EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APEAL

ANTIGUA AND BARBUDA

ANUHCVAP2018/0009

BETWEEN:

HAYNES BROWNE

Appellant/Counter Respondent

and

NEIL SARGEANT
(as Executor of the Estate of Buell Carr, deceased,
substituted for Lena Carr, deceased by her Executor Buell Carr)

Respondent/Counter Appellant

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Ms. C. Debra Burnette for the Appellant/Counter Respondent
Dr. David Dorsett for the Respondent/Counter Appellant

2019: March 13
June 20.

Civil appeal – Counter appeal – Damages – Nominal damages – Building contract – Construction agreement – Breach of contract – Assessment of damages – Method of calculating damages – Quantum of interest – Appropriate measure of damages – Diminution in value or cost of reinstatement – Pre-judgment interest – Post judgment interest

On 1st July 1999, Ms. Lena Carr, the original claimant entered into a written contract with the appellant, Mr. Haynes Browne, for the construction of a dwelling house. On 30th May 2001, Ms. Carr brought proceedings against Mr. Browne for breach of the construction

contract claiming the sum of $425,000.00. She claimed that the construction of the dwelling house was not done in accordance with the plan and specifications agreed between the parties. Mr. Browne filed a defence and counter-claim for the sum of $17,853.75 which represented a loan and interest thereon obtained by him to finance certain stages of the construction.

Ms. Carr has since died, and her brother Mr. Buell Car was added as next friend to the claim. Following the death of Mr. Carr, his executor, Mr. Neil Sargeant was substituted as the claimant and thus respondent to this appeal. The matter came up for hearing on 30th October 2006 and judgement was entered in favour of Mr. Sargeant in the absence of Mr. Browne.

The assessment of damages hearing took place on 14th December 2006 and by judgment dated 30th April 2008 Mr. Sargeant was awarded damages in the sum of $536,100.00 with interest at a rate of 2½% per annum from the date of service of the claim to the date of trial. Interestingly, it was not until 18th February 2014, almost 6 years after delivery, that the judgment on the assessment was served on Mr. Browne. Mr. Browne sought and obtained an extension of time to appeal and leave to appeal the decision of the learned judge. The appeal was heard on 2nd March 2017 and the Court, amongst other things, allowed the appeal and remitted the matter to the High Court for re-assessment based on the documents that were before the learned trial judge.

Pursuant to the Court order, the matter came up before the learned master for reassessment of damages on 23rd November 2017 and on 13th February 2018 she delivered her judgment. The learned master awarded a global sum of $95,000.00 for breach of contract plus interest thereon at a rate of 2½% per annum from the date of service of the claim to the date of judgment on liability and thereafter at the statutory rate of 5% per annum. The learned master determined that the appropriate measure of damages was the diminution in value of the work due to the breach of contract.

Mr. Browne appealed and the three main issues for this Court's determination are whether the learned master erred in her method of calculation; whether the damages awarded to Mr. Sargeant was excessive and whether the master erred in the period over which pre-judgment interest was awarded. Mr. Browne, on appeal, contended that the master erred in calculating the diminution in value by using the square foot value referable to the contract price while Mr. Sargeant, in his counter-notice of appeal, argues that the master erred in assessing damages based on the diminution in value of the property rather than the cost of reinstatement.

Held: allowing the appeal; setting aside the order of the learned master; dismissing the counter appeal; awarding the respondent a total of $60,000.00 nominal damages together with pre-judgment interest of 1½% per annum from the date of service of the claim to the date of this judgment and thereafter at the statutory rate of 5% per annum until the debt is satisfied; and ordering that the appellant pay the respondent prescribed costs in the High Court pursuant to rule 65.5(2) of the Civil Procedure Rules 2000 ('CPR') and the respondent to pay the appellant on the appeal two-thirds of the prescribed costs pursuant to CPR 65.13, that:

1. The normal measure of damages for breach of building contracts is the cost of reinstatement unless it would be unreasonable to so insist. Damages for the non-compliance with contract specifications would be assessed based on the diminution in value where the cost to reinstate would be out of all proportion to the benefit which would accrue to the innocent party. In assessing the damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between the claimant and the defendant.

   Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 applied; Treitel The Law of Contract (7th edn, Sweet & Maxwell 2007) applied; Southampton Containder Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" Mgh & Co. [2001] EWCA Civ 717 applied; East Ham Corporation v Bernard Sunley & Sons Ltd [1996] A.C. 406 considered; Hudson's Building and Engineering Contracts (8th edn, Sweet & Maxwell 1959) considered.

2. The cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award. An award of nominal damages is appropriate given the complete lack of evidence in proof of the loss. The court is empowered to make an award of nominal damages where the fact of a loss is shown but the evidence as to its amount is not proven.

   Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al ANUHCVAP2004/0022 (delivered, 6th February 2006, unreported). applied; Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 applied; Bellgrove v Eldridge (1954) 90 C.L.R 613 considered.

