IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 231

Suit No 248 of 2014

Between

(1) Ng Siok Poh (administratrix of the estate of Lim Lian Chiat, deceased)
(2) Lim Hong Liu (administrator of the estate of Lim Lian Chiat, deceased)

… *Plaintiffs*

And

(1) Sim Lian-Koru Bena JV Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[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

[2017] SGHC 231

High Court — Suit No 248 of 2014
Kannan Ramesh J
3-5 November 2015; 26 February, 4 April, 13 June 2016; 20 February, 17 April, 30 June, 25 July 2017

27 September 2017

Kannan Ramesh J:

1 This case was about the house that Mr Lim Lian Chiat ("Mr Lim") built ("the Property"). The Property is located at No 30 Lorong K Telok Kurau. The present dispute raised interesting issues regarding damages for torts affecting land and interest on special damages for damage to property.

2 The plaintiffs sued the defendant in tort for causing damage to the Property. They obtained interlocutory judgment by consent with damages to be assessed. On 30 June 2017, I assessed the damages at $462,200.76 and delivered brief grounds of decision. On 25 July 2017, I decided not to award interest on the damages assessed and ordered the defendant to pay the plaintiffs' costs fixed at $68,000 and reasonable disbursements save for disbursements incurred for

the second tranche of the hearing. The plaintiffs now appeal against my decision. These are the full grounds of my decision.

Facts

The parties

3 The first plaintiff, Ms Ng Siok Poh, was Mr Lim's wife. The second plaintiff, Mr Lim Hong Liu, is one of Mr Lim's sons. After Mr Lim passed away on 7 October 1987, the plaintiffs were appointed to administer his estate. The first plaintiff passed away after this action ("Suit 248") was commenced.

4 The defendant is a Singapore-incorporated company and in the business of construction. The defendant is the developer of The Amery, a condominium which is located on the plot of land adjoining the Property.

Background to the dispute

5 Mr Lim, who worked in the construction industry, designed and built the Property in the 1970s as a family home. He had seven children with his wife; and the Property, which has seven bedrooms, reflects the size of the family ("the Lim family"). The Property was a labour of love for Mr Lim. Having purchased the land with his savings, Mr Lim built the Property over three years using carefully selected materials. Mr Lim's children grew up in the Property. Clearly, the Property had great sentimental value to the Lim family.

6 In the 1990s, after Mr Lim's death, two neighbours of the Lim family chose to sell their land to a developer and proposed that the Lim family similarly sell the Property for the parties to participate in a joint development of their land. However, the Lim family decided not to sell the Property. According to the second plaintiff, this was because the Property had "a special value to the

Lim [f]amily that transcends any monetary value that one can ascribe to it": it was constructed as the family home, and constitutes Mr Lim's legacy to his family. The Lim family was keen to preserve Mr Lim's legacy.

7 In 2007, property agents approached the Lim family to sell the Property. However, for similar reasons, the Lim family chose not to sell the Property.

8 In late 2008, the defendant began the construction works for The Amery. Thereafter, the defendant commenced excavation works for the construction of the basement carpark of The Amery.

9 In about late March 2009, the second plaintiff noticed that the Property had sustained damage: cracks had formed, tiles on the building apron had been forced out and the polyvinyl chloride grilles on the drains were bending and breaking. On 2 April 2009, he began to suspect that the Property was tilting when he observed that the metal main door grille was closing by itself. The tilting was also evident from ponding of water in the Property, and tests conducted using a marble ball which ran quickly in the direction of the tilt.

10 A joint inspection of the Property was conducted on 3 April 2009. Dr Yong Deung Ming ("Dr Yong"), a professional engineer engaged by the defendant, attended the inspection, and issued a letter to the defendant. In his letter, Dr Yong certified that, as of 3 April 2009, "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". However, the second plaintiff took objection to this letter and began corresponding with the Building and Construction Authority ("the BCA"). Shortly thereafter, on 8 April 2009, two tiltmeters were installed on the Property. Measurements were taken of the tilt on 9 and 25 April 2009 ("the April 2009 Measurements"). The April 2009

Measurements were taken by optical survey, as opposed to measurements from the tiltmeters, and purported to be measurements of the absolute tilt of the Property (see [13] and [42] below).

11 On 15 April 2009, the BCA informed the second plaintiff that it had issued a Stop Work Order directing the defendant to cease excavation works while Dr Yong conducted a detailed assessment of the same.

12 On 15 May 2009, Dr Yong issued a report on the excavation works. He then issued a further report, on 25 June 2009, certifying that the Property was safe for residential usage, and a letter on 11 August 2009 certifying that the Property was "structurally sound and safe for its continued occupation". As will be seen later, the accuracy of the April 2009 Measurements, which were reflected in Dr Yong's reports in May and June 2009, turned out to be the source of much controversy in this case.

13 Following the issuance of these reports, various measurements were taken from the tiltmeters from March 2010 to July 2012. It is important to appreciate that these measurements did not assess the absolute tilt of the Property, *ie*, the tilt *vis-à-vis* a vertical straight line (see further [42] below). They only measured how much more the Property tilted from 8 April 2009 onwards. Notably, by 8 April 2009, the Property had already tilted. The tiltmeter measurements did not account for this pre-existing tilt as of 8 April 2009. Rather, they used the state of the Property on 8 April 2009, which was assigned a notional tilt angle of 0.000, as a baseline, and measured the further tilt of the Property, after 8 April 2009, by reference to that baseline. Accordingly, these further measurements did not verify the accuracy of the April 2009 Measurements. They simply used the state of the Property on 8 April 2009 as a

baseline from which to measure how much more the Property had tilted as opposed to exactly how much the Property had tilted from the start.

14 The construction works eventually resumed, and the Temporary Occupation Permit for The Amery was issued in November 2010.

15 On 27 July 2012, JIB Specialist Consultants Pte Ltd prepared a report ("the July 2012 Report"), which was checked and approved by Dr Yong, after a further inspection of the Property on 24 July 2012, to assess whether its state had deteriorated from July 2010 to the date of the inspection. In the July 2012 Report, Dr Yong stated that he "was satisfied that the structural condition of the building remained as stable as it was two years ago". In other words, the Property was stable by July 2010. This conclusion was based in part on the readings taken by the two tiltmeters between March 2010 and July 2012 (see [13] above) assessing the situation against the state of the Property on 8 April 2009, which showed that the tilt had only worsened slightly from 2009 to 2010 before becoming stable after 2010. No measurements of absolute tilt (see [13] above and [42] below) were taken in July 2012. In other words, no measurements were taken to ascertain exactly how much the Property had tilted from the start.

16 As of the date of the proceedings before me, the Lim family continued to reside in the Property: the second plaintiff, two of his sisters, a brother, sister-in-law and niece, and two helpers occupied the Property. The Property remained registered in Mr Lim's sole name.

Procedural history

17 On 4 March 2014, the plaintiffs commenced Suit 248 in their capacities as the administratrix and administrator of Mr Lim's estate. Their case was that,

in constructing The Amery, the defendant caused damage to the Property, including the tilting of the Property, and was therefore liable in tort for private nuisance and negligence. The plaintiffs claimed the costs of reinstating the Property to its original state and of alternative accommodation and transport expenses while reinstatement works were carried out; and, alternatively, the diminution in value of the Property.

18 On 14 August 2014, the plaintiffs obtained interlocutory judgment, by consent, with damages to be assessed and with "all issues relating to causation, damages, cost and interest … reserved".

19 The first tranche of the assessment of damages hearing was convened on 3 to 5 November 2015. On 4 November 2015, I conducted a site visit to assess first-hand the extent of the problem caused by the tilt.

