IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

CIVIL ACTION NO. HBC 184 of 2014

BETWEEN : **DEO CONSTRUCTION DEVELOPMENT COMPANY LIMITED** a duly incorporated company having its registered office at 11 Kennedy Street, Martintar, Nadi.

PLAINTIFF

AND : **DENARAU CORPORATION LIMITED** a company duly Incorporated under the laws of Fiji and having its registered office at Level 10, FNPF Place 343 Victoria Parade, Suva in the Republic of Fiji.

DEFENDANT

Mr. Gyanendra Adish Narayan for the Plaintiff
(Ms) Bhavna Geeta Narayan for the Defendant

Date of Ruling : - 10th March 2017

RULING

(1) This is the Plaintiff's application for assessment of damages further to Judgment delivered in its favour on 24th February 2015, by Hon. Justice Mohammed Ajmeer.

(2) At the hearing for assessment of damages, the Plaintiff called the following witnesses:

i. Mr Vimal Deo – Managing Director of the Plaintiff

ii) Mrs Sunita Kumari Prasad – Team Leader for Deo Group

The Defendant called the following witnesses:

i. Mr Rupeni Fonmanu – Chief Executive Officer of the Defendant

ii. Mr Robert Kruger – Member of Denarau Residential Estate Limited Development Review Committee and Denarau Corporation limited Board.

(3) The Plaintiff tendered the following documents as exhibits.

Exhibit 1	-	Copy of Sale and Purchase Agreement with Coptic Church dated 17th February, 2014.
Exhibit 2	-	Copy of ANZ Bank Offer letter dated 13th July, 2015.
Exhibit 3	-	Copy of ANZ Bank Statement dated 18th May, 2016.
Exhibit 4	-	Copy of Agreement to lease with David Bowden dated 26th August, 2015.
Exhibit 5	-	Copy of Bank statement from 20th October, 2015 to 6th January, 2016 showing rental of $8000.00.
Exhibit 6	-	Copy of Higgins Tenancy Agreement dated 21st May, 2015.
Exhibit 7	-	Copy of Fairway Palm Tenancy Agreement dated 20th August, 2015.
Exhibit 8	-	Copy of Paradise Point Tenancy Agreement dated 23rd of November 2015.
Exhibit 9	-	Copy of Carol West's email dated 23rd March, 2015 enclosing letter dated 23rd March, 2015.
Exhibit 10	-	Copy of DCL's receipts from 26th February, 2014.
Exhibit 11 (A)	-	Copy of Ronil's email enclosing photographs dated 6th November, 2014.
Exhibit 11 (B)	-	Copy of invoices for mobilizing and demobilizing costs
Exhibit 12	-	Copy of VP Work's invoices.
Exhibit 13	-	Copy of Power Run Contracting invoices.
Exhibit 14	-	Copy of invoices of Standard Concrete Industries.
Exhibit 15	-	Copy of Schedule of Standard Concrete Industries with the

Invoices.

Exhibit 16 - Copy of Fiji Revenue Custom Authority Receipt dated 19th July, 2016.

Exhibit 17 - Copy of receipt VP Works in the sum of $16000.01.

Exhibit 18 - Copy of Receipt VP Works in the sum of $17150.00

Exhibit 19 - Copy of Receipt Power run for $21,000.00.

Exhibit 20 - Copy of various receipts from Standard Concrete, internet banking slips and the Highlighted Schedule.

The Defendant tendered the following documents.

DE1 - Development Consent Application dated 8th April, 2014

DE2 - Approval Letter dated 3rd March, 2015.

(4) THE FACTUAL BACKGROUND

The factual background to the case before me is set out in the Judgment of Hon. Justice Mohammed Ajmeer as follows; (Reference is made to paragraph (04) of the Judgment).

