have been an important consideration to me. A coral stone building with spaces in all the joints would constitute an unsafe structure... ..

A section of the floor was rotten. I can't recall which section. Mr. Forde went in with me. We entered and just looked around. I saw that part of the floor was damaged. The inside was dirty with pieces of cardboard, paper and plastic.....I walked to the back of the building on the inside. Mr. Forde was with me when I walked to the back of the building on the inside. I was not wearing any special respiratory equipment... ..I do recall walking through the building with [Mr. Forde].”.

[17] The third defence witness, Ms. Valcia Stoute, was familiar with the building, having lived in the area until sometime in 2005. Her evidence was not based on a personal inspection of the building, but on her observations when driving by the building. Her oral evidence was that driving by allowed her to see that the building had a deteriorating asbestos roof. However, she was unable to assess the nature and extent of the deterioration while driving by.

[18] When the property was acquired by the Claimant, it was indeed suitable for use as a warehouse. The parties were agreed on the internal layout of the building. And, given the absence of internal partitioning, except for the

washroom, the building was ideal for storage. According to the valuer, Mr. Franklyn:

“The only requirement for a storage facility is four walls and a roof, and the ability to access your storage material and secure it. I know that the building was a very basic rectangular structure, originally designed for church use, which would make it similar to warehouse facilities due to the lack of internal partitioning and its rectangular design. It is very unlikely that a church building would have rectangular rooms.”.

Although the Defendant contended that the building was not used as a storage facility by the Claimant, there was no challenge to Mr. Franklyn’s evidence that the layout of the building was conducive to warehousing.

[19] The Claimant had also insured the building for \$120,000, with effect from 01 October 2005. The policy endorsement contains an inaccurate description of the building. However, there was no evidence that the Claimant owned any other properties in Titchbourne, St. Michael. Therefore, the Court accepts that the insurance document refers to the demolished building.

[20] Perhaps the Claimant did use the building for storage purposes. However, the Court is of the view that the building was not in use when it was demolished. The Court also concluded that Mr. Ralph Jones did not visit the building, on behalf of the Claimant, as regularly as he would have the Court

believe. How else could he explain a drive by of the premises in late September to early October 2005, and his discovery of the demolition in February 2006? He failed to explain to the Court why his visits took longer over the Christmas period. Mr. Worrell, the Claimant's managing director, first had knowledge of the demolition in January 2006. It is also instructive that the Claimant withdrew its claim for \$105,505 worth of goods and materials allegedly stored in the building when it was demolished.

[21] It does not follow, necessarily, that a building not currently in use has been abandoned. Mr. Franklyn's unchallenged evidence was that the Claimant requested a valuation of the building in April 2005. In addition, by letter dated 10 February, 2006, the Claimant requested its broker to cancel the insurance coverage for the building. This request was subsequent to the discovery that the building had been demolished. The Claimant was also paying for a supply of electricity to the building. It was Mr. Seal who informed the Court that one of his employees removed the meter from the building. But he could not say definitively that there was no electrical supply to the meter. These factors suggest to the Court that the Claimant had not abandoned the building, although it was not in use.

[22] According to Daniel Forde, a building in the condition he described at Tichbourne was considered to be derelict and should be demolished. This

espoused the departmental policy. Forde spoke about a building in poor structural condition, with a partially destroyed asbestos roof, and visible signs of termite and rodent infestation.

[23] Having taken the decision to demolish the building, the governmental apparatus embarked on a process that eventually lead to the Claimant being deprived of its property. The common law has jealously guarded the property rights of persons from encroachment by governmental agencies, except for good and sufficient reason, and within the legal parameters. The reason advanced by the Defendant in this instance was the interest of public health.

[24] Mr. Forde annexed to his witness statement a copy of a letter purportedly sent to Mr. Worrell. It is dated 05 September, 2005 and reads in part:

“Dear Sir/Madam

Notice Given Under Section 11(1)
of the Health Services Act Cap.44.