20 On 3 December 2015, shortly before written closing submissions were filed, the second plaintiff applied for leave to adduce further evidence of the current state of the tilt of the Property. Pertinently, during the first tranche of the hearing, the parties and their experts had proceeded on the basis that the Property had ceased to tilt since around 2010, in line with Dr Yong's conclusion in the July 2012 Report. The parties had relied on tiltmeter readings in the July 2012 Report showing that the tilt had stabilised from 8 April 2009 to 24 July 2012 (see [15] above). However, the second plaintiff sought to reopen the evidence on the basis that this common assumption was incorrect: the tilt had in fact worsened since 2010.

21 On 4 April 2016, I granted the second plaintiff's application. I ordered the parties to jointly engage an independent surveyor to measure the tilt, in line with a methodology to be agreed by the engineering experts, Mr Lim Kim

Cheong ("Mr Lim KC") for the plaintiffs and Assoc Prof Tan Siew Ann Harry ("Assoc Prof Tan") for the defendant, and these measurements would bind the parties. I also ordered the said experts to file a joint report or individual reports based on the measurements, and granted the parties leave to cross-examine the experts. Thereafter, the parties' engineering experts filed separate supplemental reports and the second tranche of the hearing was held on 20 February 2017.

The parties' submissions

22 Interlocutory judgment was granted on the basis that issues of causation would be reserved to the assessment of damages (see [18] above). In a joint expert report dated 12 January 2015, the parties' engineering experts agreed that "[t]he basement excavation of [The Amery] caused the damages and tilt to existing bungalow at [No] 30 Lorong K Telok Kurau". The parties' submissions on damages proceeded from this common ground.

23 The plaintiffs made the following submissions:

(a) First, on the measure of damages, the plaintiffs argued that they were entitled to the reinstatement costs and abandoned their alternative claim (see [17] above) as to the diminution in value of the Property. The plaintiffs submitted that the appropriate measure of damages was the reinstatement costs because they had a genuine desire to reinstate the Property, and the reinstatement costs were not unreasonable, *ie*, not grossly disproportionate to the benefit of reinstatement.

(b) Secondly, in terms of the mode of reinstatement, the plaintiffs initially suggested two types of reinstatement works. First, micro-pile underpinning works to lift up one end of the Property to remove the tilt and set the Property upright ("the Underpinning Method"). Secondly,

aesthetic works to remove any sense that the Property suffered from a tilt ("the Aesthetics Method"). The plaintiffs also submitted that, if the court adopted the Aesthetics Method, they should be awarded damages for loss of amenity. In their closing submissions, the plaintiffs made clear that the Underpinning Method was their preferred option but did not abandon the Aesthetics Method. However, in their supplementary submissions filed after the end of the second tranche, for quite different reasons, the plaintiffs argued that the Underpinning Method was the only appropriate mode of reinstatement. I will address those reasons later.

(c) Thirdly, the plaintiffs sought relocation and rental costs for the period in which the reinstatement works were to be carried out.

24 The defendant accepted that the proper measure of damages in cases of tortious damage to property was generally the cost of reinstatement. However, it contended that the costs of the Underpinning and Aesthetics Methods were "exorbitant" and "wholly unreasonable". The defendant also argued that Mr Ho Ngon Fatt ("Mr Ho"), the plaintiffs' expert who assessed the costs of rectifying the tilt under the Aesthetics Method, had acted on the instructions of the second plaintiff and was accordingly neither independent nor objective. I was invited not to place any weight on his report or testimony. Finally, the defendant submitted that the plaintiffs were only entitled to recover $47,600 to repair non-structural damages, with the Lim family having to live with the tilt for which a sum of $20,000 for loss of amenity was suggested as compensatory damages.

The issues

25 Four principal issues arose for determination:

(a) First, what was the appropriate measure of damages: was it the reinstatement costs, or the diminution in value of the Property ("the First Issue")?

(b) Secondly, if the appropriate measure of damages was the reinstatement costs, should damages be awarded based on the Underpinning Method or the Aesthetics Method ("the Second Issue"); and, if so, what was the quantum of damages that should be awarded?

(c) Thirdly, if it were appropriate to award damages based on the Aesthetics Method, were the plaintiffs also entitled to damages for loss of amenity ("the Third Issue")?

(d) Fourthly, was it apposite to award interest on the damages assessed, and what was the appropriate cost order ("the Fourth Issue")?

I will now address these issues in turn.

The First Issue

The law

26 In *Afro-Asia Shipping Company (Pte) Ltd v Da Zhong Investment Pte Ltd and others* [2004] 2 SLR(R) 117 ("*Afro-Asia*"), the leading local authority on the measure of damages for tortious damage to land, Judith Prakash J (as she then was) set out the relevant principles. At [130], Prakash J noted that the typical measure of damages is the cost of replacement or repair. However, the cost of reinstatement is not appropriate "in situations where it was not contemplated or where it was not practical or sensible to reinstate", and where reinstatement is "out of all proportion to the injury to the plaintiff".

27 I agreed with Prakash J's statement of the principles, which the parties did not dispute. Having reviewed the authorities, in my judgment, in cases of tortious damage to land, the victim may only recover the costs of reinstatement if two conditions are satisfied.

28 First, the victim must intend to continue occupying the property and/or reinstate the land: see Harvey McGregor QC, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor*") at para 37-006. In *Hole & Son (Sayers Common) Ltd v Harrisons of Thurnscoe Ltd* [1973] 1 Lloyd's Rep 345, the reinstatement costs were not awarded as the plaintiff intended to demolish the cottages which the defendant had damaged and so did not intend to repair them. Similarly, in *CR Taylor (Wholesale) Ltd and others v Hepworths Ltd* [1977] 1 WLR 659 ("*Taylor*"), the defendant's employees started a fire which destroyed a disused billiard hall on the first plaintiff's land. The reinstatement costs were not awarded as the first plaintiff held the property on which the billiard hall stood solely for its development potential, and did not intend to reinstate it.

29 Secondly, the victim's intention to reinstate must be reasonable. The touchstone for reasonableness in this regard is whether the cost of reinstatement is out of proportion to the injury the plaintiff has suffered: see *McGregor* at para 37-011. In this regard, two factors are relevant:

(a) First, whether the property has unique or sentimental value, or has a special use or purpose. In *Hollebone and others v Midhurst and Fernhust Builders Ltd and Eastman & White of Midhurst Ltd* [1968] 1 Lloyd's Rep 38 (at 39), the court found that the damaged property was unique due to its size, position, features, seclusion and location. In the circumstances, the court found that the plaintiffs had acted reasonably

in repairing the damage and awarded the costs of the same to the plaintiff.

(b) Secondly, whether the reinstatement costs (as opposed to damages for diminution in value) are disproportionate to the victim's loss. In *Afro-Asia*, the plaintiff sued the defendants in tort for damage caused to their building. The plaintiff's shareholders then consented to the sale of the building. Prakash J found that it would not be reasonable for the plaintiff to repair the property before selling it. The benefit of reinstatement did not justify the cost of doing so as the property would soon be sold, the plaintiff and its tenants had continued to occupy the building (thus indicating that it was still fit for its purpose), and repairing the property would not significantly increase the income that could be earned before it was sold: see *Afro-Asia* at [132]. Similarly, in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2009] 1 SLR(R) 385 ("*Sonny Yap*"), the plaintiff sued the defendant for breach of contract in building undersized bedrooms. Prakash J held that it would not be reasonable to demolish and rebuild the bedrooms as the cost of doing so would be disproportionate given that the plaintiff's loss was not the lack of usable bedrooms but the lack of additional space in those bedrooms: see *Sonny Yap* at [127].

