[ZEKIA, J. and ZANNETIDES, J.]

MEHMED VAHIP AGHAZADE AND OTHERS,

Appellants (Defendants),

v.

FAIK SHEMI *Respondent (Plaintiff)*.

(Civil Appeal No. 4295).

Immovable Property—Easement—Lateral Support—Interference, with—Tort—Damage to the dominant building—Liability—Independent contractor—Joint liability of the owner of the servient tenement and the building contractor—Damages—Measure of damages.

The appellants and the respondents are owners of adjoining buildings. Some time in 1957 appellants employed defendant 5, a contractor, to pull down their premises and build new ones in accordance with the specifications attached to a contract of building. Defendant 5, the contractor, in the execution of the said building contract removed certain arches supporting the shop of the respondent, after excavating to a certain depth the side bordering on the said shop. The lateral support of the shop having thus been removed, the wall bordering on the excavated side cracked together with the arches and the whole shop was rendered dangerous for occupation or habitation. It was no longer in a tenantable state.

The respondent-plaintiff brought the present action against the appellants as well as the contractor and claimed damages for the injury caused to his property. The trial Court held that the appellants as well as the contractor were liable for the damage occasioned by the removal of the lateral support and awarded £450 damages under 3 heads:

(a) £300 as a sum reasonably required to rebuild parts of the shop in order to render it safely habitable;

(b) £100 representing a reasonable sum for the space to be left to the street under the Street (Alignment) Laws and Regulations;

(c) rents lost, as consequential damages for the period of six months. Costs on the appropriate scale were also awarded in favour of the plaintiff.

From this judgment defendants 1 to 4 appealed. The grounds of appeal as stated in the notice of appeal may be grouped in two: (A) Those relating to the liability on the part of the appellants to pay damages and (B) the measure of damages adopted by the trial Court. It was argued on behalf of the appellants that, having employed an indepen-

dent contractor, they could not, in law, be held liable for the manner he executed the work, and that, in any event, the trial Court assessed the damages on a wrong principle.

Held: (1) *affirming the judgment of the Court of trial:*

The Court of trial was right in holding that the appellants were liable to compensate the respondent (plaintiff) notwithstanding that the building operations in question were entrusted to an independent contractor. The Court correctly relied on the statement in *Bower v. Peate* (1876) 1 Q.B.D. 321, 326, *per Cockburn, C.J.*, quoted with approval by Atkinson, J. in *Spicer v. Smee* (1946) 1 All E.R. 489, 495 (*see post*); *See:* also *George Martin Hughes v. John Percival* (1883) 8 App. Cas. 443, approving *Bower* v. *Peate* (*supra*). Statement of the law, in Salmond, On Torts, 12th edition, p. 215 (v. *post*) *adopted.*

(2) *As to the measure of damages, reversing the judgment of the lower Court,—*

(a) From the evidence it was clear that the building was damaged beyond any repair. Furthermore the Municipality would not allow the kind of repair necessitated by the damage occasioned unless the front wall was withdrawn about 5 ft. inside from its original position. Now that would amount to a substantial alteration in a small shop of a size of 330 sq. ft. The space to be lost would be 114 sq. ft. In the circumstances one has to consider the shop of the respondent as virtually destroyed and in such a case in assessing damages the rule in *Moss v. Christchurch R.D.C.* (1925) 2 K.B. 750 should, in our mind, apply, i.e. the measure of damages would be the difference between the money value of the owner's interest in the property before and after the damage was done and not the cost to repair or partly to restore it.

(b) The case should be remitted back to the trial Court for reassessment of damages in the light of the rule in *Moss v. Christchurch* (*supra*).

Appeal allowed to the extent as aforesaid. Case remitted back to the lower Court for re-assessment of damages in accordance with the rule in Moss v. Christchurch (*supra*).

Cases referred to:

Bower v. Peate (1876) 1 Q.B.D. 321;
Spicer v. Smee (1946) 1 All E.R. 489;
George Martin Hughes v. John Percival, (1883) 8 App. Cas. 443.