> *"Deo Construction Development Company Limited (DCDCL), the Plaintiff is in the investment, development and construction business. DCDCL acquired a vacant section of land comprised in Certificate of Title 35924 being Lot 6 on Deposited Plan 9135 with restrictive covenant number 502650. This land is a waterfront lot situated in the residential precinct known as "sovereign Quays" on Denarau Island. It acquired this land from Coptic Orthodox Church Victoria Property Trust (COCVPT) and the transfer formalities were completed on 23rd August 2014. During the course of completion of the acquisition of the above land DCDCL on 8th April 2014 applied for development consent from Denarau Corporation Limited (DCL), the defendant, DCDCL's development plan is for a construction of a residence. DCL's approval is required before the Nadi Rural Local Authority, in whose jurisdiction Denarau falls, will process and approve the plans. DCDCL lodged the application form and paid the fee to DCL for which it gave a receipt. DCDCL did not receive a response from DCL. By 19th May 2014 Mr Deo Vimal, director of DCDCL spoke by phone to Mr Rupeni Fonmanu and Mr Roneel Deo who are employees of DCL. On 6th June 2014 DCL rejected the application citing that DCDCL was not the registered owner of the*

property and alleged that Deo Family Trust (DFT) a major shareholder of DCDCL owed outstanding levies to DCL. DCL advised that the consent will only be considered provided the DCDCL becomes the registered owner and that the levies owed to DCL are fully paid up. DCDCL commenced these proceedings seeking declaration and damages for wrongfully refusing to grant consent to development plan.

In the instant case, the Plaintiff initiated the proceedings by way of Originating Summons and the following Orders and Declarations were made by the Court on 24/2/15:

1. *A declaration that the Defendant's refusal to grant development permission or consent and the withholding thereof to construct a residence on Certificate of Title 35924 being Lot 6 on Deposited Plan 9135 situate on Denarau Island on the grounds that a shareholder of the Plaintiff, Deo Family Trust, owes levies for its own properties to the Defendant is unreasonable, unjustified, without any legal basis and wrong in law.*

2. *An order that the Defendant forthwith issue development consent to the Plaintiff submitted on 8/4/14.*

3. *The Defendant do pay damages to the Plaintiff to be assessed.*

4. *The Defendant pay the costs of this application and proceedings on a solicitor/client indemnity basis.*

(5) **<u>What is the Role of the Court in making an Assessment of Damages</u>**

Lord Diplock said in **<u>Mallet v McMonagle</u> ((68) (1970) AC 166 at 176.):**

> *"The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must take an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards."*

In **Malec V J.C. Hutton Pty. Ltd,** **(69) (1990) 169 CLR at 642 – 643.) Deane, Gaudron and McHugh JJ** said:

> *"When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured."*

(6) In regard to distinction between general and special damages, **Halsbury's, Laws of England**, 4th Edition, Volume 12 at paragraph 812 state as follows;

> *"...In the context of liability of loss (usually in contract) general damages are those which arise naturally and in the normal course or events whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss... special damages; in this context are those losses which can be calculated in financial terms. A third distinction between the two terms is in relation to pleading: here, special damages refers to those losses which must be proved..."*

In the case of **Pacoil Fiji Ltd v Attorney General of Fiji** **[1999] FJHC 133** Pathik J quoting from **Salmond** on the Law of Torts, 20th Edition, said:

> *"Here the plaintiff has pleaded both 'special' and 'general' damages. General damages is that kind of damage which the law 'presumes to follow from the wrong complained of and which, therefore, would not be expressly set out in the plaintiff's pleadings. Special damage on the other hand, is damage of such a kind that will not be presumed by the law and it must therefore be expressly allege in those pleadings so that the defendant may have due notice of the nature of the claim."*

In **Attorney General v Burnett** **[2012], FJCA 15 (21 March 2012)** the Court of Appea at paragraph 71 stated;

> 71. The position was clearly stated by Diplock LJ in **Ilkiw -v- Samuels and Others** **[1963] 1 WLR 991** at page 1006:
>
> *"Special damages, in the sense of a monetary loss which the Plaintiff has sustained up to the date of trial, must be pleaded and particularised... In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years – that you can recover in an action only special damage which has been pleaded, and, of course, proved."*
>
> (Emphasis Added)

It is important to bear in mind the legal principles involved in assessment of damages.

