IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 35

Civil Appeal No 130 of 2017

Between

(1) NG SIOK POH
(SUING IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF LIM LIAN CHIAT, DECEASED)
(2) LIM HONG LIU
(SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF LIM LIAN CHIAT, DECEASED)

… *Appellants*

And

SIM LIAN-KORU BENA JV PTE LTD

… *Respondent*

In the matter of Suit No 248 of 2014

Between

(1) NG SIOK POH
(SUING IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF LIM LIAN CHIAT, DECEASED)
(2) LIM HONG LIU
(SUING IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF LIM LIAN CHIAT, DECEASED)

… *Plaintiffs*

And

SIM LIAN-KORU BENA JV PTE LTD

… Defendant

JUDGMENT

[Damages] — [Measure of damages] — [Tort]

TABLE OF CONTENTS

Ng Siok Poh (administratrix of the estate of Lim Lian Chiat, deceased) and another
v
Sim Lian-Koru Bena JV Pte Ltd

[2018] SGCA 35

Court of Appeal — Civil Appeal No 130 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Judith Prakash JA
7 May 2018

3 July 2018 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

1 This dispute concerns a house at No 30 Lorong K Telok Kurau ("the Property") which was designed and built by the second appellant's father, Mr Lim Lian Chiat ("the late Mr Lim"), in the early 1970s as the family home. The Property was built over three years using materials carefully selected by the late Mr Lim. Viewed as the late Mr Lim's legacy, it is of immense sentimental value to the appellants' family and remains the centre of family gatherings to this day. Three of the late Mr Lim's children, including the second appellant, continue to reside in the Property.

2 In 2008, the respondent began developing a condominium known as "The Amery" on the plot of land adjoining the Property. From March to April 2009, the adjoining plot of land was excavated to construct the basement of The

Amery. This excavation caused the soil around the Property to shift. The result was that the Property began to tilt towards the excavation site.

3 In March 2014, the appellants sued the respondent for damage to the Property in the torts of private nuisance and negligence. Interlocutory judgment was entered in favour of the appellants. The trial below centred on the assessment of damages. To be specific, it centred on the question of whether damages should cover the cost of reinstating the Property using micro-pile underpinning (*ie*, lifting up the Property's foundations and setting it upright, so as to remove the tilt) or aesthetic renovations (to remove the sense or appearance that the Property is tilting). There is a significant difference in the cost of the two methods. The trial judge ("the Judge") awarded damages for the cost of aesthetic renovations. His grounds for doing so may be found at *Ng Siok Poh (administratrix of the estate of Lim Lian Chiat, deceased) and another v Sim Lian-Koru Bena JV Pte Ltd* [2017] SGHC 231 ("GD"). In this appeal, the appellants primarily contend that damages ought to have been assessed based on the micro-pile underpinning method instead.

Background facts

4 The first appellant was the late Mr Lim's widow. In 2014, after the commencement of the suit, she passed away. The second appellant, Mr Lim Hong Liu, is one of the late Mr Lim's children. Both appellants were administrators of the late Mr Lim's estate before the first appellant passed away. Since only the second appellant has had conduct of the case, we will refer to him as "the appellant".

5 In 2007, the respondent purchased the land adjoining the left side of the Property and, in 2008, began construction works to build The Amery. The

excavation to build the basement carpark of The Amery commenced between 9 and 23 March 2009, with varying start dates for different parts of the site. It is common ground that the excavation caused the soil around the Property to shift, and the Property to tilt towards the excavation site.

6 The tilt was first discovered in late March 2009, when the appellant noticed crack lines appearing on the car porch. Tiles on the building apron had been forced out and grilles on the drains were bending and breaking. The appellant suspected that the Property was tilting when he found that the metal main door grille was closing by itself. There was also ponding of water in the bathrooms.

7 After the respondent was alerted to the tilt, the parties jointly inspected the Property on 3 April 2009. The respondent engaged Dr Yong Deung Ming ("Dr Yong"), a professional engineer, to inspect the Property. Dr Yong reported that there was "no imminent sign of damage, distress, distortion or [danger]" to the Property and that the Property was "structurally sound and safe for its intended usage". The appellant was not satisfied and escalated the matter to the Building and Construction Authority ("the BCA").

8 On 8 April 2009, two tiltmeters were installed on the Property. The tiltmeters measured the tilt of the Property with the state of the Property on 8 April 2009 as a baseline. In other words, they only measured how much more the Property tilted from 8 April 2009 onwards, without accounting for the pre-existing tilt.

9 Separately, Dr Yong took two measurements of the tilt of the Property by optical survey on 9 and 25 April 2009 ("the 2009 Measurements"). The 2009 Measurements were measurements of the *absolute tilt* of the Property, *ie*,

the extent to which the Property deviates from a vertical straight line. The absolute tilt is measured by dropping a plumb line from the top of the building and measuring the height-distance from the plumb line to the building wall. The absolute tilt is expressed as a ratio of this distance of deviation over the height of the plumb line. A larger ratio means that the absolute tilt is more acute. For example, 1/100 represents a larger tilt than 1/500.

10 As a result of the appellant's complaint, the BCA issued the respondent with a Stop Work Order around 15 April 2009, prohibiting the respondent from carrying out more excavation works and permitting only strengthening works. The basement slabs for The Amery were cast between 21 and 25 April 2009.

11 The BCA also required Dr Yong to prepare a further report on his assessment of the tilt of the Property. In a further report dated 15 May 2009 and subsequent letters dated 25 June 2009 and 31 August 2009, Dr Yong assessed the Property to be structurally sound and safe for continued use as a residence. Based on the 2009 Measurements, he advised that the absolute tilt was within tolerable limits and appeared to have stabilised. The tilt continued to be monitored using measurements from the two tiltmeters until July 2010, before a final tiltmeter measurement was taken in July 2012 for a review.

12 On 27 July 2012, JIB Specialist Consultants Pte Ltd prepared a report, which was checked and approved by Dr Yong, after a further inspection of the Property ("the July 2012 Report"). The aim was to assess whether the state of the Property had deteriorated from July 2010 to July 2012. The July 2012 Report relied among other things on the readings taken by the two tiltmeters between March 2010 and July 2012, which showed that the tilt worsened slightly from 2009 to 2010 and stabilised after 2010. Dr Yong stated that he was satisfied that the structural condition of the building remained as

stable as it was in July 2010, and that the building was safe for continued occupation.