In accordance with Section 11 of the Health Services Act, I wish to inform you that the works set out hereunder must be undertaken in the interest of the Public Health. The building situated at TITCHBOURNE in the parish of ST. MICHAEL is (providing a harbourage for rodents and other vermin) and must be repaired or demolished. You are required to execute within **twenty-one** days from the date of this notice the following works:

- 1. Demolish stone structure. (Asbestos roof)**
- 2. Remove all debris.**
- 3. Clear site.”.**

[25] The Department’s letter did not mention either a damaged or destroyed asbestos roof, or a damaged or structurally unsound building. The only apparent public health reason for the Department’s intervention was that the building provided “a harbourage for rodents and other vermin”. And, significantly, the recipient of the letter was given a choice of repairing or demolishing the building. That choice was given with one hand and taken back with the other hand. Immediately thereafter, the recipient is given 21 days to demolish the building. The reference to an asbestos roof does not indicate whether the demolition is because of the asbestos roof; or whether care should be taken with the demolition because of the asbestos roof. The condition of the roof was not made a public health concern in this letter.

[26] It is clear from this letter that most of what Mr. Forde alleged that he found when he inspected the building, was not significant or important enough for mention in the Department’s letter. The reason given for the demolition was neither a damaged nor destroyed asbestos roof, nor a structurally unsound building.

[27] There are other aspects of Mr. Forde’s evidence that caused the Court some concern. Public health inspectors were assigned to the Titchbourne area as

well, and routinely patrolled the area. Mr. Forde informed the Court that the reports from these inspectors “would refer to derelict buildings in their catchment area”. However, there is no evidence of any negative report about the demolished building. In fact, Mr. Forde conceded that he never received a report from the inspectors about this building.

[28] Mr. Forde’s training is in the area of asbestos removal. That is his area of expertise. The Court accepts his pronouncements on the dangers of asbestos fibres. They pose a serious health hazard to individuals. In Mr. Forde’s words: “Breathing in of one fibre is as dangerous as the breathing in of 100 fibres.” Yet missing from his evidence is any statement that the damage to the asbestos roof on this building was sufficient to expose and release the fibres. There is no evidence from him that this asbestos roof constituted a clear and present danger because of either its age, or its state of deterioration or the extent of the damage.

[29] And, even assuming the existence of an environmental hazard, the building remained there for nearly four months after Mr. Forde’s initial inspection. This begs the question as to whether Mr. Forde did indeed find the roof of this building in a state that rendered it a danger to public health. As noted earlier, his letter to Mr. Worrell made no such claim.

[30] Mr. Forde also admitted that he is not an engineer. Therefore, although the condition of the building may have given him cause for concern, he did not have the expertise to deem it to be structurally unsound. Again, he did not rely on the alleged compromise of the structural integrity of the building in his letter requesting demolition.

[31] On behalf of the Claimant, Mr. Franklyn asserted that the description “derelict” contained very wide variations. He told the Court that:

“Derelict could be all the walls unusable or just the roof comprised... ..An asbestos roof or any roof would have to be destroyed for the roof to be considered derelict. For the structure to be comprised there has to be very serious damage. For the structure to be considered derelict it has to be massively compromised or damaged. It has to be very serious damage to the roof to consider it derelict.”.

The Court is persuaded by Mr. Franklyn’s evidence because, as a trained valuer, this witness could speak to the features of a derelict building.

[32] In the context of Mr. Franklyn’s evidence, the Defendant has not demonstrated to the Court, through the evidence of Mr. Forde, that all the walls of the building were unusable, or that the structure was massively compromised or damaged. Mr. Forde alleged in his witness statement that the roof was destroyed. However, his oral evidence was about a crack in the roof about 1½ feet in width. This cannot, without more, amount to a destroyed roof. In terms of the environmental concerns, the damage to the

roof may have been “very serious damage”. But Mr. Forde never asserted that the crack he observed in the asbestos roof constituted very serious damage from either a public health or an environmental perspective.

[33] Mr. Seale gave evidence of a building in poor condition, and structurally unsound. As a contractor with about 26 to 27 years of experience, he based his conclusions on the missing plaster and the damage to the eastern side of the building; to the blockwork; and to the asbestos roof. However, Mr. Seale did not characterize the structure as “massively compromised”.

[34] The main area of structural damage Mr. Seale saw was on the eastern side of the building. He was not particularly concerned about whether or not there were open joints in the blockwork. And, unlike Mr. Forde, Seale’s evidence is that he walked through the building, from front door to back door, and without respiratory equipment.