I find the principles summed up very well by **McGregor on Damages, 16th Edition, 1987,** at 236 and 360 and I adopt them here for my purposes:

> *"As Vaughan Williams L.J. put it in* ***Chaplin v. Hicks, (1911) 2 K.B. 788 C.A.*** *the leading case on the issue of certainty" "the fact that damage cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages." Indeed if absolute certainty were required as to the precise amount of loss that the plaintiff had suffered, no damages would be recovered at all in the great number of cases. This is particularly true since so much of damages claimed are in respect of prospective and therefore necessarily contingent, loss. Of course, as Devlin J, said in* ***Biggin v Permanite: [1951] 1 K.B. 422 at 438.*** *"Where precise evidence is obtainable, the court naturally expects to have it [but] where it is not, the court must do the best it can. "Generally, therefore, although it remains true to say that "difficulty of proof does not dispense with the necessity of proof", (****Aerial Advertising Co. v. Bachelors Peas [1938] 2 All E.R. 788 at 796, per Atkinson J.),*** *the standard demanded can seldom be that of certainty. Even if it is said that the damage must be proved with reasonable certainty, the word "reasonable" is really the controlling one, and the standard of proof only demands evidence from which the existence of damage can be reasonably inferred and which provides adequate data for calculating its amount. The clearest statement of the positions is that of Bowen L.J. in* ***Ratcliffe v Evans [1892] 2 Q.B. 524 at 532-533, C.A.)*** *where he said:*

> *"In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

In assessing damages on a loss or injury suffered the following passage from the judgment of Deane J in the **Commonwealth of Australia v Amann Aviation Pty Limited (1991) 174 CLR 64** at 111-112 is worth noting in this context:

> *"The frequent inability of curial procedures to determine with certainty what has happened in the past, let alone what would have been or what will be, necessarily gives rise to a need for a number of subsidiary rules governing the determination of the loss or injury which a Plaintiff has actually sustained by reason of a wrongful act. One such subsidiary rule is that ... a plaintiff bears the onus of establishing the extent of his loss or injury on the balance of probabilities. To satisfy the requirements of that rule, a plaintiff must, if he is to recover more than a nominal amount in such an action, affirmatively establish assessable damage, that is to say, loss or injury which is capable of being measured in monetary terms.*
>
> *... In particular, it may be appropriate that damages be assessed by reference to the probabilities or the possibilities of what would have happened or will happen rather than on the basis of speculation that probabilities would have or will come to pass and that possibilities would not have or will not."*

Deane J at 119 goes on to say:

> *"In such a case, considerations of justice require that the plaintiff be entitled to recover the value of the lost chance it self and that the defendant be not allowed to take advantage of the effects of his own wrongful act to escape liability by pointing to the obvious, namely, that it is theoretically more probable than not that a les than 50 per cent chance of success would have resulted in failure."*

On the question of loss of anticipated profits a very useful summary of the principles and factors governing the situation such as the present, in my view, appears in the following passage from a foreign judgment in the case of **Holt v United Security Life Ins & Trust Co (1990) 72 Atlantic Reporter 301** at 305-306 and quoted by Brennan J in **Amann Aviation** (supra) at 106:

> *"The fundamental and cardinal principle that underlies all rules for the admeasurement of damages is that the injured party shall have compensation for that which he has directly lost by reason of the act of the other party, so far as such loss was or ought to have been in the contemplation of the parties. This includes the loss of anticipated profits where these are capable of legal ascertainment. But, where the profits are not capable of ascertainment, or are remote and speculative, and therefore not proper to be adopted as a legal measure of damage, it does not follow that the injured party is remediless... Losses directly incurred, as well as gains prevented, may furnish a legitimate basis for compensation to the injured party. And, among such immediate losses, expenditure fairly incurred in preparation for performance or in part performance of the agreement, where such expenditures are not otherwise reimbursed, form a proper subject for consideration where the party injured, while relying upon his contract, makes such expenditures in anticipation of the advantage that will come to him from completed performance ... where one party repudiates, and thus prevents the other from gaining the contemplated profit, it is not, we think, to be presumed in favour of the wrongdoer (in the absence of evidence) that complete performance of the agreement would not have resulted in at least reimbursing the injured party for his outlay fairly made in part performance of it. Ordinarily, the performance of agreements results in advantage to both parties over and above that with which they part in the course of its performance; otherwise there would soon be an end of contracting. And it seems to us, upon general principles of justice that, if he who, by repudiation, has prevented performance, asserts that the other party would not even have regained his outlay, the wrongdoer ought at least to be put upon his proof."*

It was held by Blackburne J in **Obagi v Stanborough (Developments) Ltd and Others** (1993, 15 December, The Times Law Reports 646) that:

> *"A plaintiff could recover damages in respect of a loss of profit which he might, but for the breach of contract by the defendant, have made, without proving, on a balance of probabilities, that he would have made it. But his chance of making it had to be a substantial one, more than a mere speculative possibility."* (Emphasis added)

(7) Let me now return to the claim before me, bearing those principles uppermost in my mind.