Procedural history

13 On 4 March 2014, both appellants commenced the suit below alleging that the respondent was liable in tort for private nuisance and negligence that caused damage to the Property while constructing The Amery. The pleaded damage included: the tilt of the Property; cracks; door hinges and frames being out of alignment and not functioning properly; water ponding in the bathroom and other areas as a result of the tilt; a slope in the living room floor; dented wooden decking, damaged drains and drainage grating; and other damage that resulted from the tilt of the Property. As relief, the appellants claimed the cost of reinstating the Property to its original state without the tilt, and the costs of alternative accommodation and transport expenses for the duration of the reinstatement works. Alternatively, the appellants claimed the diminution in value of the Property, but this alternative was abandoned in closing submissions.

14 On 14 August 2014, interlocutory judgment was entered by consent, with damages to be assessed and all issues relating to causation, damages, cost and interest to be reserved.

15 The first tranche of the assessment of damages was heard during the period from 3 to 5 November 2015. On 4 November 2015, the Judge conducted a site visit. The appellants called Mr Lim Kim Cheong ("Mr Lim K C"), a professional engineer specialising in structural and geotechnical engineering works, and Mr Ho Ngon Fatt, a quantity surveyor, as experts to assess the damage caused to the Property and the costs of the requisite rectification works. The respondent called Associate Professor Harry Tan Siew Ann ("Prof Tan"),

a geotechnical expert, and Mr Lee Cheng Sung, a quantity surveyor and building surveyor, as experts. In this appeal, we are concerned mainly with the evidence of Mr Lim K C and Prof Tan, and not the quantity surveyors' evidence.

16 In this first tranche, Mr Lim K C and Prof Tan based their opinions on the 2009 Measurements which showed that the absolute tilt ranged from 1/438 to 1/875 at different locations on the Property. Mr Lim K C and Prof Tan furnished a joint report dated 12 January 2015 stating that the existing structure had stabilised and no further movements were observed. They were in agreement that the structure was safe for residential occupation. They disagreed about whether it was necessary to restore the Property to true verticality using the micro-pile underpinning method.

17 During the first tranche, both experts also introduced a set of guidelines known as the "Eurocode 7: Geotechnical Design" which were adopted by the BCA in April 2015 ("the BCA Guidelines"). These guidelines were used to interpret tilt ratios and thereby assess a building's structural safety. Two ratios were relevant to the present case: 1/500 and 1/150 ("Safety Limits"). According to the BCA Guidelines, 1/500 was a safe limit for buildings where cracking or structural damage would not occur; 1/150 was a limit at which considerable cracking in panel walls and brick walls was to be expected and structural damage of buildings was to be feared.

18 On 3 December 2015, the appellant applied for leave of court to adduce further evidence of the "current state of the tilt" of the Property. In his affidavit, the appellant explained that until the trial, all indications, based on reports prepared by professionals engaged by the respondent, were that the tilt had not worsened since 2010. However, in the midst of the trial, the appellant decided to engage professionals to verify the degree of the tilt "as a matter of prudence".

He elaborated in a further affidavit that between 2012 and 2015, he could sense the tilt was still there but was assured by the July 2012 Report that it had not worsened. Moreover, no further crack lines were observed. However, during the Judge's site visit on 4 November 2015, laser beams and levelling plumbs were used to demonstrate the tilt. This indicated to the appellant and Mr Lim K C that the tilt could be worse than they had originally thought. The appellants thus commissioned Tritech Engineering & Testing (Singapore) Pte Ltd ("Tritech") to determine the state of the absolute tilt. Based on Tritech's report dated 1 December 2015 ("Tritech's Report"), the appellant claimed that the tilt "has worsened considerably such that the structure of the Property is severely compromised". The appellant sought to adduce Tritech's Report as further evidence, on the basis that it would have a significant bearing on the main issue of whether underpinning was the right mode of reinstatement.

19 The Judge granted the appellant's application in part on 4 April 2016 and re-opened the trial. He ordered the parties to jointly engage an independent surveyor to measure the tilt using an agreed methodology. The joint surveyor, Tang Tuck Kim Registered Surveyor ("TTK"), produced data of the absolute tilt surveyed on 14–16 June 2016 ("the 2016 Measurements"). The 2016 Measurements showed that the Property's absolute tilt ranged from 1/78 to 1/150; of the eight locations measured, all but one had exceeded 1/150.

20 Mr Lim K C and Prof Tan subsequently filed separate supplemental reports and were cross-examined on 20 February 2017. In the second tranche, Mr Lim K C and Prof Tan were still in agreement that the Property was structurally safe and stable. However, they differed in their views of the significance of the absolute tilt having exceeded the 1/150 safety limit and whether the BCA would require the Property to be set upright as a consequence. They also struggled to make sense of the 2009 Measurements,

tiltmeter readings and 2016 Measurements, which taken together suggested a sharp increase in the tilt between July 2012 to June 2016 even though the tilt should have stabilised soon after the basement slabs were cast in April 2009.

Parties' cases below

21 Before the High Court, the appellants submitted that they were entitled to reinstatement costs plus relocation costs for the duration of the reinstatement works. They proposed two forms of reinstatement:

(a) Their primary submission, and eventually their only submission in the second tranche, was that they should be compensated for the cost of micro-pile underpinning works to lift up the Property, reinforce the foundation and set the Property upright, removing the tilt altogether ("the Underpinning Method"). Based on the experts' views on three quotations, the Judge found that the Underpinning Method would cost $2,292,000.

(b) Their reserve submission was that they should be awarded the costs of aesthetic works that would remove the appearance of a tilt on the interior and exterior of the Property ("the Aesthetics Method"). If awarded this, the appellants also asked for damages for loss of amenity. The appellants' quantity surveyor quantified the works necessary for the Aesthetics Method at $665,094.15.