3. In this case the cost of reinstatement is unreasonable in the circumstances. There is no evidence which demonstrates that the house is a complete disaster or that the house is so defectively constructed that it is uninhabitable and needs to be rebuilt. The loss sustained does not extend to the need to reinstate. To assess damages on any other basis would result in Mr. Sargeant being unjustly enriched. In the circumstances the cost of reinstatement is not the appropriate measure of damages. An award based on the diminution in value is the appropriate approach in the circumstances.

   Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 applied; Consolidated Development Co Ltd v Diotte 2013 NBQB 386 considered.

4. The master erred in the decision to use the square foot value of the property to determine the diminution in value. Based on the evidence before the master and the evidence of Mr. Workman, it was not open to the master to embark on the arithmetical exercise that she did. The master therefore took into account irrelevant factors which led her into error.

5. Only where the award of damages is inordinately low or unwarrantably high that it cannot be permitted to stand, will warrant interference by an appellate court. Though nominal damages do not mean small damages, the award of $95,000.00 is abnormally high and out of scale. The lack of evidence proving the extent to which the value of the house has been diminished due to the breach and also the fact that the defects identified by Mr. Workman were based on the approved and not the agreed modified drawings used to construct the house makes the task more difficult; The court, doing its best on the paucity of evidence, awards the global sum of $60,000.00 taking into account the reduction in size of rooms, the 'handing' of the house; the defective wall and the lack of a closet door as a reasonable amount for the presumed diminution in the value of the house.

   Greer v Alstons Engineering Sales & Services Ltd (2003) 63 WIR 388 applied; Josephine Gabriel & Company Limited v Dominica Brewery Beverages Limited DOMHCVAP2004/0010 (delivered 2nd July 2007, unreported) applied; Flint v Lovell [1935] 1 KB 354 applied.

6. Interest should not be awarded as compensation for the damage done. It should be awarded to a Plaintiff for being kept out of money which ought to be paid to him. The learned master erred in granting post-judgment interest from the date of judgment on liability. Where a judge conducts a bifurcated trial and enters judgment on liability only, as in this case, there is no judgment debt on which interest can accrue. The master erred in awarding post judgment interest from the date of judgment on liability

   Jefford v Gee [1970] 2 Q.B. 130 applied; Section 7 Judgments Act Cap. 227 Laws of Antigua and Barbuda applied; Section 27 of the Eastern Caribbean Supreme Court Act Cap. 143 Laws of Antigua and Barbuda applied.

7. Interest should not be suspended for the delay in service of the judgment. The delay is attributed to the vagaries of the adversarial process for which the respondent cannot be faulted; neither should the appellant be penalised.

   Rule 42.6(1) of the Civil Procedure Rules 2000 applied.

JUDGMENT

[1] PEREIRA CJ: This is an appeal against the judgment of the learned master delivered on 13th February 2018 in which she awarded damages arising from the breach of a construction contract in the sum of $95,000.00 together with interest at a rate of 2½% per annum from the date of service of the claim to the date of judgment on liability and thereafter at the statutory rate of 5% per annum. There is also a counter appeal

challenging the approach used by the master in her measurement of damages to arrive at her award.

Background

[2] A summary of the factual background giving rise to the appeal and counter appeal may be helpfully extracted from the judgment of the learned master. I take the liberty of doing so to place the appeal in context.

[3] The matter has had a somewhat protracted journey through the court system. Suffice it to say that this is round two in the Court of Appeal for the parties in a claim filed in 2001. Ms. Lena Carr was the original claimant and following her death, her brother Mr. Buell Carr was added as next friend to the claim. Following his death, the executor of his estate, Mr. Neil Sargeant was substituted as the claimant. Mr. Sargeant is now the respondent to this appeal and will be referred to throughout this judgment in place of Ms. Carr.

[4] On 1st July 1999, Ms. Lena Carr entered into a written contract with the appellant, Mr. Haynes Browne, for the construction of a dwelling house. On 30th May 2001, Ms. Carr brought proceedings against him for breach of the construction contract claiming the sum of $425,000.00. She claimed that he was required to construct the dwelling house in accordance with the plan and specifications agreed between the parties and that, in breach of the agreement, he failed to do so. Mr. Browne filed a defence and counterclaimed for the sum of $17,853.75 representing a loan, and interest thereon, obtained by him to finance certain stages of the construction.

[5] The matter came up for hearing on 30th October 2006, by which time Mr. Sargeant was substituted as claimant. There was no appearance of or on behalf of Mr. Browne and judgment was entered in favour of Mr. Sargeant. Following the entry of judgment on liability, the judge gave directions for the filing and service of affidavits and documents to be relied upon at the assessment hearing. Two affidavits were filed, an affidavit of Mr. Browne and one of Mr. Addison Workman, a civil and structural

engineer employed by Ms. Carr to carry out an examination of the house. It is noteworthy that much of the case hinges on Mr. Workman's affidavit evidence, to which I will return later.