In the case before me, the Plaintiff initiated the proceedings by way of Originating Summons and the following Orders and Declarations were made by the Court on 24th February 2015;

Para 1. *A declaration that the Defendant's refusal to grant development permission or consent and the withholding thereof to construct a residence on Certificate of Title 35924 being Lot 6 on Deposited Plan 9135 situate on Denarau Island on the grounds that a shareholder of the Plaintiff, Deo Family Trust, owes levies for its own properties to the Defendant is unreasonable, unjustified, without any legal basis and wrong in law.*

2. *An order that the Defendant forthwith issue the development consent to the Plaintiff submitted on 8th April 2014.*

3. *The Defendant do pay damages to the Plaintiff to be assessed.*

5. *The Defendant pay the costs of this application and proceedings on a Solicitor/Client full indemnity basis.*

The Court having determined liability against the Defendant ordered assessment of damages to take place.

(8) As regards the question of damages, the only pleading in relation to a claim was set out in paragraph 13 of Vimal Deo's Affidavit (the Managing Director of the Plaintiff Company) sworn on 10th November 2014, to the following effect;

Para 13. ***The Plaintiff intends to construct a residential building on the property and let it out for rental.*** *There is currently shortage of properties for residential lettings in Denarau. The Plaintiff has been in the business of letting out properties since its inception in 1993. The Plaintiff currently owns four properties in Denarau out of which three are on rental. The subject property has not been built on. The refusal by the Defendant to grant consent has caused delay in the construction and this has led to* ***loss of potential income*** *for the Plaintiff.*

(Emphasis Added)

In all cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the Plaintiff's rights, and calls it **general damage.**

Special damage in such a context means the 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 it ought to give warning in its pleadings in order that there may be no surprise at the hearing.

The Plaintiff's claim for damages in respect of loss of 'rental income' cannot be ordinarily a direct and natural result of the Defendant's refusal to grant development consent which is neither tort nor breach of contract. To be more precise, the law does not presume that the alleged loss of rental income is a direct, natural or probable consequence of the Defendant's refusal to grant development consent which is neither tort nor breach of contract and therefore would be '**special damage**'.

As was pointed out in the written submissions of the Defendant, the alleged loss of rental income and the period of loss was not pleaded and particularized in Vimal Deo's affidavit, sworn on 10th November 2014. As I said earlier, the only pleading in relation to a claim was set out in paragraph 13 of Vimal Deo's affidavit.

For the sake of convenience, the paragraph 13 is reproduced below in full;

> *Para 13. The Plaintiff* ***intends*** *to construct a residential building on the property and let it out for rental. There is currently shortage of properties for residential lettings in Denarau. The Plaintiff has been in the business of letting out properties since its inception in 1993. The Plaintiff currently owns four properties in Denarau out of which three are on rental. The subject property has not been built on. The refusal by the Defendant to grant consent has caused delay in the construction and this has led to* ***loss of potential income*** *for the Plaintiff.*

(Emphasis added)

In a claim for special damages, the defendant is entitled to the fullest particulars. As I understand Vimal Deo's affidavit, the Plaintiff claims under paragraph 13 'loss of potential rental income'.

As I said earlier, counsel for the Defendant pointed out in her written submissions that the Plaintiffs alleged loss of rental income and the period of loss was not pleaded in Vimal Deo's Affidavit, sworn on 10th November 2014.

I cannot brush aside the preliminary point raised by counsel for the Defendant in her written submissions. I remind myself that, this Court is duty bound, as a matter of law, to take into account in exercising the Court's discretion, the argument advanced by Counsel for the Defendant.

See;

- **Australian Wire Industries (Pty) Ltd v Nicholson**
  (1985) 1 NSWCCR 50 at 56-7 per McHugh JA

- **Sullivan v Department of Transport**
  (1978) 20 ALR 323 at 353 per Fisher J

- **Baldwin & Francis v Patents Appeal Tribunal**
  (1959) AC 663, 693 per Lord Denning.