22 The respondent argued that the Underpinning Method and Aesthetics Method were unreasonable because the Property was structurally safe; even the Aesthetics Method went beyond repairing existing defects to redoing parts of the Property that were not damaged. It submitted that the appellants were only

entitled to $47,600 to repair existing defects to the Property resulting from the tilt.

Decision below

23 There were four issues before the court below (GD at [25]):

(a) whether the appropriate measure of damages was the reinstatement costs or the diminution in value of the Property;

(b) if the appropriate measure was reinstatement costs, whether damages should be awarded based on the Underpinning Method or the Aesthetics Method, and what was the quantum to be awarded;

(c) if the Aesthetics Method was appropriate, whether the appellants were also entitled to damages for loss of amenity; and

(d) whether to award interest on the damages assessed, and what the appropriate costs order was.

24 The Judge found that the appropriate measure of damages was reinstatement costs, for two reasons (GD at [32]–[33]). First, the Lim family attached significant sentimental value to the Property and were keen to reinstate it to preserve the late Mr Lim's memory and legacy. Second, the reinstatement costs, if awarded based on the Aesthetics Method, would not be disproportionate to the loss sustained.

25 As to the appropriate mode of reinstatement, the Judge decided that the court should assess damages based on the less extensive mode if the latter, in comparison to its more extensive alternative(s), would (1) not result in the property having a significantly diminished appearance, life or utility, and

(2) cost far less (GD at [38]). This followed from the principle of reasonableness and was an exercise in weighing the relative costs and benefits of each method. On the facts, the Judge decided that the appropriate mode of reinstatement was the Aesthetics Method. Based on the 2016 Measurements, the appellant had argued that it was necessary to eliminate the tilt using the Underpinning Method because the Property was continuing to tilt and the tilt ratios for all four corners of the Property had breached the Safety Limits specified by the BCA Guidelines. However, the Judge found to the contrary, as follows:

(a) The Judge found that the Property stopped tilting further after the completion of the construction of the basement of The Amery (in particular, the laying of the base slab). The 2016 Measurements reflected a more acute tilt because the 2009 Measurements were inaccurate and had understated the tilt (GD at [50]).

(b) Although the Safety Limits had been exceeded at all but one point in the Property, thus effectively eliminating the safety reserve, the Property was still safe for habitation (GD at [54]). The Judge accepted Prof Tan's evidence that the BCA would not require the safety reserve to be restored and the tilt to be eliminated if the building was structurally safe (at [56]). The Judge preferred Prof Tan's opinion because, first, Mr Lim K C did not state in his report that the BCA would require the safety reserve to be restored; second, there was no evidence of the BCA's position even though the appellants had ample time to obtain confirmation from the BCA; and third, if the Property was structurally safe and there was no evidence of further tilting, it was logical that the BCA would not require the appellant to carry out the costly and invasive Underpinning Method. In relation to old buildings which were not designed according to more recent specifications, the BCA's

paramount consideration would be structural safety rather than the safety reserve.

(c) Since the restoration of the safety reserve was not material, it was not reasonable to incur the significantly higher costs of the Underpinning Method (which came up to 29% of the Property's value) when the Aesthetics Method, with its significantly lower cost, would equally remove the sense of the tilt (GD at [62]). It was mere speculation that the Property might become unsafe due to a subsequent event if it was not set upright.

26 The Judge awarded the costs of the Aesthetics Method as set out in the Annex to the GD. He disallowed the cost of works to rectify the exterior (as the tilt was not perceptible from the outside) or any of the bathrooms except for the two which experienced ponding issues, and held that the doors need not be replaced.

27 The Judge did not award the appellants damages for loss of amenity because the Aesthetics Method would eliminate any perception of the tilt and would thereby directly address the loss of amenity suffered by the appellants (GD at [84]).

28 Finally, the Judge did not award interest on the damages because the appellants had not been kept out of their money (GD at [92]). The appellants were awarded costs for the first tranche but were denied costs for the second tranche because they had pursued an issue which was found to be unmeritorious (*ie*, the continuing tilt) (GD at [93]).

Issues

29 There are four issues in this appeal, three of which only need to be considered if the appellant fails on the first issue:

(a) whether damages should be assessed based on the Underpinning Method or the Aesthetics Method;

(b) if the Aesthetics Method is the appropriate method, whether damages for loss of amenity should be awarded to the appellant;

(c) if the Aesthetics Method is the appropriate method, whether the Judge erred in refusing to award the costs of new doors and repairs to the additional bathrooms and the external façade of the Property; and

(d) whether the appellant should have been awarded costs and disbursements for the second tranche.

Parties' cases on appeal

30 On the first issue, the appellant submits that the Underpinning Method should be applied because it is the only way to eliminate the tilt which has exceeded the Safety Limits. He contends that he has been left with an inferior building for two main reasons. First, the tilt has diminished the Property's utility because the BCA will not allow major renovation works to be carried out without the tilt having first been rectified. Second, the tilt has diminished the Property's safety because the Safety Limits have been exceeded and the BCA would require the Property to be set upright as a consequence. He argues that the Judge erred in his assessment of the evidence when he concluded that the BCA would not require the safety reserve to be restored. Finally, he also

contends that the Judge failed to accord sufficient weight to the unique value of the Property when deciding what a reasonable owner would do.

31 If the appellant fails to be awarded damages assessed using the Underpinning Method, then in the alternative, the appellant argues:

(a) He should be awarded damages for loss of amenity on the basis that his ability to use the Property and his sense of comfort and safety have been diminished. Even if such damages are not awarded for his prospective loss of amenity, he claims to be entitled, at the very least, to damages for loss of amenity for the period from 2009 to the date when the perception of the tilt is rectified to compensate him for the "discomforting perception of tilt".

(b) In determining the quantum of damages based on the Aesthetics Method, the Judge should have awarded the cost of repairs to remove the sensation of tilt from the Property's wet areas and external façade as well as the cost of replacing the doors.

(c) He should be awarded the costs of the second tranche which was convened because the tilt was far more severe than originally thought and the Safety Limits had been exceeded.