30 In my judgment, both of the above two factors go towards whether, in the light of the loss which has been sustained, it is reasonable to reinstate. That is the perspective from which the issue of whether reinstatement is reasonable should be assessed. This was made clear in *Sonny Yap* at [126], where Prakash J cited Lord Jauncey's *dictum* in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 ("*Ruxley*") at 357E that if is unreasonable to award the reinstatement costs, "it must be because the loss sustained does not extend to

the need to reinstate". This neatly sums up the core consideration: does the damage suffered justify reinstatement? I note that *Sonny Yap* and *Ruxley* were actions for breach of contract and not in tort. However, the parties here did not dispute that the same principles applied to the measure of damages for tortious damage to land. I took the view that this common premise was well-founded for the following reasons.

(a) As a matter of authority, in *Southampton Container Terminals Ltd v Schiffahrtsgesellschaft "Hansa Australia" mbH & Co (The Maersk Colombo)* [2001] 2 Lloyd's Rep 275, Clarke LJ, delivering the main judgment of the English Court of Appeal, held at [43] that the principles which governed the measure of damages for tortious damage to land and breach of contract in circumstances like *Ruxley* were the same. Clarke LJ noted that the House of Lords in *Ruxley* had relied, *inter alia*, on *Taylor* which involved tortious damage to land.

(b) As a matter of principle, as May J noted in *Taylor* at 667D–E, the two conditions set out at [28]–[29] above reflect two basic principles of the law of compensatory damages, which apply regardless of whether the action is in tort or for breach of contract. First, the overarching aim is to put the victim in the position that he or she would have been in if the wrong had not been committed. Secondly, this guiding aim, is however qualified by the requirement of reasonableness as seen from the perspective of both parties: the damages awarded must be "reasonable … as between the plaintiff on the one hand and the defendant on the other": see *Taylor* at 667E.

31 Nonetheless, in my judgment, the approach in contract towards claims for loss of amenity is not quite the same as that in cases of torts affecting land.

I will return to this point under the Third Issue at [80]–[81] below. I now turn to the application of the principles in [28]–[30] above to the facts.

Application to the facts

32 First, I found that the Lim family intended to continue occupying the Property and to reinstate the Property (if the reinstatement costs were awarded). It was plain that the Lim family (and in particular the second plaintiff) attached significant sentimental value to the Property for the following reasons.

(a) First, the Property had by and large been preserved in its original form. The Property's aesthetics reflected the design elements of a 1970s construction. This was very evident to me from my site inspection. The Property stood in stark contrast to the new condominium projects and houses which had sprouted adjacent to it and in its vicinity. It had retained the mould that it was cast in in the 1970s. That the Lim family had resisted the temptation to recast the Property in modern iteration illustrated their clear desire to preserve the Property in the form in which it was constructed by Mr Lim. The Property was more than a residence; it was a home for his family. The plaintiffs wanted to maintain that. This demonstrated that they attached significant sentimental value to the Property.

(b) Secondly, despite newer residential options in the market, the second plaintiff, who was unmarried, and three of his siblings continued to reside in the Property (see [16] above). Moreover, the second plaintiff's evidence, which I accepted, was that Mr Lim's children and grandchildren continued to flock back to the Property for family celebrations. This was further evidence of the Lim family's sentimental attachment to the Property.

(c) Thirdly, the Lim family had rebuffed two offers to sell the Property to prospective purchasers who had plans to build a condominium development where the Property stands (see [6]–[7] above). Given the number of condominium developments in the vicinity, it seemed quite apparent that the Property could have been sold to developers for a substantial sum taking into account its development value. However, the plaintiffs resisted the temptation. This lent credence to the second plaintiff's assertion that the Property was "the centre or nucleus of [the] family".

(d) Fourthly, close to 30 years after Mr Lim's death, the Property remained registered in Mr Lim's sole name (see [16] above). This supported the second plaintiff's assertion that the Property was Mr Lim's legacy, which the Lim family was keen to preserve.

For these reasons, I concluded that the Property carried significant sentimental value to the Lim family and to the second plaintiff in particular. Having made that finding, I accepted the second plaintiff's clear and consistent evidence that the Lim family did not intend to sell the Property, and was keen to reinstate it to preserve Mr Lim's memory and legacy. The defendant did not challenge this evidence, as it was *not* the defendant's case that the Lim family intended to sell the Property or would not reinstate it.

33 Secondly, in my judgment, the reinstatement costs which I awarded by applying the Aesthetics Method were not disproportionate to the loss sustained. At this juncture, I note that there was no credible evidence on the appropriate quantum of damages if the measure of damages was the diminution in value of the Property. In his supplemental report, the defendant's expert, Mr Lee Cheng Sung ("Mr Lee"), opined that the sum of $105,000 reflected the diminution in

value. However, during cross-examination, it became clear that this figure did not reflect the diminution in value of the Property. First, Mr Lee agreed that the figure of $105,000 did not reflect the fall in value of the Property but the cost of replacing certain items. Secondly, Mr Lee did not deny that the methodology which he used in arriving at the figure of $105,000 was unheard of. Thirdly, Mr Lee also agreed that a 10% figure which he adopted in arriving at the value of $105,000 was arbitrary. For all these reasons, it was clear that there was no credible evidence before me regarding the quantum of damages if the measure was the diminution in value of the Property. Unsurprisingly, the defendant did not rely on the $105,000 sum in its closing submissions.

34 For these reasons, I concluded that the appropriate measure of damages was the reinstatement costs. Naturally, the plaintiffs have not appealed against my conclusion in this regard; nor has the defendant filed an appeal. The real issue is therefore whether the reinstatement costs ought to be based on the Underpinning Method or the Aesthetics Method, to which I now turn.

The Second Issue

The law

35 Where the measure of damages is the reinstatement costs, and there is more than one mode of reinstatement, the court must decide which mode of reinstatement to adopt to assess the damages. I drew guidance from the following two authorities on the proper approach in such circumstances.

36 In *Lodge Holes Colliery Co Ltd v Mayor of Wednesbury* [1908] AC 323, the local authority sued mine owners whose works under a highway caused the road to subside. The local authority subsequently restored the road to its former level at a cost of about £400. An equivalent road could have been built for £80.

Lord Loreburn LC, delivering the principal judgment of the House of Lords, recognised that a court should be slow to countenance "captious objections" by a tortfeasor to the rectification methods adopted by the victim. A court "should be very indulgent and always bear in mind who was to blame" (at 325). But his Lordship held that the local authority was only entitled to £80, the cost of an equivalent road, for the following reasons (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 will lead to a ruinous and wholly unnecessary outlay. … Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them with the bounds of reason.*
>
> [emphasis added]

37 In *Dodd Properties Ltd and another v Canterbury City Council and others* [1980] 1 WLR 433, the defendants' construction works caused damage to the plaintiff's garage. At first instance, an issue arose as to whether the rectification costs should be assessed based on the plaintiff's proposals for extensive repairs or on the defendants' more modest proposals. Cantley J noted that the plaintiff's proposed works would have cost more than twice that proposed by the defendants and taken three times as long to complete (at 441E), before making the following observations (at 441F–G):

> 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.*
>
> [emphasis added]

Cantley J then held that the rectification costs should be assessed on the basis of the defendants' proposals. The plaintiff appealed against Cantley J's decision on another ground; and, in allowing the appeal (at 447-459), the English Court of Appeal did not criticise Cantley J's reasoning or disturb the finding on this point.

38 I gleaned the following principle from these two cases. Where there is more than one mode of reinstatement, 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 (see Andrew Burrows, *Remedies for Torts and Breach of* Contract (Oxford University Press, 2004) ("*Burrows*") at p 235). This follows from the same principle of reasonableness that governs the choice of the measure of damages, and is an extension of the inquiry into whether the loss extends to the need to reinstate (see [30] above). The focus here is whether the loss merits more extensive rectification in the face of a less costly alternative, weighing the relative costs and benefits of either in the process.