[6] The assessment of damages hearing took place on 14th December 2006 and the learned judge, by judgment dated 30th April 2008, awarded damages to Mr. Sargeant in the sum of $536,100.00 with interest at a rate of 2½% per annum from the date of service of the claim to the date of trial. In relation to the counterclaim, judgment in default of defence was entered on 8th April 2013 in favour of Mr Browne.

[7] Interestingly, it was not until 18th February 2014, almost 6 years after delivery, that the judgment on the assessment was served on Mr. Browne. On becoming aware that judgment was entered against him, Mr. Browne sought and obtained an extension of time to appeal and leave to appeal the decision of the learned judge. The appeal was heard on 2nd March 2017 and the Court, amongst other things, allowed the appeal and remitted the matter to the High Court for re-assessment based on the documents that were before the learned trial judge.

Re-assessment proceedings before the master/ **the master's ruling**

[8] Pursuant to the Court order, the matter came up before the learned master for reassessment of damages on 23rd November 2017 and on 13th February 2018 she delivered her judgment.[1] The learned master awarded a global sum of $95,000.00 for breach of contract plus interest thereon at a rate of 2½% per annum from the date of service of the claim to the date of judgment on liability and thereafter at the statutory rate of 5% per annum.

[9] The learned master determined that the appropriate measure of damages was the diminution in value of the work due to the breach of contract. At paragraph 39 of the judgment she stated:

[1] Neil Sargeant v Haynes ANUHCV2001/0177.

> "While it has been established that Mr. Brown constructed a dwelling house which is not in accordance with the plans and that there are defects, there is no evidence that the house is uninhabitable as a dwelling house. The only structural defects identified by Mr. Workman are the vertical cracks along the wall in the porch and the separating of the wall in the storage area under the staircase which has to be rebuilt. There is no evidence that these walls cannot be rebuilt. In the absence of any evidence that the house is uninhabitable it can only be concluded that the claimant/and or her successors in title had and have the benefit of the dwelling house fit for habitation. The dwelling house has a value. The claimant's successors in title have the benefit of a dwelling house which will be retained. If the claimant's successors in title are awarded the cost of reinstatement and also retain the house it would mean that they '*would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide*.'"

[10] In seeking to quantify the extent of the diminution in value, the master noted that 'notwithstanding the absence of a valuation of the house as constructed, it cannot be disputed that at least one of the defects would have resulted in a diminution in the value of the house as a whole – the reduction in the size of the upper floor'.[2] The master calculated the difference in the value of the house that was contracted for and the value of the house that was built using a square footage price. She noted that Mr. Browne charged Mr. Sargeant $360.51 per sq ft to construct the dwelling house and that the upper floor is 177.95 sq ft smaller than what was contracted. She concluded that the difference in value between the size of the building specified and the size actually built is $64,153.05.

[11] The master went on to state that the other defects identified by Mr. Workman in his report/affidavit related to poor quality of workmanship in relation to the walls, the construction of doors of the walk-in closet and the 'handing'[3] of the house. However, she highlighted the fact that there was no evidence as to whether and the extent to which those defects diminished the value of the dwelling house. Accordingly, she awarded nominal damages under each head. Having made a global award of $95,000.00 and awarding $64,153.05 for the reduction in the size of the upper floor, it

[2] Neil Sargeant v Haynes ANUHCV2001/0177 Para 45.

[3] This expression was understood to mean where rooms or spaces may have been erected on the left side or right side of a building as opposed to the side depicted on a drawn plan.

can be deduced that the nominal damages awarded for the remaining defects were $30,846.95.

The Appeal and Counter appeal

[12] Based on the six grounds of appeal contained in Mr. Brown's notice of appeal, three main issues arise for the Court's determination:

(a) Whether the learned master erred in her method of calculating Mr. Sargeant's damages for diminution by using the square foot value ("Method of calculation").

(b) Whether the damages awarded to Mr. Sargeant was excessive ("Damages awarded").

(c) Whether the master failed to consider the period of delay in service of the judgment of the learned judge and the subsequent reversal of his decision by the Court of Appeal, when she awarded interest from the date of service of the claim to the date of judgment on liability and thereafter interest at the statutory rate of 5%. ("Quantum of interest").

[13] Mr. Sargeant, in his counternotice, complains that the master erred in assessing damages based on the diminution in value of the property rather than the cost of reinstatement ("measure of damages"). This complaint is intertwined with the first issue raised on the appeal and may be best dealt with together.

