IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. C.L. 2002/R-054

BETWEEN	*TYCHICUS RICKETTS*	*CLAIMANT*
A N D	*ALCOA MINERALS OF JAMAICA INCORPORATED*	*DEFENDANT*

Heard: 4th & 5th March & 10th December, 2008

Appearances

Mrs. M. Taylor-Wright instructed by Taylor-Wright & Company for the Claimant.

Mr. K. Anderson instructed by Dunn Cox for the Defendant.

Williams, J.

Background

Mr. Tychicus Ricketts owns land amounting to approximately one and a half (1½) acres in Dawkins District, Mocho, Clarendon. The land he said was being used for both agricultural and residential purposes. His property was damaged on diverse days between 1996 and May 1997. He claims the damage was caused by activities carried on by Alcoa Minerals of Jamaica Incorporated and General and Compressor Services Limited on lands adjoining his.

He filed suit initially in 1997 with a subsequent suit filed in 2002.

The matter was settled with General Compressor Services Limited and a notice of discontinuance was filed in relation to them.

On the 23rd of October 2007, the defence of Alcoa Mineral Jamaica Incorporated was struck out and judgment entered for Mr. Ricketts. The matter was to proceed to assessment of damages emanating from mining activities only.

Mr. Ricketts in his witness statement states he has "since discontinued proceedings against (Jamalco) and General Compressor Services Limited in Suit No. C.L.1997/R-053 and against General Compressor Services Limited in Suit No. C.L. 2002/ R-054. The result is that the only suit remaining is Suit No. C.L 2002/R-054 in which the only defendant is Jamalco."

The amended writ of summons in this suit dated 20/6/2002, was endorsed inter alia that the plaintiff claim was for damages.....in negligence or alternatively in nuisance and for breach of Statutory Duty to Wit .section 8 (F) of the Mining Act.

In his further amended statement of claim dated 1/12/03 Mr. Ricketts outlined the particulars of special damages under the following headings:-

(a) For repairs to the main building

Substructure

Stiffeners, Beams and Lintels

Roof and Roof Finishes

Doors and Windows

Fixtures and Furnishing

Floor Finishes

Wall Finishes and Painting

Ceiling Finishes

Plumbing Installation

Electrical Installation

For repairs to:-

Outside Kitchen

Storeroom

Outside Toilet

For external works and repairs to Drainage system

and Preliminaries

The total amount being claimed as special damages was $3,309,967.00. It is also to be noted that the claim was in respect to damage done to the house mainly. In his particulars of damage however, he also mentioned the improper land fill which was done resulting in leaching on his land.

Issue

The issue therefore before this court was a determination of the appropriate award to be made to Mr. Ricketts for damage done to his property from the mining activities of Alcoa Mineral of Jamaica Incorporated on those divers days between 1996 and May 1997.

The Evidence

Firstly it is to be noted that the orders for direction dated 23/10/2007 relative to the conduct of this assessment included the following:-

(1) Reports of experts, Garth Martin, Karl Wilson and George Lechler as filed to stand but to exclude references to blasting.

(2) All experts to attend at assessment of damages emanating from mining only and be available for cross-examination.

(3) Claimant's statement concerning damages to be filed and served on or before 21/12/07.

At the hearing the claimant and two of the three experts, Mr. Martin and Mr.Wilson attended and gave evidence.

There was no indication as to what had happened to Mr. Lechler.

Mr. Ricketts in his witness statement dated 20/12/07 – evidence-in-chief spoke firstly to his cultivation which he says was practically destroyed as a result of the mining damage by the time he brought the action.

He spoke to the road which was built and completed in 1995 after which the mining commenced. The mining was up to within 110 feet from his house on the north side and within 30 feet on the south side. He was isolated in the middle with access only on the east. Vegetation was removed from the mined land.

Between 1996 and 1997, he says Jamalco mined up to within 30 feet from his house and as deep as 50 feet. This he points to as the cause of instability to his land and house, storehouse, outside kitchen and outside bathroom. This also left his "land to extremely vulnerable condition". "Land shifting became a reality".

The land surrounding his property is lower than his land now with the result being that his land is destabilized and started to shift. The steps to the house have broken away and cracks are in the middle of the floors due to land shifting. He opines that "even if repairs to the superstructure is undertaken the entire house is at risk of being totally destroyed at any time".

He asks for the full replacement cost as in the report of Mr. Wilson.