Application to the facts

39 I shall first examine the relative advantages of the Underpinning Method *vis-à-vis* the Aesthetics Method.

The relative advantages of the Underpinning Method

40 In this case, the plaintiffs put forward two modes of reinstatement: the Underpinning and the Aesthetics Methods (see [23(b)] above). Both of these would have eliminated the sense that the Property suffered from a tilt. However, only the Underpinning Method would have eliminated the tilt altogether.

41 Significantly, the plaintiffs' initial position, as stated in their closing submissions after the first tranche of the hearing, was that the Underpinning Method was appropriate because the tilt had reduced the Property's safety zone ("the Safety Reserve"), and not that the Property had continued to tilt. The Safety Reserve is not a technical term. It essentially means the Building's tolerance to further tilting. As will be noted later, as described by the plaintiffs, the Safety Reserve is defined by reference to certain technical safety limits which are based on ratios. One must therefore appreciate the scientific background to understand the concept.

42 The technical term for a tilt in this context is "angular distortion", which is measured in the form of a ratio. The ratio measures the absolute tilt of a building. Absolute tilt refers to the deviation from verticality, *ie*, the tilt *vis-à-vis* a vertical straight line. This must be distinguished from "differential distortion". Differential distortion refers to the difference in the absolute tilt, or angular distortion, of two points, *eg*, the east and west sides of a building. Differential distortion occurs where a building does not tilt uniformly, *ie*, where different parts of a building tilt to different degrees. For present purposes, we are concerned only with absolute tilt.

43 In the present case, two ratios were relevant: 1/500 and 1/150 ("the Safety Limits"). It was undisputed that the BCA had adopted the Safety Limits by adopting the Eurocode 7 on Geotechnical Design which contained them.

44 Before the second tranche of the hearing, the plaintiffs' case was that the defendant's works had moved the tilt closer towards the Safety Limits and had thus reduced the Safety Reserve. Any future incident which caused further tilting would render the Property unsafe. Thus, the Property ought to be set

upright, which in turn meant that the reinstatement costs should be assessed based on the Underpinning Method.

45 In the second tranche of the hearing, the plaintiffs shifted ground significantly. On the basis that the Property had continued to tilt (which was contrary to the position found by Dr Yong), they contended that the ratios for all four corners of the Property had breached the Safety Limits. The Property was thus unsafe in view of the breach of the Safety Limits and the continuation of the tilt. Accordingly, the plaintiffs submitted that the BCA would require the tilt to be eliminated. This raised quite different considerations. It was therefore evident that one had to determine whether the basis for the submission – that the Property had continued to tilt – was correct.

46 In the premises, there were three factual issues for me to determine.

(a) First, was the Property continuing to tilt or had it stabilised? This was the basis on which the evidence was reopened (see [20] above).

(b) Secondly, had the Safety Limits been exceeded and what was the nature or purpose of the Safety Reserve?

(c) Thirdly, what followed from my findings on points [(a)]–[(b)] above? In particular, was the Property unsafe for habitation and would the BCA require the Property to be set upright?

(1) The stability of the Property

47 It was undisputed that the measurements of the tilt taken by Tang Tuck Kim Registered Surveyor ("TTK") in June 2016, the surveyor appointed by the parties in accordance with my directions (see [21] above), showed that the tilt was worse than what was registered in the April 2009 Measurements (see [12]

above). The plaintiffs' case was that the measurements were different because the Property had continued, and was continuing, to tilt. Their theory, as reflected in a graph that was tendered during the second tranche of the hearing, was that the tilt had stabilised from 2010 to about July 2012, when further measurements had been taken and used for the July 2012 Report (see [13] above), before worsening thereafter. This theory was based on the fact that the tiltmeters, which were installed on 8 April 2009, had not recorded that the tilt had significantly worsened from then until July 2012 (see also [20] above).

48 I had several difficulties with the plaintiffs' theory.

(a) First, during cross-examination, Mr Lim KC said that he had "no clues" why the tilt would have worsened. However, and crucially, he accepted that even if the tilt had worsened after July 2012, this would not have been due to the defendant's excavation works but to some fresh and intervening event. Therefore, even if the Property had continued to tilt and was continuing to tilt after July 2012, the defendant would not be liable to the plaintiffs for the continuing tilt (on their pleaded case).

(b) Secondly, Assoc Prof Tan's evidence was that the tilt would have ceased after early 2012, by which time the basement base slab of The Amery was cast and sealed and permanent structures were constructed to prop up The Amery. Mr Lim KC agreed with this proposition. This was a significant point in my view. Both experts were in agreement that, at the very latest, the completion of the construction of the basement of The Amery would have stopped the Property from tilting. This undercut the plaintiffs' case that the Property was continuing to tilt post July 2012 by reason of the tortious acts of the defendant.

(c) Thirdly, the plaintiffs engaged Tritech Engineering & Testing (Singapore) Pte Ltd ("Tritech") to measure the tilt in December 2015 (and had relied on Tritech's report in applying to reopen the evidence). If the Property was continuing to tilt, then the tilt would have worsened from December 2015 to June 2016, when the measurements for the TTK report were taken, and this would have been apparent from the disparity between the Tritech and the TTK measurements. Yet Assoc Prof Tan's evidence, which I accepted, was that the measurements in the Tritech report were very close to TTK's measurements. This indicated that the Property had not tilted from December 2015 to June 2016, and thus cast doubt on the theory that the Property was continuing to tilt.

(d) Fourthly, if the plaintiffs had believed that the Property was continuing to tilt, it was unclear why further monitoring of the Property was not done, following the readings taken by Tritech, to demonstrate that the Property was continuing to tilt after December 2015, to emphatically register that point. I found this omission troubling especially because the need for further monitoring was noted in Mr Lim KC's supplementary report. Yet, no effort was taken to carry out such activity or to apply to the court for directions for this purpose.

(e) Fifthly, if the Property had continued to tilt from July 2012, and was continuing to do so, the situation would have been apparent to the plaintiffs and to the engineering experts before the first tranche of the hearing. Yet, the parties were happy to proceed on the basis that the tilt had ceased. This also indicated that the tilt had stabilised.

49 For these reasons, I found that the Property had ceased to tilt, at the very latest, by July 2012, after the construction of The Amery was completed, and had stabilised since then.

50 Ultimately, as Mr Lim KC accepted, there was another explanation for the differences between the April 2009 Measurements and those taken in June 2016 by TTK: *the April 2009 Measurements were inaccurate*. I found that this was why the two measurements differed. I will explain.

(a) The parties and their experts accepted that the completion of the construction of the basement of The Amery would have stopped the Property from tilting any further (see [48(b)] above). The plaintiffs did not identify any other event, *eg*, a tortious act by the defendant or third parties, which would have caused the Property to tilt further after July 2012. Thus, the difference between the April 2009 Measurements and the June 2016 measurements by TTK could not be explained on the basis that the Property had continued to tilt after July 2012.

(b) The tiltmeter measurements that were used for the purpose of the July 2012 Report measured how far the Property tilted from the baseline state of the Property on 8 April 2009 (see [13] above). They showed that the tilt had only worsened slightly between 8 April 2009 and 2010 before stabilising after 2010 (see [15] above). Thus, the measurements of the absolute tilt in December 2015 (by Tritech) and June 2016 (by TTK) ought to have been only slightly different from April 2009 Measurements. (As noted at [15] above, no measurements of the absolute tilt were taken in July 2012).