[35] The Court could not reasonably conclude from Mr. Seale’s evidence that all of the walls to the building were unusable. In relation to the asbestos roof, Mr. Seale never said that it was destroyed or seriously damaged. As a builder, he did not opine that the building was massively compromised or damaged, or beyond repair. Therefore, his evidence did not satisfy the Court that, in keeping with Mr. Franklyn’s guidelines, the building was derelict.

[36] A further consideration for the Court was the significant inconsistencies between the evidence of Messrs. Forde and Seale. For example:

(1) Forde described a crack in the asbestos roof of about 1½ feet in width.

Seale referred to an oblong shaped hole roughly 5 to 6 feet wide, and about 6 feet in the other direction.

(2) Forde also said that, because the floor boards were rotting he was unable to walk through the building from the front door to the back door.

“Flooring board was missing so I could not walk from the front door to the back door. I don’t know if the back door was open. I went about 4 to 5 feet into the building.”.

Seale’s recollection was different. His evidence was that:

“A section of the floor was rotten. I can’t recall which section. Mr. Forde went in with me. We entered and just looked around. I walked to the back of the building on the inside. Mr. Forde was with me when I walked to the back of the building on the insideI do recall walking through the building with him.”.

(3) Seale noted that about 75 percent of the plastering was missing from the outer walls of the building. There is, however, no mention of missing plaster anywhere in Mr. Forde’s evidence.

(4) Seale saw a damaged window on the eastern side of the building. But Forde could not recall whether all the windows in this small building were intact.

(5) Whereas Forde mentioned open joints in the blockwork, Seale could not recall if he saw open joints. Seale did not consider open joints to be an important consideration. Yet he expressed the view that “A coral stone building with spaces in all the joints would constitute an unsafe structure.”.

[37] The third witness for the Defendant, Ms. Valcia Stoute, referred to the building as derelict in her evidence. Counsel for the Claimant suggested to her that she could only use this description if her Department had inspected the building. Ms. Stoute did not agree with Counsel. She informed the Court that:

“Normally, if we do [an inspection] there are notes on our files that would say that the building is derelict; and I am sure we have notes. I don’t have them with me.”.

Ms. Stoute did not produce any departmental notes to support her view that the building was derelict when demolished.

[38] Ms. Stoute was unable to explain adequately how the valuation for a supposedly derelict building was increase in 2005 from \$47,500 to \$65,000. This represented an increase in the valuation by just over 37½ percent. Ms. Stoute admitted the inconsistency of this approach. It followed that it was also inconsistent to apply a rate of depreciation of fifty percent in arriving at a replacement cost for the building.

[39] This Court conducted a careful analysis of the evidence presented by the three Defence witnesses. The Court accepts that this old building, with a cracked asbestos roof as conceded by Mr. Jones, was providing a harbourage for termites and rodents. Indeed, that was the only public health concern in the correspondence from Mr. Forde's department. But the quality and consistency of the evidence was not to a standard that compelled this Court to a finding that, when demolished, the building was either abandoned, or derelict, or structurally unsound.

The Law

[40] The Claimant is entitled to damages for the loss occasioned by the trespass to its property that led to the destruction of the building on that property. Stollmeyer J. explained the development of the law in the computation of damages for torts affecting land. In **Bankay et al v. Harrilal et al T&T HCA No: S-100 of 1999** (judgment delivered on 30 September, 2002), Stollmeyer J. said that:

“The measure of damages was long held to be the demerit in the value of the land (See **Jones v. Gooday [1841] 8M&W 146**) but the decisions in **Hollebone v. Midhurst and Fernhurst Builders [1968] 1LLR 38** and **Harbutt's Plasticine v. Wayne Tank Ltd. & Pump Co. [1970] 1 All ER 225** provide the basis for the more modern rule that the cost of replacement or reinstatement is, or can be the proper measure of damages. It will in any particular case depend on all of the circumstances, however, and such costs will not be allowed where the plaintiff did not in fact have

the intention to reinstate. See, for example **Hole & Son (Sayers Common) v. Harrisons of Thurnscoe [1973] 1LLR 345; Taylor (Wholesale) v. Hepworths [1977] 2 All ER 784.**”.