The question that looms large before me is whether this alleged loss of 'rental income' which is capable of substantially exact calculation is pleaded and particularized while at the same time giving the Defendant access to the facts which make such calculations possible, thus showing the Defendant the case it has to meet.

It is important to remember that the damage claimed under paragraph 13 of Deo's Affidavit is in its nature special damage, and, in accordance with the ordinary rule, where a Plaintiff is claiming special damage; he must give sufficient particulars of his claim. That raises the first point, and, indeed the most important point, which calls for consideration. I must confess that I cannot extract from paragraph 13 of Vimal Deo's affidavit any sufficiently clear statement as to **the quantum of the alleged loss and the period of alleged loss. There is no mention at all of quantum of alleged loss and the period of loss**. The Defendant ought to have this particulars, because the said particulars would give the defendant adequate opportunity to investigate it. The Defendant is entitled to get the said particulars in order to enable it to know what the Plaintiffs real claim for damages is. **The Plaintiff has not pleaded and particularised the quantum of alleged loss which is capable of precise quantification in monetary terms and the period of alleged loss**. In my judgment, this is embarrassing. The Plaintiff has put the Defendant in a difficulty. It is impossible for the Defendant to come to a conclusion as to what would be reasonable sum to pay to satisfy the Plaintiff's claim if it minded to take that course before the hearing. The quantum of alleged loss and the period of loss are capable of substantially exact calculation at the time of institution of the action. Therefore, in the pleadings, the Plaintiff must disclose them and give the defendant access to the said facts which make such calculation possible, thus showing the defendant the claim it has to meet.

The damages recoverable for loss of "rental income" would be special damages which are capable of precise quantification in monetary terms and there is an obligation on the Plaintiff to plead special damages beyond the words ***"potential income"*** appearing in paragraph 13 of Vimal Deo's affidavit. The law will not infer the "loss of potential rental income' from the Defendant's refusal to grant development consent which is neither tort nor breach of contract. The loss of potential rental income does not follow in ordinary course. It is exceptional in character and the quantum and the period of loss should be specifically pleaded, particularized and proved. I call them three P's. The Plaintiff's loss of rental income is liquidated, capable of precise quantification in monetary terms, verifiable and probable sums. The Plaintiff would suffer no harm or injustice by pleading as to the quantum of alleged loss which is capable of precise quantification in monetary terms and the period of alleged loss. Why should the Plaintiff prevent the Defendant from knowing before the hearing of assessment of damages, the quantum of alleged loss of rental income and the period of alleged loss? Why should the Defendant be kept in the dark? The Plaintiff ought to plead and particularize in its pleadings the quantum of alleged loss of rental income

and the period of alleged loss in order that there may be no surprise at the hearing of assessment of damages.

The obligation to particularise arises not because the nature of the loss is necessarily unusual, but because a Plaintiff who has the advantage of being able to basis claim on a precise calculation must give the defendant access to the facts which make such calculation possible and put the Defendant on its guard and tell him what it has to meet when the damages comes in for hearing.

The matter is clearly stated in **Mayne and MacGregor on Damages (12th Edn, 1961)** in para 970, where the learned editor writes:

> *"Special damage consists in all items of loss which must be specified by [the plaintiff] before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial."*

I cannot accept the contention, which Counsel for the Plaintiff presented in his written submissions, that, "*In the matter of the current proceedings before the Master the action was not brought by Writ with pleadings but an Originating Summons so that the same detail as to pleadings do not apply.*"

With due respect to the forceful and tenacious argument of counsel for the Plaintiff, in my opinion, this practice could operate to the disadvantage of the Defendant. This practice manifestly leads to the greatest injustice. I cannot resist in saying that it is not permissible to fashion legal principles or judicial procedures in someone's interest. The Plaintiff should not expect the Court to assess the requirements of justice with its eyes in blinkers; it must look at all the circumstances.

If this practice is persisted to its logical conclusion, it would reduce to farce the pleading of special damage, of which particulars have to be given. Such a practice would not only reduce the giving of particulars of special damage to a farce, but would prevent the objects of the giving of those particulars, viz,

- to enable the Defendant to know what is really being claimed so that it may, if it so desires, to settle the claim.
- give the defendant adequate opportunity to investigate it.
- allow the Defendant to come to a conclusion as to what would be reasonable sum to pay to satisfy the Plaintiff's claim if it minded to take that course before the hearing.
- showing the defendant the claim it has to meet.