32 The respondent seeks to defend the Judge's decision to assess damages using the Aesthetics Method. It argues that the unique value of the Property does not make the exorbitant costs of the Underpinning Method reasonable. As regards the appellant's claim that the Property's utility is now diminished, the respondent highlights that it was never part of the appellant's case at trial that the tilt had to be rectified so that the BCA would grant approval for renovation works to be carried out. As regards the diminished safety of the Property, the

respondent argues that the loss of the safety reserve is not an issue if the Property is structurally safe and there is no further tilting. The respondent also submits, based on Prof Tan's evidence, that "serious structural problems" were to be expected only if the differential distortion – rather than the absolute tilt – exceeded the 1/150 safety limit.

33 If the Aesthetics Method is upheld, the respondent seeks to defend the Judge's decision on the remaining three issues for the reasons given by the Judge.

Our decision

Issue 1: Underpinning Method or Aesthetics Method

34 We begin with the first and central issue of whether the cost of reinstatement should be assessed using the Underpinning Method or the Aesthetics Method.

The law

35 The parties did not dispute the law applied by the Judge. We agree with the Judge's statement of the law (see GD at [26]–[31] and [35]–[38]). The choice of the mode of reinstatement, including the decision of whether to award the cost of a partial or full reinstatement, is part of a broader inquiry into the suitable measure of damages. As noted by James Edelman *et al*, *McGregor on Damages* (Sweet & Maxwell, 20th Ed, 2018) ("*McGregor on Damages*") at para 39–012, the difficulty in deciding the suitable measure of damages arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort even though the expense required to achieve this may be substantially greater than the diminution in value. The governing principle

in this context is one of *objective reasonableness*. The plaintiff's desire to reinstate the property, and his desire to reinstate it by his proposed method, must be reasonable. In assessing whether it is reasonable to reinstate the property and what the reasonable cost of reinstatement is, the court will take into account (a) the property's unique or sentimental value, or special use or purpose; and (b) the proportionality of the cost proposed to be incurred to the loss suffered by the plaintiff. In deciding between alternative modes of reinstatement, the court will weigh the relative costs and benefits of each mode and determine if the additional cost of more extensive reinstatement works is justified by the advantages. Everything will depend on the precise facts and circumstances of the particular case.

36 The following cases are useful illustrations of how the court has assessed reasonableness where torts against land are concerned. In *Lodge Holes Colliery Company, Limited v Mayor of Wednesbury* [1908] AC 323, the mining operation caused a road to subside. The local authority restored the road by an embankment and retaining walls and claimed the cost of so raising the road to its old level. The mine owners claimed that such extensive reinstatement was unnecessary and an equally commodious road could have been made for substantially lower cost at the sunken level. Lord Loreburn LC opined that a court should be very slow to countenance any attempt by a wrongdoer to object to the methods by which the party injured by him has sought to repair the injury. Nevertheless, the party wronged must also act reasonably. The House of Lords found for the mine owners, with Lord Loreburn LC stating the criterion of reasonableness as follows (at 326):

> The point of law which was advanced by the plaintiffs, namely, that they were entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, will not, in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay.

> There is no authority for it, though there is authority to shew that as between the owners of a public road and the adjacent lands the former may be entitled to restore the ancient level. Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them within the bounds of reason.

37 The above *dicta* were applied at first instance in *Dodd Properties Ltd and another v Canterbury City Council and others* [1980] 1 WLR 433 ("*Dodd Properties*"). In that case, the defendants erected a multi-storey carpark next to the garage owned by the first plaintiff and leased by the second plaintiff. The pile-driving operations to build the multi-storey carpark caused damage to the garage such as cracks in the walls and concrete floor. Settlement and movement of the foundations also caused distortion to the garage building's steel frame to a degree not perceptible by ordinary observation. This distortion resulted in the flat roof sloping slightly in the wrong direction.

38 In *Dodd Properties*, the plaintiffs and the defendants agreed that the defendants were liable for the cost of reasonable repairs to the building, but disagreed on what repairs were reasonable. The plaintiffs' experts proposed to remove and reconstruct the roof, straighten the steel frame, and conduct an extensive inspection of the foundations. The defendants' experts proposed only to regrade the roof so as to restore it to its former slope, with no works on the foundation or the steel frame. The works proposed by the plaintiffs cost twice as much as the works proposed by the defendants, and would take thrice as long to complete. Cantley J preferred the defendants' more modest proposals as the basis for assessing the plaintiffs' damages, and this aspect of his decision was not challenged on appeal. Cantley J was satisfied that no work was needed on the steel frame because the strength of the building had not been significantly diminished by the distortion of the steel frame. Further, he was satisfied that no investigation of the foundations was called for because nothing had gone wrong

since the time of the damage. Though the plaintiffs suggested that the distortion of the steel frame would prevent the building owner from building a new first floor, Cantley J was not convinced that such a project would be undertaken or that such works could not be accommodated if the building were restored according to the defendants' proposal.

39 Having considered the disparity in cost and duration alongside all these factors, Cantley J awarded the cost of repairs based on the defendants' proposals (it bears noting that this particular part of the learned judge's decision was not reversed on appeal). The learned judge summed up his inquiry into reasonableness in the following terms (at 441F–H):

> … The plaintiffs are entitled to the reasonable cost of doing reasonable work of restoration and repair. They are, of course, not bound to accept a shoddy job or put up with an inferior building for the sake of saving expense to the defendants. But I do not consider that they are entitled to insist on complete and meticulous restoration when a reasonable building owner would be content with less extensive work which produces a result which does not diminish to any, or any significant, extent the appearance, life or utility of the building and when there is also a vast difference in the cost of such work and the cost of meticulous restoration.