Moss v. Christchurch R.D.C. (1925) 2 K.B. 750.

Per curiam: Even if it were to be assumed that the respondent's shop had not become a total loss and that the damage was merely a repairable one, still the method of assess-

ment adopted by the trial Court would not be correct. The correct method in such a case would be the one suggested in Charlesworth, on Negligence, 3rd edition, p. 580 (*post*).

Appeal.

Appeal by defendants Nos 1 to 4 against the judgment of the District Court of Nicosia (V. Dervish, P.D.C., Feridoun, D.J.) dated the 21st July 1959 (Action No. 969/57) whereby £450 were awarded to the plaintiff as compensation for damages wrongfully caused to his shop by building operations affecting its lateral support.

Hakki Suleyman for the appellants.

Ali Dana for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court which was read by:

ZEKIA, J.: The appellants and the respondent are owners of adjoining buildings. Some time in 1957 appellants employed defendant 5, a contractor, to pull down their premises and build new ones in accordance with the specifications attached to a contract of building. Defendant 5, the contractor, in the execution of the said building contract removed certain arches supporting the shop of the respondent, after excavating to a certain depth the side bordering on the said shop. The lateral support of the shop having thus been removed, the wall bordering on the excavated side cracked together with the arches and the whole shop was rendered dangerous for occupation or habitation. It was no longer in a tenantable state.

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(c) rents lost, as consequential damages for the period of six months. Costs on the appropriate scale were also awarded in favour of the plaintiff.

From this judgment defendants 1 to 4 appealed. The grounds of appeal as stated in the Notice of Appeal may be grouped in two: (A) Those relating to the liability on the

part of the appellants to pay damages and (B) the measure of damages adopted by the trial Court.

A. *Regarding Liability:*

It was argued by the appellants that—

(a) the contractor being an independent one, appellants who employed him were not liable for the manner he executed his work;

(b) the shop of the respondent being a very old one was already in a dilapidated condition before the excavation works started and the arches were removed;

(c) adequate measures were taken by the contractor to prevent any damage to the building of the respondent : and

(d) the trial Court went against the weight of evidence in accepting the evidence of witness No.2. the architect called as witness by plaintiff-respondent in the Court below.

B. *As to the measure of damages:*

It was said that the appellants were not liable to pay any damages—

(a) because the old shop of the respondent was in a state of collapse and the Municipal Authorities could order demolition at any moment without paying any compensation. In such a case he. the respondent, would not be entitled to any compensation in respect of the space to be left out for the street when a new building was to be erected;

(b) the damages assessed were remote. vague and uncertain ; and

(c) the Court assessed damages on the wrong principle.

As to the liability of the appellants to pay damages to the respondent for the injury to his building occasioned by the removal of lateral support, i.e. by removal of the arches of the building of appellants and by the excavation on the immediate proximity of the wall of the shop of the respondent there was ample evidence before the trial Court for finding that the damages on the shop were caused by such excavation and removal of the arches and that the appellants were liable to compensate the plaintiff-respondent. notwithstanding that such building operations were entrusted to an independent contractor. The Court correctly relied on *Bower v. Peate* (1876) 1 Q.B.D. 321, 326, quoted with approval by Atkinson, J. in *Spicer v. Smee* (1946) 1 All E.R. 489., 495. In the former case Cockburn. C.J.. said (*ibid*):

" A man who orders work to be executed from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises or some independent person —to do what is necessary to prevent the act he has ordered to be done from becoming wrongful ".

In *George Martin Hughes v. John Percival* (1883) 8 App. Cas. 443, the House of Lords approved *Bower v. Peate* and made it clear that an adjoining building-owner cannot get rid of the responsibility by delegating the performance of building operations to an independent contractor.