Repairs will no longer suffice, he asserts and bases this assertion on the report of Mr. Martin.

He speaks to the income he has lost due to the inability to cultivate on the land. He says there has been leaching into the land fill area, hence agriculture is not a workable venture.

He asks the court for the value of his land and relies on Mr. Wilson's valuation. He also seeks to be compensated for the monies spent in obtaining the requisite reports.

Interest he asks the court should be at the 24.21 percent per annum as indicated by the Bank of Jamaica statistics for the period 1997 to the end of 2007.

Under cross-examination Mr. Ricketts admits not earning from small farming at present and indicates that ¾ acre of his land had been fully cultivated.

His house he says was built in 1992 while the other structures were built earlier although he doesn't remember directly when, but estimates it was in 1991.

The description he gives of these buildings indicates the house was incomplete. There was no bathroom in the house with a bath or face basin, the kitchen had no sink or cabinets. There were no light fittings, fixtures or wiring, indeed there was no electricity at the house in any event -- a kerosene lamp provided lighting.

He advises that he does not have anywhere else to build but does not plan to build at the exact location. He at the time of the statement was living with his father. No one was then living at the property and no one was maintaining it.

As to the damage to his house, Mr. Ricketts states the holes in the zinc and damage to the windows were caused by the blasting activity which had caused rocks to be blown about.

He was also tested as to his farming activities and earnings therefrom.

Under re-examination he explained that the walls were being prepared for electricity but he doesn't know if any wires had been put in.

The first expert called, Mr. Garth Martin had visited the property and prepared his report in 1998. He is a civil engineer; his report is titled "Structural and soil investigation re possible damage caused by others working adjacent to property".

He described the property as "a plot of land standing like an island surrounded by mined and landfilled reclaimed properties .....the land is heavily treed and fruited interspersed with other agricultural crops."

The structure on the land he describes as follows:

- a partly completed single storey house of approximately 100 square feet.
- outside detached kitchen of approximately 200 square feet
- outside detached bathroom of approximately 94 square feet
- outside detached storeroom of approximately 55 square feet

The house is basically of block and steel construction, zinc roof supported by wooden frame, purloins and rafters. Sections of the floor have a concrete type finish. There is little or no finish work i.e rough cast and render, painting, plumbing and electrical.

Under observation he lists firstly masonry cracks in building, majority occurring in the upper half of the building. He noted that Mr. Ricketts had explained the cracks occurred after blasting was in progress.

He further observed that several glass windows were cracked or shattered which he noted Mr. Ricketts also had explained as being caused during the process of blasting. Cracks were seen in the mortar around the windows which Mr. Martin said could be

shrinkage cracks or the result of shock waves brought on as result of blasting exercise. Zinc cladding on the roof was seen to be punctured in several areas.

Finally in his observations he spoke to the reclaimed land that was now at a lower level than before mining commenced. He opined that when it rains the water would flow from the property which results in leaching action, thus depleting the soil nutrient in the land.

He then went on to state his conclusions. As regards the zinc sheeting and cladding, the French windows and frames; separation of masonary mortar used to pin the windows and doors to the wall; and the cracks in the upper sections; they were consistent with his observations. He relied on what Mr. Ricketts had told him that the damage was related to the blasting which had caused flying rocks and shock waves.

His conclusion as to the land is that with continued rainfall and subsequent leaching, it would continue to loose plant nutrient with the final result being that for agriculture to continue to be an economical venture, massive imputs of fertilizer would be necessary.

He also opined that with the mining of the lands adjacent to Mr. Ricketts' land, the status quo has been altered. He pointed to what he describes "as a tendency for an active lateral pressure to be created with soil movement or migration to the newly filled land which is now at a lower elevation."

Mr. Martin's concluding statement concerns the shift in the soil levels on Mr. Ricketts' land which he is confident will be inevitable. Further, the shift from Mr. Ricketts land to a newly refilled mined-out area will result in a shift in the foundation of

the house and in the walls cracking. This will happen over an extended period maybe ten to twenty years he predicted.

The comments by Mr. Martin in conclusion are best appreciated if repeated as is rather than paraphrased.

> "It must therefore be documented at this time that with evidence of cracking in the foundation there will be structural damage to the house due to land shifting.
>
> Cost to restore and ensure continued structural integrity of the existing building will prove prohibitive. It is definitely not recommended as it will finally prove to be an exercise in futility due to dynamic substructure activities as interaction between landfill areas and undisturbed consolidated areas occur"

He provided pictures to support his observations but unfortunately the originals were missing from the file and the copies not very clear.