40 *Walter Frederick Scutt v John Lomax* [2000] WL 394 ("*Scutt v Lomax*") is an illustration of how a property's special value is taken into account in the assessment of reasonableness. The claimant planted several trees on a plot of land as a memorial to his late daughter. He and his wife visited the site regularly and tended the trees for more than two decades. In 1995, the defendant cleared the land, destroying substantial numbers of the claimant's mature trees. At first instance, the district judge awarded the claimant damages of £18,500 as the reasonable cost of reinstating mature trees. On appeal, the county court judge reduced the award to £2,000 as the reasonable cost of reinstating trees of a modest height which would grow to some degree of maturity within a moderate

period. On a further appeal, the English Court of Appeal accepted at [53] that "the special value to the claimant of the particular property damaged by the trespass, its use, position, features, seclusion, locality, uniqueness or rarity" were all features relevant to determining what reinstatement would be objectively reasonable, although these factors were not exhaustive. The court felt that the county court judge had paid due regard to the uniqueness of the land and its special value to the claimant, and even so, rightly held that it was not reasonable to replace trees of full maturity. Thus, while the special value of the damaged property is a relevant consideration, it must be balanced against other factors and does not mandate full reinstatement at all costs. Nonetheless, the court found the figure awarded by the county court substantially too low and held that the claimant should be reasonably entitled to plant as large trees as possible, provided that the overall cost was not too great. It was important that the claimant should be able to plant reasonably mature trees – more mature than those which the county court judge had had in mind – which he would be able to enjoy without waiting for too long. Accordingly, the balance was struck at an award of £8,000.

41 In *Douglas Bryant and another v Frank Harvey MacKlin and another* [2005] EWCA Civ 762 ("*Bryant v MacKlin*"), the defendants' horses and cattle broke through a fence on the boundaries of the claimants' land and damaged a row of mature poplar trees which had provided a screening effect for the claimants' property. At first instance, the judge awarded the claimants the diminution in value of their property because it was not reasonable to incur the cost of replacing the trees, whether they be like-for-like replacements, medium sized or young whips. On appeal, the English Court of Appeal agreed that a like-for-like replacement was unreasonable, the cost being nearly half the value of the claimants' property. However, the English Court of Appeal awarded a

higher figure than that awarded by the first instance judge, this being the cost of replacing the damaged trees with young whips supplemented by general damages for loss of amenity due to the loss of the screening effect for the claimants' home.

Application to the facts

42 Turning to the facts of the present case, the key difference between the two alternative modes of reinstatement is this: while the Aesthetics Method would remove only the sense that the Property is tilting, the Underpinning Method would eliminate not only the sense of a tilt, but also the actual tilt itself. The Underpinning Method would cost $2,292,000 whereas the Aesthetics Method would cost a maximum of $665,094.15 (if the appellant succeeds on all items of aesthetic renovation claimed). The issue is whether the advantages of eliminating the actual tilt using the Underpinning Method justify its substantially greater cost. In other words, the question is whether it is objectively reasonable for the appellant to require the actual tilt to be eliminated at significant expense. The Judge found that it was not reasonable to do so, given that the Property was structurally safe and stable and it was not proved that the BCA would require the safety reserve to be restored.

43 The appellant argues that the Property's utility and safety would be compromised if the actual tilt were not eliminated. He also argues that the Judge failed to give sufficient weight to the special value of the Property when considering the reasonableness of the Underpinning Method. We address these arguments in turn.

44 First, in relation to the Property's special value, we are of the view that the Judge gave due consideration to this factor. While the special value of the

Property is a relevant consideration, it does not justify a complete reinstatement at all costs (see the discussion of *Scutt v Lomax* at [40] above). Considering that there is a wide disparity in cost between the Underpinning Method and the Aesthetics Method, the Judge did not err in assessing the relative costs and benefits of both methods. Furthermore, the Aesthetics Method still respects the special value of the Property by enabling the appellant and his family to continue living in the Property without the sense of tilt impairing their enjoyment of the Property. The quotation for the Aesthetics Method also takes into account the cost of replacing unique features of the Property, such as the rare and imported floor tiles and mosaics.

45 Next, the appellant contends that if the actual tilt were not eliminated, the Property's utility would be diminished because the Lim family would not be able to obtain the BCA's approval to perform renovation works in the future. He focuses on Prof Tan and Mr Lim K C's evidence that if major renovation works were to be done, the Property would have to comply with the Safety Limits under the BCA Guidelines notwithstanding that it is an old building. Thus, they claim that before any renovation works can be carried out, the absolute tilt would have to be corrected because it currently exceeds the Safety Limits.

46 However, as the respondent correctly points out, it was never part of the appellant's case at trial that the actual tilt needed to be rectified in order for the BCA to grant approval for future renovation works. Rather, his case was that the actual tilt had to be rectified simply because the Safety Limits had been breached and the tilt was still worsening. In his closing submissions after the second tranche of the trial, the appellant did submit that the BCA would require compliance with the BCA Guidelines before issuing any permits for future renovation works. However, the appellant had not given evidence of his

intention to carry out renovations, or of what kind. The appellant's written case in this appeal is the first time that he mentions the installation of a lift as an example of renovation works that the Lim family intends to effect in the future. Moreover, since the ability to perform renovation works was not part of the appellant's case, the experts were not examined on the scope of renovation works that would require the Property to first be set upright. This would have been relevant to assessing the extent to which the future utility of the Property has been diminished. It was only in response to the Judge's queries about the applicability of the Safety Limits in the BCA Guidelines to pre-existing buildings that the experts had made remarks about future renovation works during the trial.

47 Given the way the case was run at trial, we do not think it is open to the appellant to now base his submission for the Underpinning Method on potential renovations in the future. As there is no evidence that the appellant plans to carry out renovation works, it would be too speculative to factor this into our assessment as to whether the utility of the Property would be diminished if the Aesthetics Method were employed. Leaving aside potential renovations, the experts are in agreement that the Property is fit for continued use as a dwelling house.

48 Finally and most significantly, the appellant contends that the actual tilt must be eliminated because it diminishes the safety of the Property. His key contention is that the Property must be set upright via the Underpinning Method because the Safety Limits have been exceeded. He makes several points to show that the Judge erred in his assessment of the evidence, especially as regards the significance of breaching the Safety Limits:

(a) First, he relies on the experts' evidence in the first tranche that structural damage is to be expected when the safety limit of 1/150 has been exceeded. Both experts used the BCA Guidelines as a mandatory and objective reference point for assessing the safety of the Property's tilt in the first tranche. At that point, Prof Tan's opinion was that the Property's tilt was acceptable because it was within the 1/500 limit. The appellant claims that it was only during the second tranche, upon realising that the Property's absolute tilt was 1/78 to 1/150, that Prof Tan sought to downplay the BCA Guidelines as merely informative and not binding.