(c) However, there was in fact a vast disparity between the April 2009 Measurements on the one hand and the Tritech (December 2015)

and TTK (June 2016) measurements on the other (notably, these latter measurements were broadly the same).

(d) The parties did not challenge the TTK measurements that were taken in June 2016. As noted at [(a)] above, the vast disparity between the 2009 measurements and those taken in 2015 (Tritech) and 2016 (TTK) could not have been due to the tilt having significantly worsened after July 2012 as the consensus of the experts was that the tilt would have stabilised by then, following the completion of the basement.

The inexorable conclusion was that the April 2009 Measurements were incorrect.

51 Finally, notwithstanding the position that was taken in the second tranche, I note that, in their supplementary submissions, the plaintiffs did not argue that the Property had tilted after July 2012 and was continuing to do so. Instead, they emphasised that the tilt was worse than they had originally thought without offering any reasons why the tilt had in fact worsened. I found this telling. The plaintiffs implicitly accepted that their case that the Property had continued to tilt after July 2012 had fallen away.

52 Accordingly, the analysis on the appropriate remedy must proceed on the basis that the Property had stabilised.

(2) The nature of the Safety Reserve

53 The TTK Report indicates that TTK measured the tilt at eight points. At seven points, the tilt had exceeded the Safety Limits. The parties accepted that the TTK measurements were accurate. Thus, I found that the Safety Limits had been exceeded at all but one point in the Property. Hence, the Safety Reserve

had been reduced and effectively eliminated. The crucial question, to which I now turn, was what followed from this finding.

(3) The safety of the Property

54 It was undisputed, and I found, that the Property was still safe for habitation notwithstanding that the Safety Limits had been exceeded.

55 However, the experts disagreed on whether the fact that the Safety Limits had been exceeded would have any further implications.

(a) Mr Lim KC testified that the BCA, if notified of the readings and the situation, would order the tilt to be remedied by the Underpinning Method because the Safety Reserve had been lost.

(b) Assoc Prof Tan disagreed. He testified that a distinction should be drawn between old buildings, with a predisposition to tilt, and which were not designed to today's standards, and new properties that were to be constructed today. In relation to old buildings, the BCA's central concern was whether the building was structurally safe. If it was, the BCA would not require the Safety Reserve to be restored because the Safety Limits were design parameters for new constructions. Otherwise, many old buildings in Singapore would have to be set upright because the Safety Reserve has been lost despite their being structurally safe.

56 I accepted the evidence of Assoc Prof Tan for the following reasons.

(a) First, I noted that the allegation that the BCA would require the tilt to be eliminated if it was made aware of the situation was conspicuously absent from Mr Lim KC's supplementary report. Mr Lim KC only made this assertion during the second tranche of the hearing.

One would have thought that a matter of such purported significance would have been driven home emphatically in the supplementary report. But it was tellingly silent on this point. Moreover, evidence was not reopened on this basis but on the premise that the Property had continued and was continuing to tilt, which I have not accepted (see [48]-[49] above).

(b) Secondly, and crucially, I did not understand why the BCA was not informed that the Safety Limits had been exceeded if it would have required the Property to be set upright upon learning this. It seems fairly obvious that, if the BCA had required the Property to be set upright, that would have fortified the plaintiffs' case that the Underpinning Method was the appropriate methodology for reinstatement. The interval between the two tranches of the hearing – the first tranche concluded on 5 November 2015 and the second tranche was held on 20 February 2017 (see [19] and [21] above) – afforded sufficient time for the plaintiffs to secure a clear position from the BCA. After all, the plaintiffs were no strangers to communicating with the BCA having lodged complaints with the BCA in the past resulting in a Stop Work Order being issued against the defendant's works (see [10]-[11] above). However, the BCA was not so informed and the plaintiffs did not satisfactorily explain this omission. Consequently, I was asked to consider and decide on the approach that BCA would have taken on the basis of expert testimony which, as Mr Lim KC ultimately admitted, was speculative.

(c) Thirdly, I found Assoc Prof Tan's evidence logical and cogent. If the Property was structurally safe and there was no evidence of further tilting, I would imagine that the BCA would not have required the costly and invasive procedure of deploying the Underpinning Method even if

> the Safety Reserve was no longer there. I was persuaded by Assoc Prof Tan's view that a different perspective on the Safety Reserve would be taken as regards old buildings, with the paramount consideration being the structural safety rather than the Safety Reserve.

57 In this case, it was not in dispute that the Property was structurally safe: Mr Lim KC's position was that the Property was unsafe in the sense that the Safety Limits had been exceeded *and not that it was structurally unsafe*. I therefore found that the Property was structurally safe and, adopting Assoc Prof Tan's evidence, that the BCA would not require it to be set upright.

58 In summary, the plaintiffs' case on the implications of the loss of the Safety Reserve was entirely built on the BCA's likely response to the loss of the Safety Reserve. In this regard, I am cognisant of the fact that the burden is on the plaintiffs to establish the approach that the BCA would take. But I did not have evidence from the BCA on what its response would have been. I was asked to conclude, based on Mr Lim KC's testimony, that it would have required the Property to be set upright. But Assoc Prof Tan gave a cogent explanation why the BCA would not have acted as Mr Lim KC said it would. In the final analysis, I was unpersuaded by Mr Lim KC's evidence here.

59 I shall now consider the relative costs of the Underpinning Method vis-à-vis the Aesthetics Method.

The relative costs of the Underpinning Method

60 With regard to the risks of the Underpinning Method, Assoc Prof Tan's initial position was that it would involve "major and difficult foundation works" and would constitute "a delicate process … [that] may cause more damage to the house when not executed correctly". However, the engineering experts

eventually agreed that, if it was carried out properly, the Underpinning Method would entail "minimal risk … [of] further damage to [the Property]" and no risk of damage to the surrounding properties.

61 In terms of the cost of the Underpinning Method, the plaintiffs received three quotations. During cross-examination, Mr Lim KC accepted that the least expensive quotation had not included certain items. I therefore found that the price stated therein was not a sound basis to assess the cost of the Underpinning Method. Mr Lim KC's final position was that the most suitable quotation was that provided by Ryobi GeoTech Pte Ltd ("Ryobi"). The price stated in the Ryobi quotation was $1,992,000, but Mr Lim KC adjusted it upwards as his view was that the Ryobi quotation was not wholly complete. The final figure, which the plaintiffs relied on as the cost of the Underpinning Method, was $2,292,000. This was much higher than the cost of the Aesthetics Method, which Mr Ho finally quantified at $665,094.15.

My decision on the appropriate mode of reinstatement

62 Given that the Underpinning Method was significantly more expensive than the Aesthetics Method, the issue which I had to resolve was whether the latter would result in the property having a significantly diminished appearance, life or utility as compared to the former (see [38] above). As noted at [40] above, both methods of rectification would have eliminated the sense that the Property suffered from a tilt. Granted, the Underpinning Method would have gone further in actually eradicating the tilt by setting the Property upright, which in turn would restored the Safety Reserve. But, as I found, restoration of the Safety Reserve was not material. The question could therefore be distilled to whether it was reasonable to incur the significantly higher costs of the Underpinning Method when the Aesthetics Method, with its significantly lower costs, would

have equally removed the sense of the tilt. Put another way, the question was whether the result of deploying either method would have a significantly different impact on the Property's life or utility. I found that they would not have such a different impact to justify the significantly higher costs of the Underpinning Method, for the following reasons:

(a) First, it was undisputed that the Property was safe for habitation (see [54] above) and I found that the BCA would not require it to be set upright due to the loss of the Safety Reserve (see [57] above). This conclusion significantly undermined the need for the Underpinning Method as it meant that the Property did not have to be set upright as a matter of safety. The only issue was therefore how best to deal reasonably with the tilt.