Issue 1: Appropriate measure of damages and method of calculating damages

[14] Learned counsel for the appellant, Ms. C. Debra Burnette, does not suggest that the measure of Mr. Sergeant's damages, being the diminution in value of the house due to the breach, was inappropriate but says that the master erred in her method of calculating the damages for the diminution in value by using the square foot value. She submitted that there was no evidence on which the learned master could have properly awarded damages for the reduction in the size of the upper floor in the sum

of $64,153.05 by using this method of calculation. She contended that there was no evidence of any square foot price charged by Mr. Brown or evidence in the contract regarding the size of the house that Mr. Brown should have built. The contract was for a fixed price of $425,500.00 and the contract expressly stated that the "owner is desirous of constructing [a] dwelling house according to [the] modified drawing". The assessment of Mr. Workman was based on approved plans retrieved by the Development Control Authority (the "DCA") and not the modified drawings. She argued that clear evidence must have been given on what the modified drawings were and in the absence of such evidence, the learned master could not make such a finding. To make good this point, Ms. Burnette relied on Benmax v Austin Motors Co. Ltd.[4]

[15] Counsel for the respondent, Dr. Dorsett, disagrees fundamentally with the measure of damages used by the master. On his counterclaim, he complains that the learned master erred in law in departing from the principle that in building construction cases where there has been a breach of contract, the proper measure of assessing an award of damages is "the cost of reinstatement" rather than "diminution in the value of the property", save in exceptional circumstances. He submitted based on the principles elucidated by Lord Jauncey in Ruxley Electronics and Construction Ltd v Forsyth,[5] that the cost of reinstatement is the normal measure of damages unless it would not be reasonable to insist upon reinstatement.

[16] The gravamen of Dr. Dorsett's submission is that the instant case is one in which the loss suffered by Mr. Sargeant cannot fairly be measured except by reference to the full cost of repairing the dwelling house as the house delivered was not that contracted for by Mr. Sargeant. He submitted that Mr. Sargeant is entitled to damages for reinstatement, that is, "the full cost of repairing the deficiency in performance". Dr. Dorsett submitted that there exist no exceptional circumstances in this case that would justify the use of the diminution in value. He further submitted

[4] [1955] 1 ALL ER 326.
[5] [1996] AC 344 at paras 355 B – 356 A.

that nothing in Mr. Browne's affidavit alluded to the possibility that the normal measure of damages would not be reasonable in the circumstances.

[17] Dr. Dorsett accepted that based on Ruxley "where the expenditure was out of all proportion to the benefit to be obtained the appropriate measure of damages was not the cost of reinstatement but the diminution in the value of the work occasioned by the breach even if that would result in a nominal award." He sought however to distinguish the facts of Ruxley on the bases that the pool constructed was perfectly safe to dive into, that there was no evidence that the shortfall in depth had decreased the value of the pool, that the homeowner had no intention or desire to fit a diving board and or to build a new pool. He contended that, in the case at bar, 'the house that has been built is a complete disaster'. The house as built is handed, in that the left side of the house drawn on the plans has become the right side of the house built; it is structurally unsafe and is distasteful in appearance. He relied on the witness statement of Mr. Workman which indicates that certain walls of the house must be rebuilt; the rooms as built do not correspond with the plans; the kitchen that was built is 57% smaller in size than that contracted for and appliances and furnishings intended for various rooms of the house cannot be accommodated because every room is smaller than the agreed sizes.

[18] He stated that the expenditure for curing the house is not "out of all proportion to the benefit to be obtained" for having a house that is structurally safe and sound, a house with rooms that do not have "an untidy appearance" or other aspects that are "most unsightly if not hideous". He told the Court that there is no sensible or reasonable intention of putting the property on the market. The building is riddled with defects and of limited use and it is only sensible and reasonable to assume that the cost of reinstatement will be used to construct a building for which the family can get reasonable and proper benefit. Accordingly, Dr. Dorsett asserted that the master erred in principle in awarding damages based on a diminution in value.

Discussion

[19] Dealing with the issue of the appropriate measure of damages for the defective building work calls for a consideration of the authorities from which the principles informing the measure have been culled and to which both the master and counsel gave particular emphasis. The editors of Hudson's Building and Engineering Contracts,[6] state that there are:

> "three possible bases of assessing damages, namely, (a) the cost of reinstatement; (b) the difference in cost to the builder of the actual work done and work specified: or (c) the diminution in value of the work due to the breach of contract.
>
> There is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the courts will treat the cost of reinstatement as the measure of damage."

[20] These principles are aptly captured and restated in East Ham Corporation v Bernard Sunley & Sons Ltd[7] where Lord Cohen accepted that the normal measure of damages for breaches of this kind is the cost of reinstatement within the bounds of reasonableness. Reasonableness, to my mind, informs the measure of damages. My view finds support in the dicta of Clarke LJ in Southampton Container **Terminals Ltd v Schiffahrisgesellsch "Hansa Australia" Mgh & Co**[8] where he stated:

> "As I read the authorities, where reinstatement is the appropriate basis for the assessment of damages, it must be both reasonable to reinstate and the amount awarded must be objectively fair as between the claimants and the defendants. That can be seen, in particular, from para 1480 of McGregor and from *Farmer Giles Ltd v Wessex Water Authority* [1990] 1 EGLR 177. Paragraph 1480 of McGregor is in these terms:
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> 'The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of

[6] Alfred Arthur Hudson, Edward Johnson Rimmer and Ian Norman Duncan Wallace (8th edn Sweet & Maxwell1959) at p. 319.
[7] [1966] A.C. 406.
[8] [2001] EWCA Civ 717.

> the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in value of the land.'"