- give the defendant access to the facts which make such calculation possible and put the Defendant on its guard and tell him what it has to meet when the damages comes in for hearing.

(9) The Defendant has been prejudiced as a result of the pleading in its present form. The Plaintiff ought to plead the quantum of alleged loss of rental income and the period of alleged loss in its pleading in order that there may be no surprise at the hearing of assessment of damages. I cannot shut my eyes to the fact that the quantum of alleged loss of rental income and the period of alleged loss sprung on the defendant at the hearing of assessment of damages, viz, 28 months after bringing the proceedings by way of Originating Summons. The quantum of alleged loss of rental income and the period of alleged loss was not intimated to the Defendant until the hearing of assessment of damages. I find it hard to believe that this Court should be powerless to intervene to prevent such a manifest injustice. On the question of a claim for loss of rental income, this is, in my Judgment, insufficiently pleaded to the extent that the amount claimed, the period for which it is claimed and the method by which that amount is claimed were not pleaded and particularized.

The pleading is insufficient as a claim for special damage. The oral evidence and the submissions are not pleadings.

On the question of pleading special damages recoverable for alleged loss of rental income, I am left in an extremely unsatisfactory position. The Plaintiff must understand that if it brings actions for special damages it is not enough to throw a copy of Agreement for Lease (exhibit-4) and a copy of Bank Statement (exhibit-5) at the head of the Court, saying, "*This is what I have lost; I ask you to give me these damages.*" The Plaintiff is bound to plead and particularise the quantum of alleged loss of rental income which is capable of precise quantification in monetary terms and the period of alleged loss in its pleading in order that there may be no surprise at the hearing.

The Defendant has been prejudiced as a result of the pleading in its present form. The result is that the claim for award of damages for loss of rental income is dismissed.

(10) Furthermore, the Plaintiff whilst only alleging loss of rental in its pleadings, sought to prove other alleged losses at the hearing of this matter such as loan repayment on the property to ANZ Bank, costs of the building materials and other expenses incurred in building. They are special expenses incurred or monies actually lost. They do not follow in ordinary course. They are exceptional in character and therefore must be specifically pleaded and particularized. They are in the nature of special damages. In light of the trite law that <u>only special damages that have been pleaded can be</u>

recovered. The Plaintiff is not entitled to any of the special damages alleged and sought to be proved during the hearing of the assessment of damages as they have not been pleaded.

Odgers says **(D.B. Casson and I.H.Dennis, Odgers 'Principals of Pleading and Practice in Civil Actions in the High Court of Justice (22d) (London, Stevens & Sons 1981) at pp. 170, 171.)**

> *'As to the allegation of damage, the distinction between special and general damage must be carefully observed. General damage such as the law will presume to be the natural or probable consequence of the defendant's act need not be specifically pleaded. It arises by inference of law, and need not, therefore, be proved by evidence and may be averred generally. In some cases however, part of the general damages which it is sought to recover may have resulted from the wrong complained of in an unexpected though foreseeable way, in which case particulars should have be given so as to avoid surprise at the trial and to enable your opponent to consider making a payment into Court.*
>
> *Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held "remote.*

Halsbury says as follows: (4th edition at para 812)

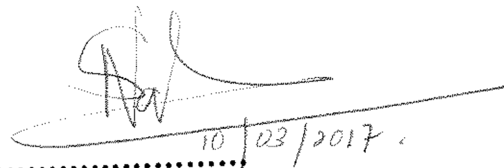
> *'General', 'special' and 'consequential' damages. A distinction is frequently drawn between the terms 'general' and 'special' damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), general damages are those which arise naturally and in the normal course of events, where special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they are not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss: here, general damages are those losses, usually but not exclusively non pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in*

financial terms. A third distinction between the two terms is in relation to pleading: here, special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, which the result that the plaintiff is required only to assert that such damage has been suffered..."

ORDERS

(1) The Plaintiff's claim for damages is dismissed.

(2) The Plaintiff is to pay costs of $1000.00 (summarily assessed) to the Defendant within 14 days hereof.



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Jude Nanayakkara
Master

At Lautoka
10th March 2017