Under cross-examination Mr. Martin indicated that the dwelling house was not painted and only minor portions of it was rendered and agreed that the majority of the house comprised of block structure with a rough cast rendering. He estimated that 25-30% of sections of floor had a concrete type finish. He did not recall there being any lighting fixtures and agreed there was little or no finish work to the house.

Although he agreed that his main focus was the main building – the house he acknowledged other structures being on the property which he felt would not have; been very costly to erect and were not substantial.

He conceded that his information was going back from memory of ten (10) years.

When tested as to the cracks in the wall, Mr. Martin opined that faulty construction could be one of several reasons for the cracks. He admitted that while the majority of cracks were to the upper section of the wall a few would have been to the lower. Some of these cracks may have been "suspect" in terms of possible foundation defects. He conceded that he did not do any digging into the foundation which would have been necessary to confirm or deny his suspicions. He however, maintained that given his years in the industry he would be able to say with 80% certainty what caused cracks in lower sections without such excavation.

He was also tested on his training in agronomy and soil mechanics given his pronouncement on leaching and the shifting in the soil. He conceded he had none in agronomy but that soil mechanics was a course in the engineering programme for his degree.

He admitted not seeing any lateral land-shift from the land but advised that at the time the fact that the land-shift stood as is means that the angle of repose was not disturbed and is holding.

He maintained when he visited in 1998 he saw what he described as a small farm with some fruits trees.

Finally he clarified that leaching is a continuous process and that he did not in fact do any tests which confirmed that water had in fact removed nutrients from the soil up to that time.

The final witness was Karl Wilson who described himself as a quantity surveyor. He inspected and surveyed the property in February 2005 and his report is dated June 2005.

The report is described as a cost report incorporating a replacement cost, completion cost, repair cost and land valuation.

While he was being cross examined counsel for the claimant pointed out that the claim related to replacement cost so questions concerning the other costs were agreed to be irrelevant.

In his report, he spoke to the property being an existing two (2) bedrooms, one (1) bathroom single storey dwelling house with outside bathroom, outside storeroom and outside kitchen of approximate gross floor area of 1007 square feet; 94 square feet, 55 square feet and 200 square feet respectively. He described the construction of the main house and spoke of finishes including concrete floor, rendering and general painting. Also he spoke of services including plumbing, electrical installations and drainage works.

He too saw the cracks in wall, holes in zinc roof and broken glass panes. He estimated the age of the building as twelve (12) years and he estimated that it has a remaining life in excess of fifty (50) years if regularly maintained.

The replacement cost he said represented the cost to replace the existing building of the dimensions as shown in his appendix. It was based on current prices [i.e. 2005] for materials and labour in the construction sector and allowing a reasonable contractors mark-up on cost. The figure given for this cost is $4,564,915.20.

The value given for the 1.5 acre on which house is built was $300,000.00.

Although it was indicated that it is the replacement cost that is being sought, it is perhaps useful to note the amounts given for completion cost and repairs cost – the former is $1,113,778.70 and the latter is $470,400.00.

Under cross-examination Mr. Wilson was asked about the crops on the property when visited in January 2005. He recalled a few but not if they were bearing at the time.

He clarified what replacement cost means to him – the value is the cost of erecting a structure of same size and specifications of the existing structure at the cost of the day being the cost at the time the survey was done.

He went on to admit he did not in fact see any plumbing fitting in the house or in the outside bathroom. He could not speak to whether any water was on location. He could not recall seeing a sink in the kitchen.

He was confronted with the fact that he had included cost of supplying and installing pipes and fitting and cold water pipes and hot and cold water fittings.

He was then forced to admit that he had factored in the cost to bring the structure to the requisite standard – as if it had been properly built. It seemed the standard he was referring to was some accepted industry standard which recognized the necessity for water, hence the inclusion of that cost.

He admitted the cost quoted in relation to electrical fittings also included a cost for bringing it to a point it had not in fact reached.

He conceded that he did not factor in whether anything from the existing structure could be used again.

He maintained that although his report included a cost for external works and drainage, there had in fact been none in existence at the time.

He opined that the cost of replacing the house would vary depending upon the location. The foundational cost is a significant factor in the overall construction and this would vary.