[21] Further, the concept of reasonableness is amply demonstrated in the speech of Lord Lloyd in Ruxley where his Lordship in considering the judgment of Cardozo J in Jacob & Youngs Inc v Kent[9] noted:

> "Cardozo J.'s judgment is important, because it establishes two principles, which I believe to be correct, and which are directly relevant to the present case; first, the cost of reinstatement is not the appropriate measure of damages if the expenditure would be out of all proportion to the benefit to be obtained, and, secondly, the appropriate measure of damages in such a case is the difference in value, even though it would result in a nominal award."[10]

Lord Lloyd went on to consider the Australian case of Bellgrove v Eldridge[11] and stated:

> "Once again one finds the court emphasising the central importance of reasonableness in selecting the appropriate measure of damages. If reinstatement is not the reasonable way of dealing with the situation, then diminution in value, if any, is the true measure of the plaintiff's loss. If there is no diminution in value, the plaintiff has suffered no loss. His damages will be nominal."

[22] Similar sentiments were expressed by Lord Jauncey in Ruxley and I find the pronouncements made at page 357 E to be instructive:

> "Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party from which it follows that the reasonableness of an award of damages is to be linked directly to the loss sustained. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate. A failure to achieve the precise contractual objective does not necessarily result in the loss which is occasioned by a total failure."

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[9] (1921) 129 N.E.889.
[10] Ruxley (n 5) p. 367.
[11] (1954) 90 C.L.R 613.

[23] The guidance derived from the foregoing authorities and the learned author of Treitel The Law of Contract,[12] is that the normal measure of damages for breach of building contracts is the cost of reinstatement unless it would be unreasonable to so insist. Damages for the non-compliance with contract specifications would be assessed based on the diminution in value where the cost to reinstate would be out of all proportion to the benefit which would accrue to the innocent party. Keeping these principles to the forefront of my mind, I return to the case at bar. Is reinstatement a reasonable response to the damage in question?

[24] Dr. Dorsett has sought to distinguish Ruxley, but in my view, Ruxley cannot be sufficiently distinguished. In Ruxley, the plaintiffs contracted to build a swimming pool and its enclosure for the defendant's garden. The contract specified that the pool should have a diving area of 7 feet 6 inches deep. On completion, the pool was suitable for diving, but the diving area was only 6 feet deep. However, there was no adverse effect on the value of the property. The estimated cost of rebuilding the pool to the specified depth was £21,560. The trial judge gave judgment for the plaintiffs on their claims for the outstanding balance of the contractual price. The judge held that the cost of reinstatement was an unreasonable claim in the circumstances. The Court of Appeal allowed the appeal holding that the defendant's loss as a result of the breach of contract was the amount required to place him in the same position as he would have been in if the contract had been performed, which in the circumstances, was the cost of rebuilding the pool. The House of Lords, in reversing the Court of Appeal's decision and restoring the trial judge's decision, held:

> "that where the expenditure was out of all proportion to the benefit to be obtained the appropriate measure of damages was not the cost of reinstatement but the diminution in the value of the work occasioned by the breach even if that would result in a nominal award".

[25] Dr. Dorsett's submits that, unlike in Ruxley, where the pool could not be said to be a complete disaster, the house built is a complete disaster. It has an untidy appearance and is structurally unsound. As attractive as this argument may be, it seems to me to

[12] G. H Treitel The Law of Contract (7th edn, Sweet & Maxwell 2007) 727.

suffer from an inherent flaw. It is discordant with the findings of the learned master that, while the dwelling house constructed was not in accordance with the plans and that there are defects, there was no evidence that the house is uninhabitable. Further, there is no evidence which demonstrates that the house is a complete disaster. The only evidence that was before the master relating to the structural integrity of the house was that there is a vertical crack along the wall in the porch and the separating of the wall in the storage area under the staircase needs to be rebuilt. There is no evidence that the house is so defectively constructed that it is uninhabitable and needs to be rebuilt.

[26] Apart from the reduction in floor size, Mr. Workman's evidence relates to shoddy workmanship. This is not to say that personal preferences and decorative aesthetics are irrelevant. These are factors that have relevance to reasonableness of an award of reinstatement as opposed to diminution in value. Likewise, Mr. Sargeant's intention to construct a house for which the family can get reasonable and proper benefit has relevance only to reasonableness.

[27] Indeed, were Mr. Sargeant to receive the cost of a new house and retain the existing one, which must have some sort of value, he would have recovered not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide. In my judgment, it is unreasonable to award the cost of reinstatement where the loss sustained does not extend to the need to reinstate. This is an appropriate case to displace the rule that damages would normally be based on the cost of reinstatement on the basis that the cost to Mr. Brown would be unfairly disproportionate to the benefit which would accrue to Mr. Sargeant.[13] To assess damages on any other basis would result in Mr. Sargeant being unjustly enriched. In the circumstances, I find no basis for interfering with the master's approach in assessing damages based on the diminution in value rather than the cost of reinstatement.

[13] Consolidated Development Co Ltd v Diotte 2013 NBQB 386.