- [41] An intention to reinstate is more readily discerned where the building was used for residential purposes. In the **Hollebone** case (*supra*), the claimant’s house was damaged by fire. The cost of reinstatement was permitted because “by reason of its size, its position, its features, its seclusion and the area in which it is located the property is properly termed unique or of a nature that comparable properties are few and far between”. (See [1968] 1 LLR 38 at 39).
- [42] Likewise, in **Ward v. Cannock Chase District Council [1986] Ch.546**, the claimant was entitled to claim the cost of rebuilding because his was an exceptional case. The destroyed buildings had stood on premises that represented a land holding of special and particular value to the claimant and his large family. If he was awarded only the demerit in the value of the premises, he would never be able to rebuild or purchase another property.
- [43] In relation to commercial property, the cost of reinstatement was allowed for a factory where individuals were employed. **Harbutt’s Plasticine** (*supra*) is such a case although in contract law, but the principles for computation of damages are applicable equally to torts affecting land. And in **Dominion Mosaics and Tile Co. v. Trafalgar Trucking Co. [1990] 2 All ER 246**

CA, the cost of purchasing an alternative property was allowed because the cost of rebuilding was not practicable.

[44] The cost of reinstatement was not allowed in the **Taylor** case (supra), where a billiard hall was destroyed by a fire caused by the defendant's negligence. The billiard hall had not been used as such since 1939. It was subsequently used as a warehouse, but that usage was discontinued around 1967. Thereafter, the building remained empty. The evidence established that the premises were kept for investment purposes. The plaintiff anticipated a capital appreciation given the developmental value of the premises. However, the plaintiff did not intend either to occupy or rent the premises. The court held that in these circumstances it would be unreasonable to award the cost for reinstating the building.

[45] It does not appear that deductions for depreciation or betterment are automatically made from an award of reinstatement costs, where the reinstated property is more valuable than it was before the act of trespass. In **Dominion Mosaics** (supra), no discount was made where the claimant acquired twenty percent more floorspace. Lord Denning M.R. said in **Harbutt's Plasticine** that:

“The destruction of a building is different from the destruction of a chattel. If a second-hand car is destroyed, the owner only gets its value; because he can go into the market and get another second-hand

car to replace it. He cannot charge the other party with the cost of replacing it with a new car. But when this mill was destroyed, the plasticine company had no choice. They were bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit (for which they would be able to charge the defendants). They replaced it in the only possible way, without adding any extras. I think they should be allowed the cost of replacement. True it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account. If they had added extra accommodation or made extra improvements, they would have to give credit. But that is not this case.” ([1970] 1All ER 225 at 236d-f).

[46] Lord Justices Widgery and Cross agreed with Lord Denning M.R., with Widgery L.J. opining:

“Nor do I accept that the plaintiffs must give credit under the heading of “betterment” for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernizing of their plant which might be highly inconvenient for them.”. ([1970] 1 All ER 225 at 240e).

[47] Cross L.J. added that:

“It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendant’s are not, as I see it, entitled to any allowance. I can well understand that if the plaintiffs in rebuilding the factory with a different and more

convenient lay-out had spent more money than they would have spent had they rebuilt it according to the old plan, the defendants would have been entitled to claim that the excess should be deducted in calculating the damages. But the defendants did not call any evidence to make out a case of betterment on these lines and we were told that in fact the planning authorities would not have allowed the factory to be rebuilt on the old lines. Accordingly... ..the capital sum awarded by the judge was right.”. ([1970] 1 All ER 225 at 242f-h).

- [48] The Canadian case of **Nan v. Black Pine Manufacturing Ltd.** 80 DLR (4th) 153, considered deductions for either betterment or depreciation. In that case the plaintiff’s 14 year old home was destroyed. In an action for damages, the plaintiff’s award was the full cost of rebuilding the house. It was argued that the award should be reduced to allow for the benefit to the plaintiff of replacing an old home with a new one. The defendant was unable to show that the market value of the new house was more than the market value of the destroyed home.
- [49] The British Columbia Court of Appeal held in **Nan** that the court should adopt a flexible approach in making allowances for depreciation or betterment. They were factors to be considered, but even if there was evidence of betterment or depreciation, the damages would not be adjusted automatically to reflect this. In arriving at its decision, this Court of Appeal

also referred to the **Hollebone**, **Harbutt's Plasticine** and **Taylor** cases (supra).

[50] Speaking for the court in **Nan**, Wood J.A. referred to the "long established principles applicable to damages in tort actions". The learned Justice of Appeal continued:

"The first of those principles is reflected by the maxim *restitutio in integrum*, the damages shall be such as will, so far as money can, put the plaintiff in the same position as he would have been had the tort not occurred. The second is that the damages awarded must be reasonable both to the plaintiff and to the defendant.