He concluded by indicating that the rates used in preparing the reports would increase at an average of 20% today and the value of the land increased by approximately 35% to 40%.

The Submissions

FOR THE CLAIMANT

Mrs. Taylor-Wright, on behalf of the claimant, began by reminding that this being an assessment, the court cannot now deal with the question of the existence of liability.

On this issue of assessment she quotes the leading text in this area McGregor on Damages 17th edition page 12 paragraph 1-021 and 022-

> "The object of an award of damages is to give the claimant compensation for the damages or injuries he has suffered..... .....The accepted measure of damages is that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

She gives the main mining damages as follows:-

(a) masonry cracks in building

(b) landfill was improperly done resulting in leaching of the soil on claimant's land

(c) cracking visible in the foundation of the building

She points to the unchallenged testimony of the claimant that his land was used for both agricultural and residential purposes and that between 1997 and 2002 the farm was so damaged that he was unable to earn an income therefrom.

The damage to the steps and cracks in the floor are pointed to as proof of the land shifting.

The defendant, she argues, has raised no challenge to the fact of structural damage of the building nor the land shifting. Mr. Martin's evidence is held up as the only expert to have provided evidence of these items mentioned above.

She in effect urges the court to disregard the issue as to whether the claimant acted unreasonably. This she states was not properly raised and in any event no notice was given as to the issue being raised. She relies on the Privy Council decision of Geest Plc v. Monica Lansignot P.C appeal No. 27 of 2001 for the statement of this principle.

On the issue of leaching she refers to the evidence of Mr. Martin again and urges that since he remains unchallenged he must be accepted along with his competence to speak on this issue.

She maintains that despite the trend of the cross-examination of the claimant, the fact remains that his land is now marooned and useless for rebuilding; his house is not habitable. In effect what Mr. Martin had predicted would have happened in 1997 was manifest on 2007.

As to the appropriate measure of damages, it is the replacement value which would be reasonable she submits.

Reliance is sought from **Dodd Properties v. Canterbury Council [1980] 1WLR 433** for the assertion that the two (2) accepted measure of damage to compensate for damage to property are:-

(a) the diminution in value of the building

(b) the cost of repair

However, the House of Lords decision of **Ruxley Electronics and Construction Limited v. Forsyth 1996 AC 344** is the authority cited for the proposition the court should be concerned with whether the claimant has suffered an irreparable loss for which it is reasonable to award the cost of re-instatement.

In this case, it is urged, that the claimant has expressed an intention to rebuild and the evidence is that the loss is irreparable, re-instatement is reasonable.

As to the date for which assessment should be measured the Privy Council decision of **Alcoa Minerals of Jamaica v. Broderick [2002] 1 AC 371** is referred to as good authority for the proposition that the increased cost of repairing the damage as at the date of trial can be the appropriate measure. She quoted the following from the judgment:-

> "The general rule in tort that damages should be assessed at the date of breach was subject to exceptions and if adoption of the rule produces injustice, the court had a discretion to take some other date."

The failure of the defendant to put forward an alternative figure for repair cost or replacement cost is to be noted, she urges. Hence, the court is urged to accept the only evidence as to the cost of replacement as from Mr. Wilson which must move upwards by 20%.

It is noted that there was reference in Mr. Wilson's report as to the effect of blasting, however she submits that this does not take away from the position that the structural damage is irreparable and that the entire house needs to be replaced as at today's value.

There being no challenge to the evidence as to the value of land, it must be accepted with the recommended 35% to 45% increase.

The submission as to loss of income is founded on the assertion that there was no challenge to evidence that the land was richly cultivated up to the date of filing. The stated income of $500,000.00 per year also is not challenged and hence it is submitted he should be compensated for six (6) years that has passed since filing. The lack of documents to prove his earnings is not to prevent his being compensated and the Supreme Court decision of **Walters v. Mitchell [1992] JLR 173** is the authority relied on for this submission.

Mrs. Taylor-Wright asserts that the claimant is to be compensated for the interference with the use and enjoyment of his property – the essence of the wrongdoing in the tort of nuisance. He was inconvenienced by having to leave his home and reside at his father's which it is submitted must be annoying and irritating. The case of **Murnaghan v. Markland Holding Limited and Cantier Construction Limited [2004] 1 EHC 432** is referred to. An award was there made of £10,000.00, for nuisance which

persisted for less than a year. In the instant case, the claimant had been disturbed and abused for over ten (10) years with no attempt to relocate him – is the submission made. Hence using the case mentioned for guidance, the Jamaican equivalent of the award requires it be multiplied by 100 which must then be multiplied by six (6) for each of the six (6) years of distress.