[28] It seems to me, however, that the master took a wrong turn when, having concluded that the appropriate measure of damages was the diminution in value, she engaged in an arithmetic exercise using the square foot value of the property to determine the diminution in value. As alluded to earlier, the master arrived at that value by calculating the difference between the size of the house 'specified and the size actually built' (which she found to be 177.95 square feet) and multiplying this reduced size by a value ascribed per square foot based on the overall construction price agreed. This worked out to be $360.51 per square foot).

[29] Before proceeding any further, it bears noting that this matter suffered and continues to suffer from a paucity of evidence regarding the loss sustained. Neither counsel submitted evidence of the cost of reinstatement or the diminution in value of the property. It may very well be that the master having recognised that Mr. Sargeant had suffered a loss and that there was no evidence to suggest the diminished value, decided to calculate the reduced value of the upper floor based on the square foot price in an attempt to reflect the diminution. Unfortunately, this was not a course open to her as evidence relating to the actual cost loss is lacking on either side. The evidence of Mr. Workman is far from complete on the issue. It simply identifies the defects based on the approved and not the modified drawings but does not give any indication as to the value of the property. Therefore, it was not open to the master to embark on the arithmetical exercise that she did. I accept the argument of Ms. Burnette that in doing so the master took into account irrelevant factors which led her into error, but I do consider an award of nominal damages to be appropriate given the complete lack of evidence in proof of the loss.

[30] In this connection, I turn to the second issue of the quantum of damages awarded.

Issue 2: Whether the learned master's award of nominal damages was excessive

[31] Ms. Burnette submitted that in the absence of clear and reliable evidence, Mr. Sargeant can only be entitled to a nominal award. I agree. In furtherance of this argument, counsel cited and relied on the seminal Privy Council decision of Greer v Alstons Engineering Sales & Service Ltd.[14]

[32] The thrust of her argument is that the award of $95,000.00 is excessive and unsupported by the evidence. While Mr. Workman's report identified the building defects, it did not give the value of the dwelling house. She submitted that Mr. Workman's evidence is that he was not aware that the contract referred to "modified drawings" and that he prepared his report having examined the contract as well as the approved drawings from the DCA. She further submitted that Mr. Workman's report indicated defects such as the vertical crack on the walls; rooms being smaller than that identified on the approved plans (and not the agreed modified plans); handing of the house which would change views, ventilation and comfort; no doors on the walk-in closet which he accepted may be a design issue rather than a construction issue without the drawings. Ms. Burnette stated that it was the responsibility of Mr. Sargeant to prove his loss. She asserted that the report of Mr. Workman is unreliable because he cannot properly explain his method of examination taking into account the terms of the agreement between the parties. In the absence of clear and reliable evidence, Mr. Sargeant can only be entitled to a nominal award.

[33] Ms. Burnett contended that though the master did not specifically say how much is awarded as nominal damages she made a global award of $95,000.00 and having awarded $65,153.05 for the reduction in the size of the upper floor, one can only deduce that the nominal award for the other defects is $30,846.95. She stated that if this was the master's intention, then the nominal damages is entirely too high when the nature of the defects is considered. She further stated that the award should not

[14] (2003) 63 WIR 388.

exceed $10,000.00 which is in keeping with the body of case law from the Eastern Caribbean Supreme Court.

[34] Dr. Dorsett, in response, stated that the real complaint was that nominal damages was something other than small. However, based on the Privy Council decision in Greer, nominal damages do not mean small damages. Further, he contended that lack of evidence with respect to damages, does not mean disentitlement of damages. When there is want of evidence the court must 'make such an award in respect of the losses suffered by the claimant as the court considers reasonable in the circumstances.' He referred to Proprietors Condominium Plan No 2/1989 v Trinity Investment Co Ltd[15] in support of his contention and stated that the only basis upon which Mr. Browne could succeed on this issue is if he shows that 'the amount was so extremely high or so very small as to make it an entirely erroneous estimate of damages to which the plaintiff is entitled'. This, he said, Mr. Browne has not achieved.

Discussion

[35] The onus is on the claimant who avers that he has suffered loss to produce evidence of that loss. Failure to do so, however, does not mean that 'the court is inescapably driven to refuse to award any amount for an undoubted loss'.[16] The court is empowered to make an award of nominal damages where the fact of a loss is shown but the evidence as to its amount is not proven. I am reminded by Sir Andrew Leggat of the Privy Council in Greer v Alstons Engineering Sales & Services Ltd and by Barrow JA of this Court in Josephine Gabriel & Company Limited v Dominica Brewery Beverages Limited[17] that nominal damages does not mean small damages and that the court can award a substantial rather than minimal or derisory amount to compensate for an unquantifiable loss that has undoubtedly been suffered. It is the duty of the court in such a situation to make an award that is not out of scale.

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[15] (2016) 89 WIR 315 at para. 28.
[16] Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al ANUHCVAP2004/0022 (delivered, 6th February 2006, unreported).
[17] DOMHCVAP2004/0010 (delivered 2nd July 2007, unreported).