(b) Next, the appellant argues that since the Safety Limits have been breached, the BCA would require the tilt to be corrected notwithstanding that the Property is an old building. He criticises Prof Tan for confining the applicability of the BCA Guidelines to new designs and newly constructed buildings, and relies instead on Mr Lim K C's view that the BCA would require all buildings to comply with the prevailing safety standards.

(c) Finally, the appellant claims that because the Safety Limits have been exceeded, the Property is more vulnerable and can only be said to be safe for habitation for the time being. He emphasises that both parties' experts recommended continued monitoring of the Property. During the oral hearing, the appellant's counsel, Mr Cavinder Bull SC ("Mr Bull"), stressed that a reasonable owner of the Property would correct the actual tilt because, being on notice that the Property has exceeded the BCA's Safety Limits, the owner would potentially be liable to third parties entering his Property if the Property were to collapse.

49 In response, the respondent submits that the loss of the safety reserve is not an issue if the Property is structurally safe and there is no further tilting. Moreover, it is for the appellant to show that the BCA would require the tilt to be corrected. The respondent also submits that Prof Tan did not shift his position in the second tranche, but maintained all along that it was where a building's differential distortion (as opposed to absolute tilt) exceeded the Safety Limits that structural damage would result.

50 In our view, it is not obvious from the evidence before the Judge that, simply because the Safety Limits have been exceeded, the Property is unsafe and the actual tilt must be eliminated. On the one hand, the 2016 Measurements appear alarming if an absolute tilt beyond 1/150 is as severe as the experts had explained in the first tranche – namely, that it would cause serious structural damage or problems. Considering the severity of the 2016 Measurements, Mr Lim K C's view was that the BCA would direct the appellant to eliminate the actual tilt and restore the Property's safety reserve.

51 On the other hand, the experts were still in agreement during the second tranche that the Property was structurally safe and stable on a visual inspection and that no large cracks were observed. In other words, the structural damage that, according to the guidelines referred to by the experts, is to be expected when a tilt exceeds 1/150 has not materialised. Though the Property has lost its safety reserve, it is not patent that the Property is thereby in a perilous condition. Prof Tan explained that there was no risk of collapse because a tilt of about 0.5 degrees was relatively small and the Property's centre of gravity was well within the base of its foundation. Matters were further complicated by the experts' comparison of absolute tilt and differential distortion. Differential distortion refers to the difference in the absolute tilt of two points of a building, *ie*, where different parts of the building tilt to different degrees. According to Prof Tan, it

is differential distortion (not merely absolute tilt) beyond the Safety Limits that causes differential stress in the structural components and leads to structural damage such as cracks or collapsing beams.

52 Nonetheless, Prof Tan accepted that the Safety Limits prescribed by the BCA applied to measurements of the absolute tilt of a building's members when a building's design is being assessed. But he explained that for existing buildings, the BCA would establish if there is significant structural damage and whether there is a risk of collapse before deciding if costly underpinning work is justified. The appellant challenges this view as illogical because, if the Safety Limits do not apply, there would be no guidelines for the engineers assessing the Property. However, both experts appear to accept that the safety of an existing building is assessed not only by the measurements on paper but also by visual signs of structural problems such as large cracks on structural members of the building.

53 Ultimately, as the Judge noted, the appellant's case on the implications of the tilt breaching the Safety Limits and the loss of the safety reserve was entirely built on the BCA's likely response. Yet, there was no evidence from the BCA on whether it would have directed the actual tilt to be rectified. The Judge was asked to come to a conclusion based on the experts' evidence and arrived at the view that the appellant had not discharged his burden of proof. He found that Prof Tan had given a cogent explanation as to why the BCA would not require the Property to be set upright in the present case.

54 Like the Judge, we have difficulty understanding why the BCA was not informed that the Property's tilt had exceeded the Safety Limits so that the BCA could assess the safety of the Property and ascertain whether it was necessary to set the Property upright. In our view, evidence of the BCA's position would

have been determinative. It would have greatly strengthened the appellant's case if the BCA had concluded that the Property was unsafe and that the safety reserve had to be restored. Conversely, if the BCA had concluded that it was unnecessary to set the Property upright, that would have laid to rest the appellant's concerns about safety and future liability to occupants or visitors.

55 The appellant explained that the BCA had not been called because he feared that the BCA would require him to engage in costly rectification works to eliminate the actual tilt without the assurance that those costs could be recovered in damages. During the oral hearing, Mr Bull attempted to persuade us that it was understandable for the appellant not to have called the BCA to testify. He explained that before the second tranche began, the appellant had had Prof Tan's clear evidence from the first tranche that the Property would be in an alarming state if the Safety Limits were to be exceeded, as the 2016 Measurements indeed indicated. Moreover, his own expert, Mr Lim K C, was a BCA accredited checker. Even so, Mr Lim K C was not representing the BCA and conceded that he could only speculate as to the BCA's response. Without the benefit of the BCA's opinion as an objective point of reference, we are unable to conclude from the totality of the expert evidence that an actual tilt that has exceeded the Safety Limits must be immediately rectified. Significantly, when the BCA was last involved in 2009, it based its intervention on the 2009 Measurements which have now been adjudged to be inaccurate. Based on the 2016 Measurements, the tilt is much worse than when the BCA was last notified. In these circumstances, we find it puzzling and surprising that the appellant did not approach the BCA during the trial or even after the Judge's decision below.

56 Nonetheless, we were concerned about concluding, without the benefit of the BCA's views, that the Property presents no potential safety issues in the

present or foreseeable future. However remote the probability may appear on the evidence presented to us, the risk, if it materialised, could cause serious harm. We had some sympathy for the appellant's contention that, having been fixed with notice that the tilt has exceeded the Safety Limits prescribed by the BCA, the family could be vulnerable to liability to third parties or face difficulty insuring the Property. Hence, we considered whether to remit the case to the Judge so as to allow the appellant to adduce evidence of the BCA's view on the safety and stability of the Property and the BCA's recommended course of action.