The next compensation which Mrs. Taylor-Wright requests be made is for out of pocket expenses. This should include the amount for which the receipt was not tendered into evidence. Mrs. Taylor-Wright points to the fact that it was disclosed and it authenticity not challenged so it ought properly be paid.

Finally on the question of interest it is submitted that 24.21% per annum as illustrated in the Bank of Jamaica statistical digest for that period 1996-1997 would be appropriate.

The total award sought is given as follows:-

1.	Cost of replacement of building	$5,447,898.24
2.	Cost of replacement of land	$ 435,000.00
3.	Loss of income	$3,000,000.00
4.	Damage of nuisance	$6,000,000.00
5.	Out of pocket expense	$ 140,000.00

With interest at 24.21% on items 1 to 4.

For the defendant.

Mr. Anderson points out that since there was an indication that only one claim is being pursued, any evidence in relation to damage to crops must be disregarded as the remaining claim is only concerned with the damage to the property.

Further, the point is also made that loss of income was never pleaded and so no award can properly be made for this heading. Reference to this loss is first made in the claimant's witness statement.

Civil Procedure Rule 8.9 (a) is referred to which states that the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim but which could have been set out there unless the court gives permission. Although the matter was raised in his witness statement, it is not part of the pleadings. There was no application to amend to bring in this claim, hence there can be no award.

It is further argued that loss of income is classified as a specie of special damages and hence must be claimed specially and strictly proved. This principle was enunciated in **Storms Brunks Aktie Bolay v. Hutchinson [1950] AC 515** and Mr. Anderson cites the following passage in support of this submission.

> Special damages are "such as the law will not infer from the nature of the act. They also do not follow in ordinary course. They are exceptional in their character and therefore must be claimed specially and proved strictly."

In his reviewing the evidence Mr. Anderson submits that in 2007 Mr. Ricketts had placed blame for damage to his house on mining activities and expressly stated that the blasting did not cause his house to be inhabitable and this contradicts what was pleaded in his earlier statement of claim. Hence the claimant's honesty is being challenged. The court is asked to consider his evidence questionable not only in relation to what caused the damage but also to the extent o the damage done.

Mr. Anderson in attacking the claimant's case addressed items claimed separately.

As regards the windows, he submits the damage there was caused by blasting and hence the claimant should not recover anything.

He submits the same in effect applies to the damage caused to walls and zinc roof.

He points to the fact that the evidence revealed the house was unpainted and roofing made of zinc with no roof finishing hence again there should be no award for this.

The claim for floor and floor finishes is attacked for the fact that the evidence from Mr. Martin was that only 25-30% of the floor was cemented hence only that percentage can be compensated for.

As regards the kitchen, bathroom and storeroom, the evidence revealed that these structures were not very expensive and did not seem to have much in them. Mr. Anderson opines that to allow recovery of the amount claimed would be unjust enrichment and therefore merits a minimal award.

The claim for the doors, it is urged should fail in its entirety as the doors could have been removed to a new structure.

Under the heading fixtures and furnishing, Mr. Anderson submits this claim was based on the quantity surveyor's report which would include a kitchen. Since the evidence revealed the estimate was based on what a reasonable kitchen would include as opposed to what was actually there, the amount claimed cannot be allowed.

As to walls finishes and paintings it is submitted this also must fail as the evidence revealed the house was unpainted and most of it was not rendered. Further, he states the absence of a ceiling also means no such cost can be recovered.

The claim for electrical installation and plumbing is also submitted must fail since the quantity surveyor Mr. Wilson admitted that his estimates for these items included the cost of bringing the house up to a standard specification.

The evidence of the experts was also considered by Mr. Anderson. He submits that they failed to discharge their duties as espoused by Civil Procedure Rule 32.4(1).

He urges that Mr. Wilson "was obviously influenced by the demands of litigation when he made estimates." It should be disregarded.

Mr. Martin's evidence is attacked particularly as it relates to his failure to do exhaustive exploration to determine the cause of the cracks in the structure, being satisfied with his ability to make a determination based on his years in the industry. In effect it is opined that Mr. Martin was an ordinary witness who just relied on his visual assessment along with what he was told by the claimant. It is Mr. Anderson's submission that such opinion based on hearsay is inadmissible and he refers to the case of **English Exporters (London) Limited v. Eldonwall Limited [1973] 1 All ER 726.**

The Court is invited to note the discrepancies between the claimant's evidence and that of the experts.