[36] Informed by that principle, I consider that it was permissible for the master to make an award of nominal damages in the absence of evidence to prove the loss suffered. I have no doubt that the master awarded damages in the sum of $95,000.00 in recognition of the fact that Mr. Sargeant did suffer loss, though unquantified. The ultimate question is whether that award was out of scale.

[37] The instances when an appellate court will interfere with an award of damages are well-known and need no recitation. Suffice it to say that the Court will only interfere with an award of damages where the award made is inordinately low or unwarrantably high that it cannot be permitted to stand. This guiding principle is borne out of the speech of Greer LJ in the leading case of Flint v Lovell[18] and has been applied in a plethora of cases both within and outside of our jurisdiction.[19] Greer LJ stated that:

> "this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damages to which the plaintiff is entitled."

[38] It is not disputed that loss has ensued and there has been a diminution in the value of the house. However, the award of $95,000.00 is inordinately high and out of scale. Having already found that the master had no basis to apply the square foot methodology in valuing the reduction in the size of the upper floor, I consider the nominal sum of $30,000.00 to be reasonable. The award is made in recognition of the discomfort and inconvenience suffered by Mr. Sargeant as his furniture is unable to fit into the smaller rooms. In relation to the other defects, I would award $15,000.00 for the handing of the house, $13,000.00 for the defective walls and $2,000.00 for the

[18] [1935] 1 KB 354 at p. 359 – 360.

[19] See Nance v British Columbia Electric Company Ltd; Elwardo Lynch v Ralph Gonsalves; Proprietors Condominium Plan No 2/1989 v Trinity Investment Co Ltd (2016) 89 WIR 315 at para.28.

walk-in closet door. The total award for the presumed diminution in the value of the house would be the nominal sum of $60,000.00.

[39] The lack of evidence proving the extent to which the value of the house has been diminished due to the breach makes it difficult to award a more substantial sum. My conclusion is bolstered by the fact that the defects identified by Mr. Workman were based on the approved and not the modified drawings and that the modified drawings were used to construct the house; the findings of the learned master that Mr. Workman was unable to say what views were actually affected by the dwelling house being handed and that he could not say whether the walk-in closet doors were more of a design nature rather than a construction flaw as he did not know whether the modified drawing required closet doors.

Issue 3 - Whether the master failed to consider the period of delay in service of the judgment of the learned judge and the subsequent reversal of his decision by **the Court of Appeal when she awarded interest. ("Quantum of interest").**

[40] The nub of Ms. Burnette's complaint is that learned master erred in the exercise of her discretion when she failed to consider the periods of delay and the reversal of the judgment of the judge by the Court of Appeal. She submitted that the periods of delay, both in the service of the judgment by Mr. Sargeant and delivery on the first assessment, and the subsequent reversal of the judgment on the first assessment should have been taken into account when interest was being award. She relied on Aman v Southern Railway Company,[20] in support of her argument.

[41] Additionally, Ms. Burnette urged the Court to find that no penalty should be occasioned on the part of Mr. Browne for the delay in the delivery of the judgment of the learned judge and certainly none should be attributed to him for Mr. Sargeant's unjustifiable delay in serving the judgment after the trial.

[20] [1926] 1 KB 59 at page 72.

[42] In countering Ms. Burnette's argument, Dr. Dorsett's submission is simply that the issue of service of judgments or orders is stipulated by Rule 42.6 of the Civil Procedure Rules 2000 ("CPR"). He contended that Mr. Browne cannot argue that there was a delay by Mr. Sargeant in complying with CPR 42.6.

Discussion

[43] An appropriate starting point for the purposes of this discussion is to examine the principle governing the award of interest. I find the formulation of rationale for the award of interest of Lord Denning MR in Jefford v Gee[21] apposite:

> "Interest should not be awarded as compensation for the damage done. It should be awarded to a Plaintiff for being kept out of money which ought to be paid to him."
>
> Similarly, Lord Salmon in General Tire & Rubber Co. v Firestone Tyre & Rubber Co. Ltd [22] explained that:
>
> > "Interest is not awarded as punishment against a wrongdoer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment."

[44] In Antigua and Barbuda, the court has the power to award pre-judgment and post-judgment interest. The jurisdiction to award pre-judgment interest is rooted in 27 of the Eastern Caribbean Supreme Court Act which is in the following terms:

> "In any proceedings for the recovery of any debt or damages, in the High Court or the Court of Appeal, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment, but nothing in this section:-
>
> (a) shall authorise the giving of interest upon interest; or
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue or any agreement or otherwise; or

[21] [1970] 2 Q.B. 130
[22] [1975] 1 WLR 819 at 841.

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

[45] Section 7 of the Judgments Act[23] makes mandatory an award of post judgment interest on a judgment debt. It states:

> "Every judgment debt shall carry interest at the rate of five per centum per annum from the time of the entering up of such judgment, or from the time of the commencement of this Act in cases of judgments then entered upon and not carrying interest, until the same shall be satisfied, and such interest may be recovered in the same manner as the amount of such judgment."