(b) Secondly, the plaintiffs' principal contention before the second tranche of the hearing was that, because the Safety Reserve was reduced, the Property was at risk of becoming unsafe due to a subsequent event (see [44] above). However, this argument was grounded in speculation because I had no basis to assess what that incident might be and how it would affect the Property. More importantly, if such an incident occurred and the elements of a cause of action were made out, it would be the future tortfeasor's obligation to remedy the plaintiffs' loss, perhaps by paying for the Underpinning Method to be deployed. In my judgment, the defendant could not bear the responsibility of remedying damage which may or may not arise due to a future event.

(c) Thirdly, the cost of the Underpinning Method was significantly higher than that of the Aesthetics Method. Further, the plaintiffs were also prepared to accept that the Property is valued at $7.9m: on that basis, the cost of the Underpinning Method is 29% of the value of the

> Property. If there was no real justification for setting the Property upright, what justification was there for utilising a far more expensive option which produced broadly the same result?

63 In summary, it must be remembered that the plaintiffs sought the costs of the Underpinning Method not for the purpose of restoring an unsafe house to a safe condition, but to ensure that a structurally safe house was restored its safety buffer against an unknown and speculative contingency. The key question was whether the loss of the Safety Reserve extended to or merited a much more expensive mode of rectification when the Property remained structurally safe (see [38] above). I found that it did not. Ultimately, the issue was about remedying the perception or sense of the tilt and not the tilt itself. This pointed clearly to the Aesthetics Method.

64 For the above reasons, I found that the reinstatement costs should not be assessed on the basis of the Underpinning Method. I found that they should be assessed based on the Aesthetics Method.

Application of the Aesthetics Method

65 Mr Ho performed "a cost estimate based on aesthetic alignment", *ie*, he assessed the costs of works which he considered necessary to remove the sense that the Property had tilted. I was not persuaded by the defendant's criticisms of Mr Ho's evidence (see [24] above). In my judgment, the figures in the spreadsheets that Mr Ho placed before me as exhibits P1, P2 and P3 offered an adequate basis for assessing the appropriate quantum of damages based on the Aesthetics Method. As noted at [34] above, the defendant has not appealed against my decision.

66 I will first set out the general principles which I adopted in applying the Aesthetics Method, before discussing individual items by reference to P3.

General principles

67 First, when I inspected the Property on 4 November 2015, I noticed the tilt in several parts of the Property, particularly in the living room. However, despite multiple attempts to perceive the tilt from outside the Property, I could not visualise or sense that the Property was tilting from outside. Thus, I was not inclined to allow items for works which sought to address the tilt, from an aesthetics perspective, when the Property was viewed from the outside. Notably, Mr Ho did not suggest that any issues would arise if an aesthetic adjustment of the interior was performed without adjusting the exterior.

68 Secondly, Mr Ho sought to reflect the cost of replacing existing materials and finishes in the house, *eg*, broken onyx floor and UK imported anti-slip mosaic (items 1.1 and 1.2 in P3), with the same or similar materials, where he assessed that such materials and finishes would be impacted by the works and would thus need to be replaced. I was persuaded that this was a fair approach and adopted the rates which Mr Ho proposed, which Mr Lee did not dispute.

Individual items

(1) Items which I allowed in entirety

69 I allowed items 1.1, 1.3, 1.4, 1.6, 1.8, 2.1, 2.2, 2.5, 3.1, 5.2, 8, 9 and 10 in entirety. After inspecting the Property, hearing the experts and reviewing the parties' submissions, I found that these works were necessary to address the perception of a tilt and that Mr Ho's rates were appropriate. As the defendant has not appealed against my decision, I shall say no more about these items.

(2) Items which I allowed in part

(A) WORKS FOR THE BATHROOMS

70 Items 1.2, 1.5 and 1.7 principally concerned works for the bathrooms in the Property (floor tiles, wall tiles and waterproof ceiling). In his supplemental report, Mr Lee accepted that there were ponding issues in two bathrooms in the Property, but denied that there were such issues in two other toilets and at the kitchen floor on the first storey. Neither Mr Ho nor the plaintiffs carried out a building survey of the Property to determine whether all the bathrooms suffered from ponding problems. In the circumstances, I found that only two bathrooms needed to be rectified.

71 Mr Ho testified that all of the bathrooms were roughly of the same size, and that the cost of the items of work for two bathrooms could be determined, by a simple division and multiplication exercise, from the total cost of the items of works. In relation to items 1.2, 1.5 and 1.7, Mr Ho categorised the works into those for the first, second and third storeys of the Property. Notably, the works for the first storey included works for the kitchen. By contrast, the works for the second and third storeys only pertained to the bathrooms. I decided that it would be more appropriate to determine the cost of works for two bathrooms based on the figures for the second and third storeys, as these related to bathrooms alone, instead of the total cost of the items which would incorporate the cost of the works for the kitchen. There were six bathrooms on the second and third storeys. Therefore, I granted two-sixths (a third) of the cost of the works for the second and third storeys in items 1.2, 1.5 and 1.7, *viz*, $1416.00, $7533.33 and $424.80 respectively.

72 Item 7 concerned sanitary and plumbing works. For the reasons given in [71] above, I similarly granted two-sixths of the total costs of the works, *viz*, $17,850.

(B) MISCELLANEOUS WORKS

73 Item 3.2 concerned the timber doors and frames. Mr Ho accepted that the key problem was with the frames, which had tilted. However, he said that the doors also had to be replaced because their edges had been chamfered by the defendant, at the Lim family's request, to fit the existing frames. Yet there was no evidence before me on who had chamfered the doors and why they had done so; and Mr Ho accepted that, if the doors had remained in their original state, it would only have been necessary to replace the frames. The plaintiffs therefore did not discharge their burden of proof in relation to a claim for the cost of the doors. Mr Ho testified that the frames would cost about 30% of the total costs he had quantified. I therefore allowed 30% of item 3.2, *viz*, $7980.00.

74 Item 11 was the costs of relocation while the works were carried out. Mr Ho allowed for eight months of relocation costs for a total of $96,000. However, he conceded that this figure came from the plaintiff; and that, in his assessment, six months would be a reasonable time to complete the work. I noted that Mr Lee said that the works would take eight to nine months. Yet, both his and Mr Ho's assessments were based on the assumption that all the items of work in P3 would be carried out. However, I have only assessed damages on the basis of some of the items of works in P3. I thus decided that I would allow Item 11 in part on the basis that the works would take six months. This yielded a sum of $72,000.

(3) Items which I did not allow

75 Items 2.3, 4, 5.1 and 6 concerned works which sought to address the tilt, from an aesthetics perspective, when the Property was viewed from the outside. These were, respectively, plastering the external walls, scaffolding for works to the external walls, painting the external walls, and replacing the canopy roofs which had to be removed to carry out the external plastering works. However, as noted at [67] above, I was unable to perceive any tilt from the outside when I inspected the Property. Thus, I did not account for these items in assessing damages.

76 Secondly, I did not account for items 1.9 and 2.4 in assessing damages. Mr Ho conceded that these items were unconnected to aesthetic issues attributable to the tilt.

(4) Summary

77 Based on the above, I assessed the reinstatement costs, applying the Aesthetics Method, and the relocation costs at a total of $462,200.76. A tabulation of the breakdown using the framework of P3 is annexed hereto.

The Third Issue

78 The third issue was whether, given that I had assessed the reinstatement costs based on the Aesthetics Method, the plaintiffs were entitled to recover a further sum for loss of amenity.