On the issue of the date of assessment of damages, the case of Alcoa Minerals v. Broderick [supra] is also referred to. The peculiar circumstance of that case is highlighted in that the impecuniosity of the claimant was proven to be an important reason why he failed to effect repairs hence damages were assessed at a later date.

Mr. Anderson opines that since no such evidence was forthcoming in the instant case the same consideration cannot apply.

In concluding, he argues that the harm caused by the former co-defendants should not be placed on Alcoa's shoulder. It is his opinion that the evidence reveals that most of the balmeworthiness should be with General Compressors hence the defendant now should not be ordered to pay more than his actions contributed.

It is reiterated that the claimant should recover minimal damages due to the fact that the mining activities did not cause most of his losses – nominal damages should be awarded.

The Assessment

The need for Mrs. Taylor-Wright to start her submission by pointing out that given the order made on the 23rd of October, 2007 liability was not in issue became apparent when Mr. Anderson made some submissions seemly in non-recognition of this point. Those submissions cannot be relevant.

His invitation to reject the evidence of the experts will not be accepted but they must be considered in light of what was revealed when that evidence was tested.

Mrs. Taylor-Wright in her submission highlighted what she described as the "unchallenged" evidence from the claimants and the experts.

While it is true that the defendant did not lead evidence on its own behalf, certainly the cross-examination exposed the issue of the extent to which the court should rely on the evidence presented.

Re: Loss of income

The claimant asserted that the mining activity eventually led to his inability to earn an income from his farm. Indeed he said in his witness statement that by the time he brought the action his farm was practically destroyed. The initial action commenced in

1997. It is to be noted that Mr. Martin on his visit to the property in 1998 found the land heavily treed and fruited and interspersed with other agricultural crops e.g. yams, banana coco, pepper etc. In 2005 when Mr. Wilson visited the property he too saw a few crops.

On the issue as to the income lost from his farming, the submissions by Mr. Anderson are well made. This was never pleaded and ought not now to be allowed. I find support for this position when I consider the words of Lord Justice Bowen in the old authority of **Radcliffe v. Evans [1892] 2 QB 254** .....special damage is.....

> "particular damage ...(beyond the general damage) which results from the particular circumstances of the case and of the plaintiff's claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise at trial."

Re: Damages to the property

While it is true that if one approaches this matter item by item and consider what was damaged from the blasting as against the mining, some items would not strictly speaking appear to be recoverable.

I am however satisfied that the house of the claimant is now uninhabitable. I am particularly struck by the description of the property by Mr. Martin as "land which stands like an island surrounded by heavily mined and land filled reclaimed properties."

The assertion by Mr. Martin that given the fact that the reclaimed land is now lower that the claimant's, there is the strong probability that the land will shift downward seems reasonable. The predictions made in 1998 seem to have come to fruition given the claimant's evidence that the steps have now separated from the house and there are now cracks in the floor. Although Mr. Wilson made the assessment that the building has a

remaining life in excess of fifty (50) years if regularly maintained, I am prepared to accept Mr. Wilson's evidence that the structure would have to be underpinned.

Further I accept that this will be costly and prove to be an exercise in futility. Ultimately the need to remove and rebuild can be said to arise from the mining which disturbed the status quo of the land.

The law has developed, as seen through the cases from the old authority of **Jones v. Gooday [1841] 8 M & W 146** where it was thought the only accepted award should be the dimunition of the value of the land.

It has been recognized that an award for repairs and for re-instating or replacement may be appropriate depending on the circumstances. The overriding consideration must be what is most practical and sensible in the particular circumstance. Hence the claim for damages for the cost of rebuilding seems the most appropriate in the instant case. Further it has to be rebuilding at another location.

It is gleaned from the cases that the measure of damages must therefore be proportionate to the loss actually suffered such that the award made affords the claimant an opportunity to rebuild a home comparable to that lost.

It is noted that the sums outlined in the claim was for repairs and bear no correlation to the evidence adduced. However it is to be remembered that in 2004 an order was made for the substitution of Mr. Wilson for the original valuator who had migrated.

His report was done in 2005. The figures now given by Mr. Wilson were never used to amend the further amended statement of case before the court. However, these

new figures are not now a surprise to the defendant, hence it is to these figures reference will be made.