The result of the application of these principles, in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should be adjusted, either for pre-loss depreciation or post-reinstatement betterment, will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered.

For example, a review of the [Canadian] cases might suggest that where the property in question has a predominantly commercial nature, or was clearly held for investment purposes, such considerations should be taken into account:

But even in cases where the property destroyed is a purely commercial facility, such as a factory, the facts may be such as to compel the court not to make such an allowance, either for

depreciation or for betterment:.....”. (80 DLR (4th) 153 at 157d-158c).

[51] If this Court is minded to award the Claimant the reinstatement costs of the building, then the question of depreciation will become a live issue. The Defendant argued in favour of depreciation, given the relatively simple layout of the building prior to demolition. The Court must be satisfied that any sum awarded as replacement costs, was reasonably required to replace the building. This would involve an assessment of the nature of the property, the purpose for which it was kept by the Claimant, and the type of loss that occurred. (See **Nan** (supra) and **Jens v. Mannix Co. Ltd.** 30 DLR (4th) 260).

Assessment Of Damages

[52] The Claimant believes that it is entitled to damages for reinstatement, in the sum of \$140,000. The Defendant argued for damages based on the market value of the building, that is, the sum of \$60,000. In **British Coal Corporation v. Gwent County Council** (1995) Times, (18 July, CA), Glidwell L.J. confirmed that “In an action in tort for damage to a building, the reasonable cost of reinstatement and repair will normally be the proper basis for assessment of damages.”. Master Alexander also explained in **Joseph v. Mahabir** that:

“The cost of re-instatement is generally preferred, provided:

- (a) the claimant has restored, or intends to and can restore, the land to its previous condition, and
- (b) the cost of so doing is not entirely disproportionate or unreasonable.”. (CV 2006 02600 T&T HC 09 May 2012 at paragraph 25).

(See too **Lodge Holes Colliery Co. v. Wednesday Corp. [1908] AC 323**, and **Bankay v. Harrilal** (supra)).

[53] Counsel for the Claimant argued that there is evidence that the Claimant intends to rebuild, and that this is a reasonable intention. Counsel submitted, inter alia, that:

- (1) the Claimant purchased the property in 1988 for commercial purposes;
- (2) the Claimant used the building for commercial purposes i.e as a warehouse;
- (3) town planning permission was obtained for a change of use to a convenience store, and this required rebuilding;
- (4) the property was offered as security for a credit facility; and
- (5) the building was insured in the sum of \$125,000.

[54] The Barbados Court of Appeal has had occasion to consider whether a company evinced an intention to rebuild in its claim for reinstatement costs. In **Barbados Transport Board v. Imperial Optical Co. (Barbados) Ltd**,

(1990) 25 Barb. L.R. 346, the respondent's building was destroyed by flames which spread from a burning bus owned by the appellant. This event occurred on 27 January, 1986. The Court of Appeal referred to three letters written on behalf of the respondent between 29 January and 13 March 1986. These letters contained the phrase "should our company decide to rebuild" or similar language. Williams C.J. stated that:

"These letters show that up to March 13 [the respondent] had not decided whether they would rebuild. No one from the company testified that such a decision has ever been made." ((1990) 25 Barb. L.R. 346 at 351).

[55] The learned Chief Justice outlined the legal principles, and applied them to the facts of the case. He concluded that:

"In this case no one from [the respondent] has testified that it ever made a decision to reinstate. The record shows that the National Trust engaged [architects] to prepared redevelopment proposals for submission to the Chief Town Planner and that following approval of the architect's plans [chartered surveyors] were authorized to prepare a Bill of Quantities..... ...All this proceeded on the footing that [the respondent] had been directed by the Chief Town Planner to reinstate the building to its pre-fire condition... ..

There was in fact no such direction and no such direction could have been given. This building was insured for \$150,000, its value before it was burnt was approximately \$360,000 and the owner was awarded \$673,089.46 [by the High Court] on the basis of plans and an estimate for reinstatement where there is no evidence that it

ever made a decision to reinstate the building. In my judgment no exceptional case has been made out for an award on a reinstatement basis and the general principles should apply that the plaintiff should be put, so far as money can, in the same position as he would have been in had the fire not occurred and the award should be reasonable as between the parties.” ((1990) Barb. L.R. 346 at 355-356).