57 When this suggestion was put to the parties at the oral hearing, Mr Bull contended that the matter should be remitted because, compared to the gravity of the safety concerns, any prejudice to the respondent would be compensable in costs. Counsel for the respondent, Mr Mahendra Prasad Rai ("Mr Rai"), however, argued that the appellant had had ample opportunity to alert the BCA. The appellant had obtained Tritech's Report in December 2015; successfully re-opened the trial in April 2016; obtained the joint surveyor's 2016 Measurements in June 2016; filed Mr Lim K C's further expert affidavit in August 2016; and instructed his counsel for the second tranche of the trial in February 2017. Mr Rai emphasised that at each of these junctures, the appellant could have, but decided not to, approach the BCA. Mr Rai also highlighted that during the second tranche, he had specifically asked Mr Lim K C why, if the tilt was so serious that in his view the BCA would require it to be set upright, he had not written to the BCA to highlight the issue. Further, Mr Rai put to Mr Lim K C that the reason why he did not advise the appellant to report the tilt to the BCA was that he was not convinced that the BCA would take any action. In response, Mr Lim K C explained that he was simply consulted on the state of the Property and it was for the appellant to decide whether to make submissions

to the BCA. Having set out the background as such, Mr Rai submitted that the appellant should not be allowed to have another bite at the cherry and the interests of finality should prevail.

58 Having considered the matter carefully, we have concluded that we cannot now remit this issue to the Judge for further evidence to be taken from the BCA. The appellant must live with the tactical decisions he made in the course of litigation below in relation to the evidence he has chosen to adduce or omit. Furthermore, the Judge has made factual findings about the implications of breaching the BCA Safety Limits, and it is in the interests of finality that we do not re-open the inquiry.

59 Bearing in mind the evidential constraints the Judge was under, we see no reason to disturb the Judge's conclusion or his assessment of the expert evidence. Based on the evidence before us, in particular considering that there is no convincing evidence of the tilt increasing and the fact that the Property is structurally safe, we are not persuaded that it would be reasonable to require the respondent to bear the cost of rectifying the actual tilt using the Underpinning Method.

60 It is important that we emphasise the boundaries of our decision, which has been reached on the basis of the evidence led at the trial. Courts determine cases based on the evidence presented by the parties, which is often the result of tactical or strategic decisions made by the parties with the advice of counsel. That we find insufficient evidence before us to support the appellant's case does not imply that there is *in fact* no risk or defect of the sort alleged by the appellant; we conclude that such risk or defect has not been proven on a balance of probabilities based on the evidence presented. The appellant bears responsibility for the tactical decisions made throughout his case. Our decision

cannot exculpate the appellant if damage of the sort he now claims (albeit without the evidentiary basis) materialises in the future. If the appellant remains concerned that there is a *possibility* that structural defects could appear in the foreseeable future as a result of the tilt, we strongly urge the appellant to consult the BCA.

61 Accordingly, we dismiss the appeal on the first issue.

Issue 2: Damages for loss of amenity

62 As we have affirmed the Judge's decision to award damages based on the cost of the Aesthetics Method, we now proceed to consider the appellant's three remaining grounds of appeal.

63 First, if the absolute tilt is not eliminated, the appellant seeks damages of $150,000 for loss of amenity for the fear and discomfort of living in a house that has been tilted beyond the Safety Limits and his limited ability to renovate the Property going forward. Even if such damages for prospective loss of amenity are not awarded, he seeks damages of $50,000 for loss of amenity during the period from 2009 until such time as the Property is reinstated by the Aesthetics Method.

64 It may be useful to state some general principles at the outset. In addition to damages for physical damage to property, the court may award damages for non-pecuniary loss such as inconvenience and discomfort arising from the injury to the property. In the English High Court decision of *Ward v Cannock Chase District Council* [1985] 3 All ER 537, damages were awarded for the discomfort experienced by the plaintiffs due to the council property falling into disrepair and creating a hole in the plaintiffs' roof, until the date that the plaintiffs' property was restored. The court found it reasonably foreseeable that

the plaintiffs would experience discomfort due to the council's neglect. Where the plaintiffs' enjoyment of the property is not fully restored (or will not be restored for some time), an award may also be made to compensate the plaintiffs for the interference with their enjoyment of the property. Thus in *Scutt v Lomax* and *Bryant v MacKlin*, which concerned the tort of trespass (see [40]–[41] above), the English Court of Appeal supplemented an award for reinstatement of the trees with an award for the partial loss of amenity to the respective claimants.

65 We agree with the Judge that damages should not be awarded for the appellant's prospective loss of amenity. The Aesthetics Method addresses the appellant's discomfort with the sense that the Property is tilting. We are not persuaded that the appellant will continue to live in fear or discomfort due to his knowledge that the Property's absolute tilt is in breach of the Safety Limits. We agree with the Judge's conclusion that the appellant was mainly concerned with the appearance of a tilt which would be fully rectified by the Aesthetics Method. Though the appellant testified that he was fearful for the residents' safety when the tilt was reported to the BCA in April 2009, we infer from the fact that he has continued to live in the Property that he has felt assured that it is structurally safe. Even after discovering that the absolute tilt exceeds the Safety Limits, he did not report the matter to the BCA again or continue monitoring the tilt from the time of Tritech's Report, or the time of the 2016 Measurements, or even after the trial. It therefore appears to us that his concern is more with the sense of the tilt rather than with the absolute tilt.

66 Nevertheless, we award the appellant $50,000 in damages for *past* loss of amenity from 2009 until such time that the Property is reinstated by the Aesthetics Method. We acknowledge that the appellant and his relatives have had to live with the discomfort and inconvenience of sloping floors, cracks and

water ponding issues in the Property since 2009. It is reasonably foreseeable that causing a tilt to the Property would lead to such discomfort and would impair their enjoyment of the Property. We thus allow the appeal on the second issue to this extent.

Issue 3: Scope of works under Aesthetics Method

67 Next, the appellant argues that in quantifying the award pursuant to the Aesthetics Method, the Judge should have awarded (1) the cost of repairs to remove the sensation of tilt from the external façade, because the tilt was perceptible to persons who are more sensitive; (2) the cost of repairs to remove the sensation of a tilt from all the wet areas regardless of whether there is water ponding; and (3) the cost of new doors because the doors had been chamfered in order to mitigate the effects of the tilt.