The law

79 In *Sonny Yap* (see [29(b)] above), Prakash J, relying on *Ruxley*, awarded $50,000 to the plaintiffs for the loss of amenity consequent on the defendant's

breach of contract in constructing undersized bedrooms. The award was for "the inconvenience to be experienced from the shortfall over the years": see *Sonny Yap* at [129]. In this case, both parties treated *Ruxley* and *Sonny Yap* as directly applicable though the actions there were not in tort but for breach of contract.

80 However, I was not convinced that *Ruxley* is applicable to a claim for loss of amenity for a tort affecting land. The award for loss of amenity for breach of contract in *Ruxley* remains controversial, in particular because its theoretical basis is unclear. Lord Mustill rationalised the award as compensation for the "consumer surplus" inherent in transactions where "the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure": see *Ruxley* at 360G–H. However, Lord Lloyd understood the award as "a logical application or adaptation" of the exception to the principle that one may not recover for displeasure or distress occasioned by breach of contract, which applies where the purpose of the contract was to afford pleasure: see *Ruxley* at 374A–C. The position in Singapore is not much clearer: see the observations in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 21.094, where it is observed that "[i]t remains to be conclusively explained … whether the basis of [an award for] loss of amenity is the loss of the promisee's "consumer surplus", or the inconveniences that would be suffered as a result of the breach". Thus, it would seem that the theoretical basis for an award of loss of amenity for breach of contract is not settled though I accept that such awards were made in *Sonny Yap* and *Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2005] 2 SLR(R) 302 ("*Tan Chin Seng*") in reliance on Lord Mustill's reasoning in *Ruxley.* I should add that the Court of Appeal in *Raffles Town Club Pte Ltd v Tan Chin Seng* [2005] 4 SLR(R) 351 ("*RTC*") set aside the award for loss of amenity in *Tan Chin Seng* without commenting on the basis of the award. The

question in my view remains open for consideration in an appropriate case. This is not such a case.

81 The exact rationale of the loss of amenity award in *Ruxley* is immaterial here. What is key is that it is not the same as an award for loss of amenity where the defendant *has committed a tort affecting land*.

(a) First, as a matter of authority, damages for loss of amenity have long been recoverable in torts affecting land such as private nuisance: they have thus been described "as part of the normal measure of damages": see *McGregor* at para 37-019 and *Burrows* at pp 333-335. The position has not been the same in contract, which is one reason why the *Ruxley* award for loss of amenity remains controversial.

(b) Secondly, as a matter of principle, both of the rationales stated in *Ruxley* for the loss of amenity award are foreign to torts affecting land. The concept of consumer surplus, as stated by Lord Mustill, presupposes a contract between the parties. Lord Lloyd's justification of the award is also rooted in principles of contract law. The basis of an award for loss of amenity in cases of torts affecting land cannot be the same. It is not difficult to discern the rationale for such awards. The purpose of torts affecting land is to protect the use and enjoyment of land. It is thus unsurprising that the remedies include damages for loss of amenity.

Therefore, in my judgment, the relevant cases here are the authorities in tort and not those in contract. I thus turned to consider the authority in tort cited by the plaintiffs in support of their claim for loss of amenity.

82 In *Bryant v Macklin* [2005] EWCA Civ 762 ("*Bryant*"), the defendants' livestock damaged a row of trees on the plaintiffs' property which had protected

the land by providing a screening effect. The plaintiffs' expert put forward three rectification proposals involving the replacement of the damaged trees. The proposals differed in cost and in the age and height of the replacement trees (and thus also in their ability to screen the plaintiffs' land). Chadwick LJ (with whom the rest of the English Court of Appeal agreed) noted that the plaintiffs wished to continue occupying their property, and held that a reasonable person would pay for the most modest rectification proposal (at [26]). The plaintiffs were awarded damages on that basis. However, the court increased the award of general damages to reflect the loss of amenity which the plaintiffs would suffer. The basis for the award was that the new trees would not be able to provide the same screening effect as the original trees for years, until they had grown in height (at [27]).

Application to the facts

83 The plaintiffs argued that an award for loss of amenity was appropriate because "under the Aesthetics Method, the plaintiffs will forever live in fear that the Property may undergo further tilting in the future". But, in my judgment, this was not borne out by the evidence. The second plaintiff did not depose to this fear: on the contrary, he accepted, "with some reluctance", that he would adopt the Aesthetics Method if the court did not accept the Underpinning Method. The second plaintiff's complaint was the sensation that the Property was tilting. Thus, he made the following statements in his affidavit:

> (a) "For more than 3 decades, my family lived in the Property without ever experiencing that sinking feeling or water ponding around the house".

(b) "[Prof Tan] has never inspected the house so he cannot possibly have an idea of the frustration of living in a house that tilts. It has to be experienced to be believed. That is what my family is undergoing".

Moreover, during the hearing, I expressly asked the second plaintiff whether the substance of his complaint was the fact of the tilt or the sensation of a tilt. He clarified that it was the latter. (Notably, though the second plaintiff deposed that living in a tilted house was bad for *fengshui*, he appeared to accept that the Aesthetics Method would address this.) In any event, any fear that the Property was unsafe had no foundation as I found that the tilting had ceased and the Property was structurally safe.

84 This leads to the key distinction between this case and *Bryant*. In *Bryant*, the rectification costs were assessed based on a rectification method that would not have addressed the loss of amenity suffered by the plaintiff, *ie*, the lack of screening effect provided by the new trees until they had grown in height. This necessitated a separate award for loss of amenity. However, in this case, the rectification costs were assessed based on the Aesthetics Method. The purpose of the Aesthetics Method was to eliminate any perception of the tilt. Thus, it directly addressed the loss of amenity suffered by the plaintiffs which pertained to the visual and sensational impairment caused by the tilt.

85 In *RTC* at [45], the Court of Appeal ruled that there would be no compensation for loss of amenity because "[o]therwise there will be double compensation". Similarly, in my judgment, allowing a sum for loss of amenity here would have resulted in double recovery. I therefore did not award any damages for loss of amenity.

The Fourth Issue

86 After I delivered judgment assessing the damages due to the plaintiffs at $462,200.76, I heard the parties on the issues of interest and costs.

87 After hearing the parties and reviewing their written submissions on these issues, I decided not to award interest to the plaintiffs. While the plaintiffs have not appealed against my order, the present case engages an important point about interest for special damages for damage to property. I shall therefore set out my full reasons for my decision on interest.

88 To begin with, I accepted the defendant's submission that I ought not to award interest for the period between the first tranche of the hearing, *ie*, 5 November 2015, and the delivery of my oral grounds on 30 June 2017. That delay was a result of the plaintiffs pursuing an issue which I ultimately found to be unmeritorious. Moreover, the delay was entirely avoidable: if the plaintiffs and their experts had been more diligent in monitoring and measuring the tilt of the Property, in order to ascertain if it was getting worse, the issue would have been canvassed in the first tranche or not raised at all.

89 The real issue was whether I should award interest from the date of the commencement of the action until the end of the first tranche, and following the assessment of damages. On this point, the defendant emphasised that the plaintiffs had not carried out any rectification works and would not be doing so until the defendant paid them damages. The plaintiffs had thus not been kept out of any money, and so interest ought not to be awarded.