[56] Having found no intention to rebuild on the part of the respondent, the Court of Appeal reduced the High Court’s award from reinstatement costs of \$673,089.46, to \$370,210. The reduced award included the market value of \$360,000, plus debris removal and other fees.

[57] None of the witnesses, who gave evidence on behalf of the Claimant in this case, articulated any intention for the Claimant to rebuild the demolished building. Therefore, Counsel for the Claimant is asking the Court to infer such an intention from the evidence. The Court has already found that the building was not in use when demolished. The existence of an electrical supply does not necessarily connote usage. Indeed, the electricity bills submitted show charges, prior to demolition, in the range of \$5.00 to \$6.00 per month. This is more consistent with a charge for the meter, than with electricity charges for a building in use.

[58] The Court also accepted that the configuration of the building was conducive to warehousing, and that the building may have been used for that purpose.

But, in the absence of usage at the time of demolition, there was no evidence of an active plan for the future use of the building. It was not a place of employment; no one was stationed there. And there is no evidence that the Claimant was challenged for warehousing space after the demolition of the building.

[59] Although planning permission was mentioned, no documentary evidence was offered to show the conditions annexed to that permission. There was not a scintilla of evidence as to either the date of the permission, or the continuing validity of the permission, or of any ongoing preparations or plans for future warehousing, or rebuilding as a convenience store, or otherwise.

[60] The building was insured for \$125,000, but there was no evidence that this figure represented an up to date valuation for the building. And even if the property was offered as security for a credit facility in 2005, that does not prove an intention by the Claimant to rebuild the property. There is also evidence of at least one offer to purchase the property. But the Court was not told that this offer was refused because the Claimant had its own plans for the building. Neither did the Claimant's witnesses explain why a valuation was requested in April 2005.

[61] The building under consideration by the Court was not required or used for residential purposes. Therefore, an intention to rebuild cannot be so readily inferred. This was aging, dormant commercial property, with a cracked asbestos roof. Termites were moving in and rodents were visiting. The Claimant did not express any intention to rebuild through its witnesses. Between the demolition in 2005, and the hearing of the evidence in 2012, there is no evidence that the Claimant had initiated a rebuilding process. There is no evidence that the Claimant wished to rebuild, but was unable to do so because of cash flow or other constraints.

[62] In these circumstances, the Court finds that there is no evidence, expressed or implied, to support an intention on behalf of the Claimant to rebuild the demolished building. Following the authority of the **Barbados Transport Board** case (*supra*), the Court declines to award damages to the Claimant on the basis of replacement or reinstatement costs. There is, therefore, no need to consider the issue of depreciation.

[63] Having not awarded the Claimant the replacement cost of the building, should the Court now award the demunition in the value of the property or the market value of the building? In the **Taylor** case, the plaintiff would have been entitled to £2,500 as damages for the demunition in the value of their property. But the evidence showed that it would have cost the plaintiff

at least this amount to clear the site for development purposes. And to the extent that the site was cleared by the fire, the plaintiff was only entitled to recover the cost of any necessary remedial and safety work. (See also **Farmer Giles Ltd. v. Wessex Water Authority [1990] 1EGLR 177 CA**).

[64] The Court has found no reason in this case, to resile from awarding the Claimant the market value of the building. Counsel for the Defendant submitted a figure of \$60,000 as reasonable damages. The Claimant has not provided evidence to indicate the market value of the building. True, it was insured for \$125,000. But, as noted earlier, the Court does not know whether this figure truly represented the market value of the building in 2005.

[65] The evidence of the market value is to be found in the evidence for the defence. The building was valued in 2005 by the Land Valuations Department at \$65,000. The Claimant never objected to this valuation. Therefore, the Court accepts that when the building was demolished in 2005, its market value was \$65,000.

[66] The Court awards damages to the Claimant, in the sum of \$65,000, with interest from 15 December 2005 to 20 February 2014 at the rate of 4 percent, and from 21 February 2014 until payment in full at the rate of 6 percent.

Costs, fit for two counsel, are also awarded to the Claimant, to be agreed or assessed.

Sonia L. Richards
Sonia Richards
Judge of the High Court