68 In our view, the Judge did not err in denying the cost of repairs to the external façade and the remaining wet areas under the Aesthetics Method. Our reasons are as follows:

(a) As regards the external façade, the Judge's determination that the tilt was not perceptible from the outside was based on his site visit. We would be slow to interfere with this assessment without the benefit of a site visit. In any event, in his opening statement, the appellant's counsel at the trial below had taken the position that "the tilt is not visible to the naked eye from outside" and agreed it was "common ground that the tilt is not visible to the naked eye, as it stands now" from the outside. The appellant himself did not give evidence that the tilt was perceptible to him from the outside. His affidavit in fact states that the tilt is not visible and can only be sensed upon *entering* the building:

> I should make it clear that it is not my case that the structural integrity of the house has been compromised. That said, the impact of the tilt must not be underestimated. To be certain, it is not visible to the naked eye. In order to appreciate its existence, one needs to visit the premises. *On entering the premises*, one gets the feeling that one naturally tends to gravitate towards one side of the building. I respectfully invite the learned judge to visit the premises to have a clear idea of the actual state of the building. [emphasis added]

(b) As regards the wet areas that have not experienced water ponding, there was no evidence that the tilt in the bathrooms was perceptible without the water ponding.

69 As regards the doors, however, we are prepared to allow recovery for their replacement. The Judge refused the cost of replacing the doors because the key problem was with the door frames, which had tilted. He found no evidence as to why the doors had been chamfered and concluded that if the doors had remained in their original state, it would only have been necessary to replace the frames. On appeal, the appellant directs us to the clear evidence that the doors had been chamfered so that they could fit into the odd sizes of the tilted door frames. The appellant argues that a claimant should be able to recover damages for the harm or expense sustained by him if he takes reasonable steps to mitigate the immediate effects of a tort.

70 As a general principle, a plaintiff is allowed to recover damages for losses reasonably incurred in mitigation even though the resulting damage is greater than it would have been had the mitigating steps not been taken (see *McGregor on Damages* at para 9–102). A plaintiff's intervening act, reasonably taken to safeguard his interests, does not relieve the defendant of liability for the resulting loss. The test for recovery is simply whether the act or omission

which gave rise to the increased loss was a reasonable step for the plaintiff to take.

71 We see sufficient evidence that as a result of the tilt, some doors were unable to shut properly and had to be trimmed to fit their frames. This observation was made by both parties' quantity surveyors. Prof Tan also observed that due to the uneven floor levels, some doors had difficulty opening and closing. The only conclusion to be drawn from this evidence is that the appellant had chamfered the doors to fit the openings so that the doors continued to be usable whilst the aesthetic tilt remained uncorrected. In other words, it was in order to mitigate the consequential effects of the tilt that the doors had been chamfered. It was reasonable for the appellant to have done so, even if it resulted in damage to the doors, because they would otherwise have been unusable. We are therefore prepared to award the appellant the cost of replacing the doors. For replacing the door frames without replacing the doors, the Judge awarded the appellant only 30% of the total cost quoted; this amounted to $7,980 (GD at [73]). We therefore award the appellant the remaining 70% that the Judge deducted, *ie*, $18,620, as the cost of replacing the doors.

Issue 4: Costs of the second tranche of the trial

72 Finally, the appellant seeks to be awarded the costs of the second tranche of the trial. The Judge denied the appellant the costs of the second tranche because, in his view, the second tranche pursued an issue which he found to be unmeritorious, namely that the Property was continuing to tilt further. The appellant argues that he is entitled to costs because the second tranche revealed that the tilt was far more severe than originally thought, and that the Safety Limits had been exceeded. The first tranche had proceeded on erroneous figures that the respondent had obtained.

73 We agree that the appellant, as the successful party overall, should be awarded the costs of the whole trial, including the second tranche. Although it was not proved that the Property continued to tilt further, the evidence adduced in the second tranche completely changed the tenor of both parties' cases and the Judge's reasoning. Having found that the absolute tilt was beyond the Safety Limit of 1/150, the focus of the inquiry shifted to the significance of exceeding the Safety Limits and whether a safety reserve had to be restored. Thus, the appellant's attempt to re-open the evidence was not unmeritorious, even though his theory of a continuing tilt was ultimately rejected.

74 Although it could be argued that the appellant ought to have ascertained the current tilt of the Property prior to commencing the suit, the appellant had proceeded on the assumption that the data generated by Dr Yong and JIB Specialist Consultants Pte Ltd (*ie*, the 2009 Measurements, the tiltmeter measurements and the July 2012 Report) was accurate. This assumption also underlay the appellant's assertion during the second tranche that the Property was continuing to tilt further. In our view, it was not unreasonable for the appellant to have assumed that these earlier reports, which were closer in time to the tort and which represented that the tilt had ceased by 2012, were accurate and representative of the impact of the tort. We note that during the second tranche, the experts themselves were grappling with the data on the basis that both the 2009 Measurements and the 2016 Measurements were accurate. Since the appellant also had no reason to suspect that the tilt was more serious than that represented by the 2009 Measurements, or to doubt the conclusion in the July 2012 Report that the tilt had ceased, we do not think he can be faulted for not obtaining further readings before commencing the suit. Thus, we are of the view that the appellant should not be denied the costs of the second tranche. We

fix costs at $16,000 using the tariff applied by the Judge for one day of trial, plus reasonable disbursements.

Conclusion

75 In conclusion, our orders are as follows:

(a) We affirm the Judge's decision to award damages assessed using the Aesthetics Method, which we find to be the appropriate method of reinstatement.

(b) We award the appellant $50,000 for loss of amenity from 2009 to the time that the tilt is aesthetically rectified.

(c) We award the appellant the cost of replacing the doors, fixed at $18,620.

(d) We award the appellant the costs of the second tranche fixed at $16,000 plus reasonable disbursements.

76 Unless the parties are able to come to an agreement on costs, they are to furnish, within 14 days, written submissions limited to 10 pages each, setting out their respective positions on the appropriate costs orders for this appeal in the light of the present judgment.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Cavinder Bull SC, Lin Shumin and Madeline Chan (Drew & Napier LLC) for the appellants;
Mahendra Prasad Rai and Dean Salleh (Cooma & Rai) for the respondent.