90 The general power to award interest is found in s 12(1) of the Civil Law Act (Cap 43, 1999 Rev Ed). In *Lim Cheng Wah v Ng Yaw Kim* [1983–1984] SLR(R) 723 ("*Lim Cheng Wah*"), L P Thean J (as he then was), in considering

an earlier version of s 12(1), recognised at [6] that the basis on which interest is awarded is that a party has been kept out of money that ought to have been paid to him or her. In that case, the plaintiff's and the defendant's vehicles collided. The plaintiff and the defendant claimed and counterclaimed respectively for the damage caused to their vehicles. The parties settled on the issues of liability and the quantum of damages. The issue which arose was whether the parties were entitled to interest on the damages. In ruling that interest ought to be awarded, L P Thean J reasoned at [11] as follows:

> On the basis of the principles discussed above, I see no reason why in exercise of my discretion under s 9 of the Civil Law Act interest should not be awarded in this case. *The plaintiff and the defendant had each been out of pocket; they had actually paid the expenses incurred in the repair of their respective motor vehicles* and had been kept out of the money which ought to have been paid to them respectively. …
>
> [emphasis added]

Thus, the crucial reason why L P Thean J awarded interest was that the parties had paid for the repair of their respective vehicles and thus had been out of pocket for those sums. I shall return to this point below.

91 The facts here were akin to those in *Giles v Thompson* [1994] 1 AC 142 ("*Giles*"). *Giles* involved two appeals concerning similar facts. The defendants were liable for damaging the plaintiffs' cars in motor accidents. The plaintiffs then hired substitute cars from companies. The hire contracts provided that the companies would have the right to sue the defendants in the plaintiffs' names. The hire charges were also not capable of immediate enforcement but were only due if the plaintiffs breached provisions pertaining to the companies' pursuit of the actions in the plaintiffs' names. In one of the appeals, the trial judge awarded interest on the damages referable to the hire charges. Lord Mustill, delivering

the principal judgment of the House of Lords, ruled that the plaintiff was not entitled to interest for the following reasons (at 167–168):

> The argument for the motorist *proceeds on the basis that the motorist's cause of action* against the defendant, and the financial loss resulting from it, *came into existence at the moment of the accident*, and was later quantified as special damage when the hiring period came to an end. At this time, so the argument runs, the defendant should have recompensed the motorist for her loss. Thereafter, she was "kept out of her money," a detriment for which she should be recompensed by an award of interest.
>
> Although this argument seems logical at first sight, *it ignores the fact that the power to award interest is discretionary, and that the exercise of this power should correspond with reality.* In the present case, although the motorist incurred a genuine liability for the hire charges day by day, it was not a liability capable of immediate enforcement by the hire company. *In both practical and legal terms the financial position of the motorist was wholly unaffected by the defendant's failure to make immediate payment, since the terms of the contract meant that until judgment was given she was not obliged to pay the hiring charges and also that as soon as the claim was "concluded" and the period of credit came to an end the damages provided the necessary funds. In reality she was not "kept out of" any money of her own whilst the claim was being assessed and litigated.*
>
> [emphasis added]

I respectfully agreed with this reasoning. In my judgment, it is important to examine whether a party has been kept out of money in practical terms. Such an approach ensures that the exercise of the power to award interest "correspond[s] with reality", in the words of Lord Mustill. If the party has not been kept out of money in practical terms, then interest should not be awarded on that basis.

92 In this case, the plaintiffs were not kept out of money in practical terms because they did not commence rectification works and so were not out of pocket for the cost of the same. The facts were distinguishable from those in *Lim Cheng Wah* (see [90] above), where the parties had paid for the repairs to their vehicles. As the plaintiffs were not out of pocket for the cost of the

rectification works, I decided that it was not appropriate to award interest on that basis. I considered whether there was any other reason to award interest to the plaintiffs. Notably, the quantification of the costs of the Aesthetics Method was based on Mr Ho's report dated 10 September 2014 (albeit he later revised his figures). However, neither Mr Ho nor the plaintiffs suggested that the quantification ought to be updated in the light of inflation or that interest should be awarded to address costs increases due to inflation. In any event, I did not consider that it would be proper to award interest to address inflation. If costs had increased due to inflation, the appropriate course would have been to apply to amend the claim for special damages to reflect current costs, not to seek interest to cover the increase in costs. For all the above reasons, I decided not to award interest on the damages.

93 In relation to costs, for the reasons given in [88] above, *viz*, the second tranche was convened because the plaintiffs pursued an issue which I found to be unmeritorious, and this pursuit was avoidable, I decided that the defendant ought not to be liable for costs that was incurred for and in relation to the second tranche. However, I was not persuaded by the defendant's contention that I should award costs for the second tranche of the hearing to the defendant. In my judgment, if the issue in the second tranche had been raised in the first tranche, costs would not have been awarded to the defendant on this issue. I saw no reason why a different conclusion should follow simply because two tranches were involved. I considered that it would suffice not to award costs to the plaintiffs in respect of the second tranche of the hearing.

94 The Guidelines for Party-and-Party Costs Awards ("the Guidelines") in Appendix G of the Supreme Court Practice Directions stipulate a daily tariff of between $8,000 to $12,000 for the assessment of damages of non-motor accident matters, with the daily tariff being awarded in full if the hearing does

not exceed five days. This case involved issues of novelty and complexity. There was also the need to understand engineering issues. I therefore considered that the tariff was not directly applicable, and that the cost guidelines for simple and complex tort claims for trials were more relevant. In my judgment, a tariff of $16,000, which is between the tariffs for simple and complex tort claims for trials, was appropriate. I thus allowed costs at a rate of $16,000 per day for the three days of the first tranche of the hearing. In addition, I allowed costs for the period from the commencement of the action to the entry of interlocutory judgment which I fixed at $8,000. In addition, I allowed costs for the work done for closing submissions which I fixed at $12,000. In the round, I awarded the plaintiffs costs of the action and the assessment of damages fixed at $68,000. I also awarded the plaintiffs reasonable disbursements for the action, save for the disbursements incurred for the second tranche including the costs and expenses of their expert for that tranche, for the same reason why I declined to order costs to the plaintiffs in relation to the second tranche.

Conclusion

95 For the above reasons, I awarded the plaintiffs damages assessed in the sum of $462,200.76 and costs fixed at $68,000 plus reasonable disbursements save for disbursements incurred for the second tranche of the hearing.

Kannan Ramesh
Judge

Lai Swee Fung (Unilegal LLC) for the plaintiffs;
Mahendra Prasad Rai (Cooma & Rai) for the defendant.

Annex

A.1 The following table contains a breakdown of the damages which I awarded to the plaintiff.

Item	30 Lorong K Telok Kurau	Amount assessed
1	**INTERNAL FLOOR, WALL, CEILING**	
1.1	Broken onyx floor	$ 72,049.60
1.2	UK imported anti-slip mosaic	$ 1,416.00
1.3	Carpet	$ 8,703.20
1.4	Internet wall plaster metal lathing for thickening	$ 43,878.90
1.5	UK imported 100x100mm wall tile	$ 7,533.33
1.6	Gypsum plasterboard ceiling	$ 564.00
1.7	Calcium silicate ceiling	$ 424.80
1.8	Polished Terrazzo	$ 5,520.00
2	**EXTERNAL FLOOR, WALL PLASTERING**	
2.1	Granite cobblestone	$ 7,767.76
2.2	Homogeneous floor tile	$ 12,064.80
2.5	Re-install of timber flooring	$ 5,000.00
3	**DOORS & WINDOWS**	
3.1	Aluminium windows & doors & frames	$ 23,816.00
3.2	Timber door and frame	$ 7,980.00
5	**INTERNAL & EXTERNAL PAINTING**	
5.2	Emulsion paint internal	$ 5,871.60
7	**SANITARY & PLUMBING WORKS**	
7.1	Sanitary & Plumbing works	$ 17,850.00
8	Demolition	$ 52,922.40
9	Preliminaries (15%)	$ 67,838.37
10	Lighting, power, AC (Dismantling & Reinstatement)	$ 49,000.00
11	Relocation cost and rental of equivalent property for 6 months at $12,000/month	$ 72,000.00
		$ 462,200.76