The problem which arises is that, under cross-examination it became apparent that the final figures did not really reflect what Mr. Wilson had seen. He spoke of finishes and fixtures which the other witnesses contradicted by saying clearly that the house was incomplete and largely unrendered with little or no finished work or services. There was on the evidence of the claimant no running water or electricity – hence no fixtures for those services.

Further Mr. Wilson proved to be unreliable when he sought to deny the existence of an outdoor storeroom for which he had given an estimate having referred to it in his report and in a diagram of the property. He went so far as to say mention of it was a typographical error.

Both the claimant and Mr. Martin admit its existence – claimant built it in 1991 and in 1998 Mr. Martin described it as an inexpensive structure.

Further there is a claim for external work and drainage when in fact none existed.

It is apparent that the figures finally arrived at by Mr. Wilson does not reflect what existed at the time the claimant was forced to leave his home. I am satisfied that a fair way to make the assessment is to relate the cost given as the replacement cost to the cost for completion and determine an appropriate award.

In the circumstances I find an award of $3,450,000.00 appropriate. The value of the land as assessed by Mr. Wilson was $300,000.00 in February 2005. This value he said would have increased by 35%-40%. In the circumstances, I find the appropriate award for this value is $400,000.00.

It is in her submission that Mrs. Taylor-Wright makes mention of the inconvenience suffered by the claimant in having to leave his home and reside at his father's premises which she posits must have been an annoying and irritating experience for the claimant. Other than stating that he was residing at his father's premises when he gave his witness statement, there is no other evidence on this issue. The evidence is he had to leave an unfinished house with no water or light but no evidence as to what he moved to.

I find I am unable to make a real assessment of the level of inconvenience that his forced moved caused. This would certainly help to determine the appropriate award.

The interference with the use and enjoyment of his property is further to be ascertained from the reference of the claimant to the heavy equipment which caused strong vibrations. This was however complained of in relation to the destabilization of his land. There is no evidence as to when the claimant left his property to reside with his father nor the length of time the interferenee lasted while he remained at his property.

While I am prepared to accept it may have existed on those divers days between 1996 and May 1997, as stated in the writ, I am unable to go beyond that time.

In the case Mrs. Taylor-Wright referred to in support of her $6,000,000.00 claim under this heading, that court had much more cogent evidence on which to make an award.

In the instant case where there is none, I am prepared to make a nominal award only. Hence the award for this heading will be $500,000.00.

I am now forced to consider the date for the assessment of damages. The case of **Alcoa Minerals v. Herbert Brodrick [supra]** is cited by both counsels in their submissions for the guidance it gives in this area.

In the instant case there is only the report of Mr. Wilson that provides the basis for the claim. This report was prepared in 2005. Mr. Wilson explained it was based on the then current price for material and labour in the construction sector and allowing a reasonable contractors mark-up.

It seems therefore appropriate for that date to be the date of the assessment i.e 2005.

The submissions made by Mrs. Taylor-Wright as to the out of pocket expenses are well made. The claimant will therefore be compensated for those expenses including the amount given in evidence for the receipt that was disclosed but not tendered into evidence. The total out of pocket expenses is allowed at $140,000.00.

Finally on the issue of the interest to be awarded, Mrs. Taylor-Wright supplied the court with the statistical digest from the Bank of Jamaica as the basis for requesting interest at 24.21%. In his witness statement the claimant indicated this was the rate for the period 1997- the year claim was filed – to the end of 2007.

I am guided by the dicta of Justice Forbes in **Tate and Lyle Food and Distribution Limited v. Greater London Council and Anor. [1981] 3 All ER 716 at 724-**

> "The award of interest in these cases is a discretionary matter, and, in approaching the task of deciding such an award, I think judges are entitled to and do adopt a

very broad approach."

Hence I will award interest at 15% from the time of the estimates in 2005 to today's date.

For the nuisance the interest will be at 4% from the date of the service of the amended writ of summons which appears to be 12/12/02 to today's date.

Damages assessed as follows:-

(i)	Cost of replacement of building -	$3,450,000.00
(ii)	Cost for value of land	$ 400,000.00
		$3,850,000.00

with interest at 15% from February 8, 2005 to today's date

General damages of $500,000.00 with interest at 4% from December 17, 2002 to today's date.

Out of pocket expense of $140,000.00.

Cost to be taxed if not agreed.