Quoting from Salmond, On Torts, 12th edition p. 215:

" The right to support is completely predominant over the right of the servient owner to use his property; and if he cannot rebuild his house or extract his minerals, however carefully or skilfully, without doing damage to the dominant tenement, he is not at liberty to perform these operations at all ".

We are also of the opinion that the Court on the evidence was right in rejecting other arguments going to the liability of the appellants.

As to measure of damages : This presented, as the Court below found to be, a difficult problem. From the evidence the Court had accepted, it is clear that the shop of the respondent was extensively damaged. We quote from the evidence of architect Emel Erkan (page 17 of the record):

" Q. What damage was caused to the plaintiff?

A. The wall on the right, the adjoining wall of the demolished part, was split right through, from the roof. There were cracks on the arches themselves and cracks right through the front wall, coming down to the doorway, which was supported by a temporary strut afterwards. And the front wall may be seen in photograph 1 (F), in exhibit 1 (A). The wall which was supported by the demolished arch was split and lost its support.

Q. What other damage did you see in the shop?

A. All damages I saw in the shop as far as I could see, were due to the only and main reason of removing the arches of the adjoining shop. Peculiar things happen in buildings.

By Court:

Q. In your opinion, repairs of a permanent nature to the shop would be possible only by pulling down the wall and rebuilding it?

A. You have to remove the roof and building beams. You could not depend on the arches to support the roof, which means going into very big expenses for something which would not have been worth doing it. It could be better to rebuild the shop entirely.

Q. It would cost almost as much as to build it from the beginning?

A. Yes ".

From the evidence it was clear that the building was damaged beyond any repair. Furthermore the Municipality would not allow the kind of repair necessitated by the damage occasioned unless the front wall was withdrawn about 5 ft. inside from its original position. Now that would amount to a substantial alteration in a small shop of a size of 330 sq. ft. The space to be lost would be 114 sq. ft. In the circumstances one has to consider the shop of the respondent as virtually destroyed and in such a case in assessing damages the rule in *Moss v. Christchurch R.D.C.* (1925) 2 K.B. 750 should, in our mind, apply, *i.e.* the measure of damages would be the difference between the money value of the owner's interest in the property before and after the damage was done and not the cost to repair or partly to restore it. Even if it were to be considered that the shop in question was not a total loss but the damage a repairable one, then the measure of damages would have proceeded in the way suggested in Charlesworth, on Negligence, 3rd edition, p. 580, which reads:

> " If a building is damaged, the plaintiff can recover (1) the cost of repairs ; (2) any depreciation in value, namely, the difference in value between the building as repaired and the building before the damage ; and (3) the expense of obtaining equivalent accommodation while the repairs are being carried out. Consequential loss such as loss of business can also be recovered. In the case of total destruction of a building the measure of damages is the value of the building destroyed and not the cost of replacement ".

It must be observed that where substantial alteration is necessitated for partial restoration of a building already damaged the question of repairing does not arise, but it amounts to partial or substantial replacement. The shop in question is to lose at least one third of its size owing to the space which has to be abandoned to the street. But whether we adopt as measure of damages the one or the other the method of assessment adopted by the trial Court would not

be correct. An interference with an easement of lateral support might amount, as the Authorities go, to a nuisance, trespass or negligence in tort. But the measure of damages to the buildings by removal of support in either case appears to be the same.

We are of the opinion, therefore, that the case should be remitted to the trial Court with a view to re-assess the damages in the light of the rule enunciated in *Moss v. Christchurch* (*supra*), that is the Court to award damages on the basis of the difference of the value of the shop of the respondent before and after the damage done. The trial Court will have the power to hear fresh evidence from both sides with a view to ascertain the difference in value as indicated.

The remaining part of the judgment of the lower Court including the order for costs will stand unaffected. The costs to be occasioned by fresh proceedings will be in the discretion of the trial Court. As to the costs of appeal, each party will bear its own costs.

Appeal partly allowed. Case remitted back to the lower Court for re-assessment of damages.