[46] It is therefore unsurprising that the master made an award of both pre-judgment and post judgment interest. She awarded interest on the sum of $95,000.00 at a rate of 2 ½% per annnum on the total damages awarded from the date of service of the claim to the date of judgment on liability and thereafter at the statutory rate of 5% per annum. Ms. Burnette does not appeal against the pre-judgment interest. The crux of her argument relates to the post judgment interest. In my view, post-judgment interest as from the date of judgment on liability is wrong in principle. I consider first the post-judgment interest awarded from the date of judgment on liability onwards. In my view, section 7 makes plain that a judgment debt attracts interest. Where a judge conducts a bifurcated trial and enters judgment on liability only, as in this case, there is no judgment debt on which interest can accrue. Accordingly, the learned master erred in granting post-judgment interest from the date of judgment on liability.

[47] I turn now to address the appellant's complaint regarding the periods of delay. It is most unusual for there to be such an inordinate delay in the service of a judgment on a party. Rule 42.6(1) of the Civil Procedure Rules imposes an obligation on the court office to serve an order or judgment on the parties. It states that:

> "1 Unless the court otherwise directs the court office must serve every judgment or on –

[23] Cap 227 Revised Laws of Antigua and Barbuda 1992.

a. Any person on whom the court orders it to be served; and
b. Every party to the claim in which the judgment or order is made.

2. If a party is acting by a legal practitioner, the court may direct that any judgment or order be served on the party in person as well as on the legal representative."

This civil procedure ensures that parties are made aware of judgments or orders that affect their interest. The rules give the court a discretion, which is frequently exercised, of ordering one of the legal practitioners instead of the court to serve the judgment or order as the court office does not have the resources in every case to seek out the parties and to serve them personally.[24] I note that no order was made to this effect and it is unclear why the judgment of the learned judge was served on Mr. Browne almost 6 years after delivery. This administrative deficiency does not give effect to the overriding objective in CPR 1.1 of dealing with cases justly by eliminating delay. Indeed, a good practice which avoids delay is for a judgment creditor to take steps as soon as practicable after receipt of his judgment to serve the judgment on a judgment debtor, notwithstanding the obligation imposed by CPR 42.6 on the court office. This would more so be a good practice where, as here, the judgment debtor was absent during the assessment hearing and the further time which elapsed before the making of the first award.

[48] I am not of the view, however, as Ms. Burnette suggests that interest should be suspended for the delay in service of the judgment. The delay is attributed to the vagaries of the adversarial process for which Mr. Sargeant cannot be faulted and Mr. Browne cannot be penalised.

[49] Ms. Burnette complains that the master ought to have taken into account the fact that the judge's assessment was set aside when the award of interest was made. As previously stated, post judgment interest can only be awarded on a

[24] See Annison Rabess v National Bank of Dominica DOMHCVAP2011/0030 (delivered 13th July 2012).

judgment debt and if that debt is extinguished, so too is the interest. I am guided by the case of Aman v Southern Railway Company. In that case, the judgment became unenforceable due to a piece of legislation. The plaintiff contended that even though, through the operation of the law he had to give up his judgment, he was at least entitled to the interest on the judgment. Bankes LJ noted that "interest is nothing but the fruit of the judgment and if the tree dies the fruit must die with it". I accept and apply this principle and for this additional reason I find that the master's award of post judgment interest at the statutory rate of 5% cannot stand.

[50] The learned master ought to have awarded post-judgment interest from the date of her assessment and not from the date of judgment on liability. The periods of delay and the setting aside of the judgment by the Court of Appeal ought to have been considered when she awarded pre-judgment interest which should have been from the date of service of the claim to the date of judgment on her assessment. By not considering those factors, the master erred in the exercise of her discretion and this Court is entitled to set aside the award.

[51] It is safe to say that the period from the service of the claim to the date of this Court's assessment is the period for which pre-judgment interest should run. Post-judgment interest should be from the date of this assessment onwards. In the exercise of my discretion afresh, I would award interest at the rate of 1½% from the date of service of the claim to the date of this Court's assessment. The reason for the lower rate is to account for the periods of delay between the date of the first assessment and this Court's reassessment. I would award post judgment interest at the statutory rate of 5% from the date of this judgment until the debt is satisfied.

Conclusion

[52] For the reasons set out above, I would allow the appeal and set aside the order of the learned master. I would dismiss the counter appeal. Mr. Sargeant is awarded total nominal damages in the sum of $60,000.00 together with pre-judgment interest of 1½% per annum from the date of service of the claim to the date of this judgment and thereafter at the statutory rate of 5% per annum until the debt is satisfied.

Costs

[53] Mr. Browne shall pay Mr. Sargeant prescribed costs in the High Court pursuant to rule 65.5(2) of the Civil Procedure Rules 2000. Mr. Browne, having succeeded on his appeal, is entitled to two-thirds of the prescribed costs pursuant to CPR 65.13.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar