

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA, FIJI
EXERCISING CIVIL JURISDICTION

CIVIL ACTION No. HBC 88 of 2019

BETWEEN : **BUILDING SOLUTIONS (FIJI) LIMITED**, a limited liability company having its registered office at Nadi, Fiji.

PLAINTIFF

AND : **SHARMA MUSIC CENTRE LIMITED** a limited liability company having its registered office at Sharma Arcade, Lot-15, Naitovo Lane, main Street, Nadi Town, Nadi, Fiji.

DEFENDANT

BEFORE : Hon. A.M. Mohamed Mackie- J

COUNSEL : Mr. S. F. Koya Snr, with Ms. Takali & Mr. A. Koya Jnr, for the Plaintiff.

: Mr. J. Sharma with Ms. Singh P. for the Defendant.

TRIAL HELD : On 15th & 16th March 2023 and 26th April 2023.

W. SUBMISSIONS : Filed by the Plaintiff on 13th September 2023.

: Filed by the Defendant on 18th September 2023.

JUDGMENT : Pronounced on 30th June 2025.

JUDGMENT

A. INTRODUCTION:

1. The Plaintiff Company (“the Plaintiff”) on 11th April 2019, by way of its Writ of Summons and the Statement of Claim (“SOC”) filed the above styled action against the Defendant Company (“the Defendant”) seeking the following reliefs;
 - i. *Judgment in the sum of \$721,015.00 (Seven Hundred Twenty-One Thousand Fifteen Dollars).*
 - ii. *Damages for breach of Contract dated 22nd day of June 2017.*
 - iii. *Damages for locking out the Plaintiff from the property to carry out the construction works.*
 - iv. *Further damages against the Defendant for using the Plaintiff’s Public Liability Policy and Workers compensation Policy to complete the construction through another contractor.*
 - v. *Interest at the rate of ten percent (10%) per annum on any amount of damages awarded from the date of this writ till the date of judgment under the Law Reform (miscellaneous provisions (Death and Interest Act).*
 - vi. *Costs on a Solicitor Client indemnity basis.*
 - vii. *Such further and other relief as this Court may deem just.*
2. The Defendant on 27th May 2019 filed its Statement of Defence (“SOD”), together with a Counter Claim and moved for reliefs, *inter alia*;
 - i. *That the Plaintiff’s Statement of Claim be dismissed.*
 - ii. *Damages for breach of Contract dated 27th day of June, 2017.*
 - iii. *Damages for improper use of the Winding Up Process.*
 - iv. *Interest at the rate of ten percent (10%) per annum on any amount awarded from the date of writ till the date of judgment under the Law reform (Miscellaneous Provisions) (Death and Interest Act).*
 - v. *Costs on Solicitor /Client indemnity basis.*
3. After filing the Reply to Defence and Defence to Counter -Claim, and adherence to the Orders made on Summons for Direction, both parties had recorded the following Agreed Facts and Issues most of which, in my view, are redundant for the reasons to be discussed later in this judgment. However, for the sake of lucidity and easy comprehension, all agreed facts and issues are reproduced bellow.

B. AGREED FACTS:

1. *On the 22nd day of June 2017, the Plaintiff and the Defendant entered into Fiji Standard Form of Building Contract (hereinafter called "the Contract") whereby the Plaintiff was to construct residential flats at Lot 60, Kennedy Avenue, Nadi, Fiji on Certificate of Title No. 11351 (hereinafter called "the property").*
2. *In consideration for the contract work, Defendant was to pay the Plaintiff the total sum of \$822,000.00 (Eight Hundred Twenty-Two Thousand Dollars) inclusive of Value Added Tax.*
3. *Under the said Contract, the Defendant's architect was to issue interim certificates at intervals showing the amount due to the Plaintiff for works done.*
4. *The Defendant was to give possession of the property to the Plaintiff on the 22nd day of June 2017, and the work was to be completed by the Plaintiff by the 31st day of July 2018.*
5. *The Plaintiff's total quote to construct a substantial multi-storey building for the Defendant was in the sum of \$822,000.00 VIP.*
6. *The Plaintiff rendered 3 (three) Invoices for the sum of \$180,000.00 (One Hundred Eighty Thousand Dollars) to the Defendant as follows:*
 - (a) *Invoice No. 20177047 dated 15th day of September 2017 in the sum of \$60,000.00 (Sixty Thousand Dollars).*
 - (b) *Invoice No. 20170915 dated 15th September 2017 in the sum of \$40,000 (Forty Thousand Dollars).*
 - (c) *Invoice No. 20171010 dated 10th day of October 2017 in the sum of \$80,000 (Eighty Thousand Dollars)*
7. *The Defendant's Architect Oceanic Consultants, reduced the amounts as Invoiced and issued 3 (three) Interim Certificates for payments by the Defendant to the Plaintiff. The Interim Certificates were as follows: -*
 - (a) *Interim Certificate No. 1 in the sum of \$31,350.00 (Thirty-One Thousand Three Hundred Fifty Dollars).*
 - (b) *Interim Certificate No. 2 in the sum of \$31,635.00 (Thirty-One Thousand Six Hundred Thirty-Five Dollars).*
 - (c) *Interim Certificate No. 3 in the sum of \$38,000.00 (Thirty-Eight Thousand Dollars).*
8. *There was a reduction of \$79,015.00 (Seventy-Nine Thousand Fifteen Dollars) by the Defendant's Architect in respect of the Invoices rendered by the Plaintiff.*
9. *The Defendant paid towards the Interim Certificates issued by its Architect for which the Plaintiff issued the following Receipts:*
 - (a) *Receipt No.20170911 dated 11th September 2017 in the sum of \$10,000.00 (Ten Thousand Dollars).*

(b) Receipt No.20170410 dated 4th October 2017 in the sum of **\$10,000.00** (Ten Thousand Dollars).

(c) Receipt No. 20171210 dated 12th October 2017 in the sum of **\$42,985.00** (Forty-Two Thousand Nine Hundred Eighty-Five Dollars).

(d) Receipt No. 20171011 dated 10th November 2017 in the sum of **\$20,000.00** (Twenty Thousand Dollars).

10. The Plaintiff on the 10th day of October 2017 disputed the reduction of the invoiced amounts with the Defendant's Architect.
11. The Plaintiff was aware that the Defendant would be leasing out the Residential Flats and would be earning income from the Residential Flats in the Property.
12. The Defendant paid a sum of **\$18,000.00** to the Plaintiff on or about the 18th December, 2017.
13. The Defendant has paid the Plaintiff the total sum of **\$ 100,985.00**.

C. AGREED ISSUES:

1. Whether the Plaintiff took out a Public Liability Policy in the sum of 100,000.00 (One Hundred Thousand Dollars) and whether the Plaintiff also took out a Workers Compensation Policy in the sum of \$33,800.00 (Thirty-Three Thousand Eight Hundred Dollars) as required under the Contract?
2. **Whether the Plaintiff prepared and completed the construction of foundation and floors as per the first item under the Scope of Works and whether the works allegedly carried out were worth in the sum of \$180,000.00 (One Hundred Eighty Thousand Dollars)?**
3. **Whether upon completion of the Foundation and the Floor, the Plaintiff claimed the sum of \$180,000.00 from the Defendant, which was approximately 22% of the total project cost and whether the Plaintiff completed the Foundation and the Floor?**
4. **Whether the Plaintiff had started the second stage of the construction under the scope of works without completing the first stage?**
5. **Whether the claim by the Plaintiff in the sum of \$180,000.00 (One Hundred Eighty Thousand Dollars) was not justified and was validly disputed by the Defendant?**
6. **Whether the Defendant through its Director had assured the Plaintiff's Director that payment for the completion of the foundation and floor works will be made?**
7. Whether the Plaintiff had prepared a Trade Summary Break Down with breakdown of payments and thereafter prepared an Amended Trade Summary Break Down?
8. Whether the Defendant's Architect by the name of **Jaidev P Maharaj** had prepared the Trade Summary?

9. *Whether at the Plaintiff's request, the Defendant had agreed to an Amended Trade Summary Break Down and whether the Plaintiff told the Defendant that an error was made in the initial Trade Summary Break Down?*
10. *Whether the Plaintiff agreed to the Amended Trade Summary and whether correspondence was exchanged between the Plaintiff's Director and **Jaidev Maharaj** disputing the Trade Summary Break Down?*
11. *Whether the Defendant had received Interim Certification based upon the Amended Trade Summary Break Down for the works done by the Plaintiff?*
12. *Whether the Interim Certificates were prepared based on the initial Trade Summary?*
13. ***Whether the Plaintiff had incurred expenses on its own and for which it relied on the payment for the works it had already carried out to cover the expenses?***
14. *Whether the Defendant locked the premises where the Plaintiff was carrying out construction works preventing the Plaintiff from entering the premises to carry out the construction works?*
15. ***Whether the Plaintiff had not been able to proceed with construction of the project due to the lockout by the Defendant?***
16. ***Whether the Plaintiff ceased all works on the construction in or around October, 2017 and subsequently removed all materials and equipment from the construction site thereof abandoning the construction works without any or any proper notice to the Defendant?***
17. ***Whether the Plaintiff stopped the construction works in or around October 2017 and subsequently removed all materials and equipment from the construction site thereof abandoning the construction works without any proper notice to the Defendant?***
18. ***Whether the Defendant engaged new contractors to carry out the works under the Contract using the Plaintiff's Public Liability Policy and Workers Compensation Policy?***
19. *Whether the Plaintiff failed to comply with the contract and did not adhere to the dispute resolution mechanism provided for in the contract?*
20. *Whether the Plaintiff issued a Winding Up Notice dated 24th November 2017 to pressure the Defendant to pay a disputed debt?*
21. *Whether the Plaintiff by failing to resume construction work by 12th January 2018, repudiated the contract and such repudiation was accepted by the Defendant vide its Solicitor's letter dated 12th January 2018?*

22. *Whether the Defendant appointed a new building contractor after the Plaintiff had abandoned the construction and repudiated the contract?*
23. ***Whether the Defendant had paid the Plaintiff the sum of \$100,985.00 (One Hundred Thousand Nine Hundred Eighty-Five Dollars) and leaving a balance of \$79,015.00 (Seventy-Nine Thousand Fifteen Dollars) in respect of the Invoices that were submitted by the Plaintiff?***
24. ***Whether the Defendant is required to pay the balance payment of \$79,015.00 (Seventy Nine Thousand Fifteen Dollars) to the Plaintiff for the alleged completion of the first Scope of Work?***
25. *Whether the Plaintiff has suffered damages consisting of lost profits from the said contract and whether the Plaintiff has suffered damages consisting of expenses incurred in mobilizing workers, job foremen, subcontractors and labourers for the Defendant's works?*
26. ***Whether the Defendant or the Plaintiff has breached the Contract dated the 22nd day of June 2017?***
27. ***Whether the Plaintiff is entitled to be paid the sum of \$721,015.00 (Seven Hundred Twenty-One Thousand Fifteen Dollars) being the balance sum payable in respect of the Contract?***
28. ***Whether the Plaintiff is entitled to damages against the Defendant for breach of contract and for locking out the Plaintiff from the property to carry out the construction works?***
- 29 ***Whether the Plaintiff is entitled to further damages against the Defendant for using the Plaintiff's Public Liability Policy and Workers Compensation Policy to complete the construction through another contractor?***
30. *Whether the Plaintiff is entitled to interest at the rate of ten percent (10%) per annum on any amount of damages awarded from the date of this writ till the date of judgment under the Law Reform (Miscellaneous Provisions) (Death and interest) Act?*
31. *Whether the Plaintiff issued progress claims and/or invoices for amounts more than the amount of work carried out on the construction?*
32. *Whether the Plaintiff failed to comply with or adhering to dispute resolution mechanism in the contract?*
33. *Whether the Plaintiff breached the Contract by stopping construction work on the project?*
34. *Whether the Plaintiff breached the Contract by abandoning the construction works on the project?*
35. *Whether the Defendant's construction had been delayed due to the Plaintiff?*
36. *Whether the Defendant had to appoint another building contractor and incurred further costs and expenses?*

37. *Whether the delay in construction resulted in the Defendant suffering loss and damages?*
38. *Whether the Defendant is entitled to be paid damages by the Plaintiff?*
39. *Whether the defendant is entitled to interest at the rate of ten percent (10%) per annum on any amount of damages awarded from the date of the writ till the date of judgment under the law Reform (Miscellaneous Provisions) (Death and interest) Act.*

D. TRIAL:

4. At the trial, the Director of the Plaintiff Company, namely, Mr. **R Krishna Sami (PW-1)**, Mr. **Vijay Krishnan** (a Civil Engineer) (**PW-2**), and one Mr. **James Jacquet Prasad** (sales Rep from R.C. Manubhai & Co) (**PW-3**) testified for and on behalf of the Plaintiff. Total number of 36 documents were tendered in evidence for the Plaintiff marked from “**Pex-1**” to “**Pex-36**”.
5. On behalf of the Defendant Mr. **Sushil Chandra Sharma (DW-1)**, Director of the Defendant, and Mr. **Jai Deve Prakash Maharaj (DW-2)** the building Designer and supervisor gave evidence by marking documents from “**DEx-1**” to “**Dex-34**”.
6. I will not reproduce here the entirety of evidence led, since I find now that sizable parts of it by both parties are also redundant. On careful perusal of the pleadings, I find that the number of real issues that beg adjudication here are only few (**the Highlighted issues**) and, in my view, answering those pivotal issues will dispose this action fully and finally. Thus, in this judgment, I will refer to, reproduce or highlight only the pertinent part of the evidence so led as and when needed in order to answer those pivotal issues.
7. Both counsels have filed helpful written submissions and I thank them for the same.
8. Before proceed further, I would like to concede that there was a delay in delivering this judgment due to various reasons beyond my control. However, I have taken due diligence to delve into the whole of the oral and documentary evidence led involving large number of annexures, and to consider all pertinent issues raised, in order to arrive at the most justifiable decision.

E. ANALYSIS:

9. It is an agreed fact that on the 22nd day of June 2017, the Plaintiff and the Defendant entered into a Fiji Standard Form of Building Contract (hereinafter called "the Contract") whereby the Plaintiff was to construct 3 storied residential cum office flat for the Defendant at Lot 60, Kennedy Avenue, Nadi, Fiji, which is depicted in Certificate of Title No. 11351 (“the property”) being owned by the Defendant.

10. It was also agreed, inter alia, that, the Defendant was to pay the Plaintiff a sum of **\$822,000.00** (Eight Hundred Twenty-Two Thousand Dollars) being the total consideration for the construction inclusive of Value Added Tax. However, out of the said sum, the Plaintiff was paid only a sum of **\$ 100,985.00** (One Hundred Thousand and Nine Hundred and Eighty-Five Dollars) against 3 invoices raised by the Plaintiff on account of the **first scope of works** as per the Plaintiff's quotation, total value of which, according to the said 3 invoices was **\$180,000.00** (One Hundred and Eighty Thousand Dollars). Eventually, a sum of **\$79,015.00** (Seventy-Nine Thousand and Fifteen Dollars) was not paid out of the total sum of \$180,000.00 so claimed. (Vide agreed facts 2,6,8,9 11 and 12). This, in my view, was the root cause for the dispute between the parties that finally led to the breach of contract.
11. The Plaintiff, in paragraphs 9, 17 and 18 of its SOC, merely pleaded that the Defendant had deducted a sum of **\$79,015.00** from the total sum of **\$180,000.00** quoted for the first item under the Scope of Works. This is an admission as per agreed facts No-8, 10 and 13. However, it is noteworthy that the said sum of **\$79,015.00** was neither specifically pleaded nor prayed for as special damages.
12. It was also based on the said part of pleadings in the SOC, the issues No-22 and 23 were raised querying whether the Defendant is bound to pay the alleged arrears sum of **\$79,015.00**. But, as alluded to above, the Plaintiff in its prayer to the Statement of Claim has not specifically prayed for the said sum of **\$79,015.00** as a relief. Even if it is assumed that the Plaintiff had specifically pleaded it as special damages and included a prayer for the said sum of **\$79,015.00**, the Plaintiff will not succeed in it as it has failed to adduce any or any sufficient evidence to convince this Court that the said sum was validly due and it is entitled to receive the same.
13. As per the evidence, in my view, the main reason for the Plaintiff to become **disentitled** for the said sum of **\$79, 015, 00**, was the Plaintiff's failure to complete all the works sought to be done as per the **first item under the scope of works** in terms of its Quotation dated 14th June 2017 marked as "**P. Ex- 3**". The relevant part of the quotation reads as follows;

**"(1) FOUNDATION -GROUND FLOOR FILLING READY-MIX -2 MONTHS TIME
FRAME FOR FOUNDATION & FLOOR - \$ 180,000.00**

*Laying padding, footing, **columns** (D20 X D16 X D12 X D10- df steel) and tie beam with suspended floor 600X200 according to project design plan with concrete strength 665 mesh laid on top of the floor for 150 slab filling, including plumbing, engaging town council engineers with consultant for inspection before filling.*

14. It is clear, as per the above quotation, though the Plaintiff had included the "**Columns**" in the first scope of works, by the time the Plaintiff submitted the first set of 3 invoices for \$180,000.00, it had failed to fill the columns with concrete mixture. It means that the column work, included in the 1st scope of works, was left unattended, leaving the vertically erected steel bars needed for the columns leading up to the 1st floor slab-beam to stand as shown in the photographs marked. The Plaintiff, under the first scope

of works, was expected to fill the columns with the concrete mixture, and when it had failed to do so, it could not have submitted the invoices for the full amount of **\$180,000.00** for the said works.

15. The Plaintiff's quotation dated 16th November 2016 marked as "**Dex-1**" and the addendum to the letter dated 24th January 2018 marked as "**Dex-13**" sent by **Messrs Pillai Naidu & Associates** on behalf of the Plaintiff to **Messrs Janend Sharma & Associates**, clearly show that the **filling of the Columns** was included in the items of works that fell under first scope of works, which the Plaintiff had, undisputedly, failed to do at that stage.
16. In fairness to the Plaintiff, as the "**PW-1**" stated in his evidence in page 46 of the transcript, I observe that the **filling of the columns** was in fact to be attended with the laying of Cement Blocks for the wall of the ground-floor, which fell under the second scope of works as per the quotation. It is a well-known procedure that in the process of construction, both the column filling and raising the wall are generally done simultaneously (at least on two stages) by firstly raising the wall partially and then filling the columns to that level after doing the necessary covering of the steel bars and rings by wooden board or plank. Vide the answer to the question No- 3 in page 46 "***I was ready to lay the blocks and then I will fill***".
17. The PW-1, under his re-examination as per page 73 of the transcript, when questioned to the effect "*But up to that point you have not done the column filling?*" his answer was "*No; column filling was not on the first stage. It was just floor. That quotation at 180,000.00 is steel and filling, then block laying. Once you do the block laying Sir then you will bind the column with the rings then do the boards and fill it from the top*".
18. Careful perusal of above piece of evidence clearly demonstrates that the Plaintiff, having quoted the price for the column filling under item 1 of the first scope of work as per its quotation, without completing the works by filling those columns with concrete mixture, had called upon the Defendant to pay for it. Thus, the Defendant was not bound to pay for it at that stage and the refusal to pay by the Defendant, in my view, was justifiable.
19. An alternative that was available for the Plaintiff to have avoided this quandary was, instead of including the price for **column filling** in the first scope of works, it could have included the same in the second scope of the works, during which time the block laying for the ground floor was to be attended. This was how the PW-1 had in fact intended to do as per his evidence. But what went wrong on his part, wittingly or unwittingly, was his attempt to obtain the payment for column filling prior to that work being attended
20. Another alternative for the Plaintiff at that stage was to do the column filling up to the beam level of the first floor, without doing the block work or raising the wall simultaneously, and to have completed all the works that came under the first scope

of the works. Had the Plaintiff followed this method, then its claim for **\$180,000.00**, for the items of works that fell under the first scope of works, would have been justified.

21. In other words, when the Plaintiff had raised its first 3 invoices for the first scope of works to the value of **\$180,000.00**, which had included the charges for the column filling too, the Plaintiff had not in fact done the column filling at all. Thus, the Plaintiff was not entitled to claim the entire sum of \$180,000.00 on account of the first scope of works.
22. Moreover, the Plaintiff's witness "PW-1" under his cross examination, as per page 56 of the transcript, has acknowledged the receipt of total payment due on 3 interim certificates.

"Q. So you have been paid in full as per the interim certificates that were issued by the supervisory officer. Isn't that correct?"

A. Yes Sir"

23. Plaintiff's witness "PW-1" has also accepted that **if** the Plaintiff had completed the Defendant's building, then the Defendant would have paid the total sum of \$822,000.00 as agreed (**Vide page 57 of the transcript**).
24. However, since this sum of **\$79,015.00**, being the special damages as alluded to in a foregoing paragraph, has not been specifically pleaded in the SOC, it cannot be awarded to the Plaintiff, even if it had been prayed for accordingly. However, I find that the said sum of \$79,015.00 remains included into the relief 1 prayed for in the prayers to the SOC.
25. A pertinent point to be observed here is that the Plaintiff, having received a sum of **\$18,000.00** on 18th December 2017 in lieu of the said sum of **\$79,015.00** in terms of the letter dated 12th December 2017, marked as "Pex-9" sent by the Plaintiff's former Solicitors Messrs Pillai Naidu & Associates, apparently being the final settlement of the said sum claimed, has now surreptitiously included the said sum of \$79,015.00 into the total sum of **\$721,015.00** prayed for in terms of the prayer 1 of the SOC. This shows that when the Plaintiff was fully paid for the works it had done under first scope of works, however leaving out the claim for the unattended works, it was not open for the Plaintiff to claim the said sum any further.
26. Therefore, I find that the issues no 2, 3, 4, 5, 6, 23, which revolve around the purported claim for a sum of **\$79,015.00** will have to be answered against the Plaintiff and in favour of the Defendant.

CLAIM FOR \$721,015.00

27. The Plaintiff is now claiming and praying for a sum of **\$721,015.00**, being the alleged balance sum of total contract price of **\$822,000.00**, after deduction of **\$100,985.00** that was, admittedly, paid for the works actually done under the first scope of works,

however, taking into account the works not done (i.e., Column filling, remaining plumbing works beneath the ground floor and laying concrete floor (for pathway around the building).

- 28.** The fact that the Plaintiff was fully and finally paid for its first scope of works, as discussed in paragraph 25 above, seems to have had escaped the attention of the Plaintiff and its Solicitors when they decided to claim a total sum of **\$721,015.00** (as the 1st relief), which includes the claim for the unattended work under the first scope.
- 29.** The said purported substantive claim for **\$721,015.00**, being the balance sum of the total agreed contract price of **\$822,000.00**, which is a pre-determined amount, the Plaintiff in its SOC should have specifically pleaded it as special damages, with facts and figures as to how it became entitled for the said sum. Further, the said sum has not been prayed for as special damages in the prayer to the SOC. However, when no work at all had been done beyond the first scope of work, the Plaintiff was not entitled to and could not have made the claim for the said sum of \$721,015.00.
- 30.** However, major part of the evidence adduced by the Plaintiff to substantiate its aforesaid substantive claim is in the form of large number of documents, in the absence of sufficient oral evidence to support and substantiate the contents therein. It is also to be noted that the Plaintiff hereof does not categorise the damages claimed as General or Special damages.
- 31.** Learned Counsel for the Defendant, in his helpful written submissions, has drawn my attention to the judgment of the Fiji Court of Appeal in ***New India Assurance Company Ltd v Lal [2003] FJCA 25; ABU 0059. 2008 (13 March 2013)***, wherein, in relation to Special and General damages, it was stated from paragraph 34 to 38 as follows. I am inclined to be guided by this authority in this matter.

Special and General Damages

[34] Salmond (Salmond & Heuston on Law of Torts, Twentieth Edition at 517) states that:

"General damages is that kind of damages which the law presumes to follow from the wrong complained of and which, therefore, need not be expressly set out in the plaintiff's pleadings. Special damages on the other hand, is damage of such a kind that it will not be presumed by the law and it must therefore be expressly alleged in those pleadings so that the defendant may have due notice of the nature of the claim". (Emphasis added)

[35] **The court is not entitled to award as general damages, which are in truth special damages.** The basic test of whether damages are general or special is whether particularity is necessary and useful to warn the defendant of the type of claim and evidence or the specific amount of the claim that which he will be confronted with at trial (Credit Corporation (Fiji) Ltd. v Khan [2008] FJCA 26).

[36] Similarly in ***Ratcliffe v Evans*** [1892] UK Law Rp KQB 131; [1892] 2 QB 524, 528 Brown LJ held that special damage "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 he ought to give warning in his pleadings in order that there may be no surprise at the trial". Where the precise amount of a particular claim of damages becomes clear before the trial, either because it has already occurred and so become

crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage (McGregor on Damages 17th edition paragraph 43-11).

[37] The loss of earnings which should have been pleaded by way of special damage could not be treated as general damages (*Ilkiw v Samuels & Others* [1963] 2 All ER 879 where Willmer LJ held that in reality the general damages awarded in that case were indeed special damages disguised as general damages). In *Credit Corporation* case (*supra*) the loss of earnings was perfectly quantifiable. They could have been pleaded and calculated as special damages. They had to be presented as special damages. The inescapable logic of the absence of pleading is that not much is left as a basis for the award of damages.

[38] In the case under review, the learned Judge has rightly rejected the evidence relating to special damages. The plaintiff had pleaded special damages in his plaint and it was for the plaintiff to prove it. The plaintiff attempted to prove special damages by producing an undated photocopy of an inventory. The plaintiff stated that all the documents are with the accountant who is living in New Zealand? It is for the plaintiff to prove special damages. The learned judge refused to grant special damages as it had not been proved. However, the amount stated in the special damages had been categorized by the Judge, arbitrarily as general damages. The plaintiff's case is based on special damages. The plaintiff knew them. He had identified them; he had valued them. Thus, it is the plaintiff that has to prove them. If the plaintiff does not do so successfully, the plaintiff must fail and the claim should have been dismissed. In the circumstances I shall allow the appeal. I set aside the judgment of the court below and in lieu thereof I enter Judgment for the defendant/appellant with costs of \$2000.

32. Obviously, as per the pleadings and the evidence led by both parties, the Plaintiff has failed and neglected to complete the construction of the building as agreed, for it to be entitled for the purported balance sum of **\$721,015.00** out of the total contract price of **\$822,000.00**.
33. The Plaintiff did not even complete all the items of work that were covered by the first scope of work, which was 22% of the total works, on which the dispute cropped up crippling the progress of works under the contract leading to breach of contract. This was sorted out by payment of only \$ **100, 985.00** out of the claimed sum of **\$180,000.00** for the said works.
34. The evidence of the "PW-2", the Plaintiff's Engineer, confirmed what the Plaintiff had done above the ground level, was only erecting the steel bars for the columns up to the first floor, which was devoid of concrete mixture filling for the completion of the columns as per his evidence under examination in chief in page 81 and during cross examination in page 89. The evidence by the PW-1 that they had installed steel for the 2nd and 3rd floor is unacceptable as it was impossible to install necessary steel for the 2nd and 3rd floors in the absence of solid columns and construction in the ground floor level.
35. It has transpired through the evidence, that the Plaintiff had done nothing to continue with the construction beyond the foundation and ground-floor level, which fell under the first scope of works, and to commence the 2nd scope of works, **except for bringing uncured Cement Blocks for that purpose**. Thus, the Plaintiff could not

have lawfully claimed the sum of **\$721,015.00** as prayed for in the 1st paragraph of the prayers to its SOC. This claim has to fail and necessarily be dismissed.

36. Going back to the aforesaid claim of **\$79,015.00**, which now forms a part of the aforesaid total sum of **\$721,015.00** prayed for as the first prayer to the SOC, I find that the following contents of the Report prepared by **Mr. Sefton Erasito** of **Quan Tech pacific Quantity Surveyors and Building Consultants**, and adduced as evidence through “DW-2”, without any objection by the Plaintiff’s counsel, plays a vital role in making decision on it.
37. While this report justifies the stance taken by the Defendant in reducing the claim made through first 3 invoices, it also reveals the exact issue faced by the Plaintiff - contractor, which culminated in the abandonment of worksite and stoppage of work. It is unfortunate that the Plaintiff, by not only failing to complete the works that came under the first scope of works, also erred in bringing **uncured Cement Blocks** for the construction of the Wall under the 2nd scope of works, and thereby acted detrimentally to its interest. Vide annexure “Dex-34” being the Tab “K” in the Defendant’s bundle of documents. The evidence in this regard found in page 193 of the transcript remained unchallenged.
38. The said Report, inter alia, states as follows;

“Our finding show that IC#3 prepared by Oceanic Designs & Building Consultants had accurate percentage for work completed however a small allowance needed to be included for Water supply popes, soil pipes and waste pipes laid under the ground floor slab. A mere 5% for section 14 plumbing is sufficient to cover this and would not affect the overall result of IC#3 too much.

We have also been advised that at the time IC#3 was issued, there were no material on site. This is included in our current assessment as there are concrete blocks and stand on site. We advise that at the time of inspection, the site shed was locked thus we were not able to ascertain if any additional material was kept on site.

*However, we have noted that the main issue faced by the contractor is **that they have underquoted for this project. Many trade totals are extremely low making it impossible for the works to be constructed with acceptable workmanship and quality material.***

Section 1 preliminaries and General is way too low even though the contractor has been given the opportunity to revise this. We believe he has started to feel the pressure of underquoting this project which is why we are now in this position”. (Emphasis added)

39. I find that the contents of the following paragraphs in the said Report cannot be disregarded or lightly taken when deciding the propriety of the claim in a sum of \$180,000.00 through 3 invoices for the first scope of works.

“Items requiring legal advice are:

1. Does the letter by Oceanic Designs & Building Consultants take precedence over the Building Contractor? If so, that would allow the Trade Summary produced by the contractor at a later date to supersede the Stage Breakdown forming part of the Contract Document.

*If the Stage Breakdown signed as a part of the Contract Documents cannot be superseded then the resulting value of completed works would be \$180,000.00 VIP **however, we stress that this is too high for actual works completed and puts the remainder of the project in an extremely dangerous position.***

2. *Why dispute Resolution clauses as identified under the contract were not followed?"*

40. However, on careful perusal of the total evidence led, while agreeing with the comment given in this Report to the effect "**we stress that this is too high for actual works completed**", I would go further and say, leaving no room for doubt, that the Plaintiff was not at all entitled make a claim for the sum of \$79,015.00 or the total alleged balance sum of \$721,015.00 , when it had failed to perform the works that came under the first scope of works and all the other works above the first scope of works..

Claim for Damages for breach of Contract:

41. The next claim advanced by the Plaintiff is damages for breach of contract. The overall evidence led, undoubtedly, suggests that there was a breach of contract. The issue in this regard that begs adjudication is the agreed issue No-2, which seeks answer as to which party breached the contract?
42. I don't find any commission or omission on the part of the Defendant, that could have contributed for the interruption of the construction works leading to breach of Contract, except for declining to pay for the works that were **not done** by the Plaintiff in terms of the first scope of works, and rejecting the uncured Cement Blocks brought by the Plaintiff for the construction of wall under the second scope of works.
43. Apart from the above, there is no any evidence to pin the blame on the Defendant for the breach of the Contract. The Plaintiff had issues in settling the Hardware Bills and paying the wages owing to lack of funds, which was well articulated by "PW-1" in his evidence. The Plaintiff, instead of investing its own funds for the commencement of works, appears to have completely relied on the funds provided by the Defendant. The aforesaid Report has revealed that the Plaintiff's predicament was mainly due to its underquoting for this project, which was not denied by the Plaintiff.
44. Having underquoted for a job of this magnitude and in the absence of own funds to bear the overheads, undoubtedly, the Plaintiff could not have expected a smooth process of construction and successful completion of it. I don't find any evidence that the Plaintiff advanced its own funds for anything at the commencement or continuation of the project.
45. If not for the Plaintiff's demand for the money on account of unfinished work under the first scope of works, and bringing of uncured Cement Blocks for the second phase, most probably the construction works would have continued uninterrupted and the Plaintiff would have secured the full contract price as "PW-1" has admitted in his evidence. (Vide page 57 of the transcript).

Q. If you had completed the building as per the contract and as per the plans then the total that would have been paid to you would have been \$820,000 inclusive of VATs, correct?

A: Yes Sir.

Q: And now witness the total sum that would have been paid to you upon completion of the building that's \$822,000 VIP was not going to be all profit, correct?

A: Yes Sir.

46. Above all, the "PW-1" under his further cross examination by the Defence Counsel in page 58 of the transcript, has admitted that he stopped the work.

Q: Now witness you stopped working on the project at particular point in time, is that correct?

A: Yes Sir.

47. Also, under further cross examination in page 59 of the transcript, the PW-1 has admitted that the contract did not allow the plaintiff to stop work and it should not have stopped the work. He also admits that the contract provided a specific method for dispute resolution, and the Plaintiff did not refer the dispute for arbitration.

48. Although, the Plaintiff was, admittedly, paid a total sum of \$100,985.00 for the works actually performed, it refused to resume the work citing new conditions to be introduced with regard to future payments. The letter marked as "Dex-7" by the Defence unequivocally demonstrates that it was none other than the Plaintiff, who breached the contract. The clause 26 of the contract made provisions to be followed for the termination of the contract, but the Plaintiff did not adhere to it. No notice given by the Plaintiff to the Defendant pursuant to clause 26 (1) (a) of the contract.

49. As the Plaintiff stopped the work in the manner stated above and breached the clause 25(1) (a) and (b), the Defendant exercised its right under clause 25 (1) of the contract.

50. The above evidence, substantially convince me to arrive at an inescapable conclusion that it was the Plaintiff who breached the building contract in this matter, causing the Defendant to hire another contractor to have the remaining works of the construction completed. Thus, the issue No-26 above should necessarily attract an answer in favour of the Defendant and I decide that the Plaintiff is not entitled for any damages under this head as prayed for in paragraph (ii) prayers to the Statement of Claim.

Damages for Locking out:

51. The Plaintiff under paragraph (iii) of the Prayer to the Statement of Claim, moves for damages for allegedly being locked out of the property from carrying out the construction works. When the PW-1 had admitted the receipt of payments for the initial claims made on account of the works performed, it was the Plaintiff's turn to resume the works. It was the Plaintiff, who had left the property by taking the remainder of building materials as confirmed by the Report submitted by Quan Tech

Pacific. When the Plaintiff had left the property in this manner and thereby breached the contract, it cannot claim for damages as prayed for under this head. Thus, the claim under this head has to fail necessarily.

Plaintiff's claims on Insurance Policies:

52. The Plaintiff also claims and prays for damages, in paragraph (IV) of the prayer to the SOC, against the Defendant's alleged usage of the Plaintiff's **Public Liability Policy** and **Workers Compensation Policy** to complete the construction through another contractor.
53. Plaintiff's document marked as "Pex-4" bearing Tab No-4 in Plaintiff's BOD, shows that the Sun Insurance Policy obtained by the Plaintiff on 05th August 2016 to commence from the said date was to expire on 5th August 2018. The dispute arose between the parties towards the end the year 2017 and the new Contractor came in only in February 2018 as per the evidence.
54. In any event, the Insurance Policies obtained by the Plaintiff were for the protection of the Plaintiff and applicable only to the works undertaken by the Plaintiff, not to any other builders or works carried out by them.
55. Even the Policies obtained by the Plaintiff under Workers Compensation Act of Fiji, were personal to the Plaintiff and those Policies could not have been utilized by other person or entity. The following parts of the Defence evidence by "DW-2" reveal that the new Contractor had obtained a new Policy.
- Q: *"Witness, could you identify the date on the document?"*
 A: *Yes, the period of the insurance is from 5th March, 2018 to 5th March 2019 and*
- Q: *Witness, the Plaintiff claims further damages against the Defendant in his Statement of Claim. With the Defendant used his public liability policy and workers compensation policy to complete the construction process through that the Munif's Building Contractor, what do you say about that?*
- A: *Your Lordship, that is incorrect. When contract was terminated, and the new contract was brought on board, there was new set of insurance put in place.*
- Q: *Very well. Would you like to tender this as evidence?*
 A: *Yes, I do".*
56. Thus, the claim by the Plaintiff under this head (on insurance Policies) also should necessarily fail. The Plaintiff's claim in paragraph (v) of the prayers to the SOC for **interest** also should fail as none of the Plaintiff's substantive claim succeeds.

F. COUNTER CLAIM BY THE DEFENDANT:

57. The Defendant, together with its Statement of Defence, has advanced a Counterclaim seeking Damages for breach of contract dated 22nd June 2017 and improper use of winding up process.

58. This Court has already found that the Plaintiff is liable for breach of contract. Then what remains to be decided is, whether the Defendant is entitled for damages for the same as prayed for? and, if it is, what is the amount that should be awarded to the Defendant?
59. As far as particulars of damages are concerned, the Defendant, in paragraph 6 of his Counterclaim, has averred that;
- a. *The Defendant's Construction has been delayed,*
 - b. *The Defendant had to appoint another building contractor whereby the Defendant incurred further costs and expenses. (Full details to be provided at trial).*
 - c. *The completed project was to earn income for the Defendant and due to delay in construction the Defendant has suffered loss and damages.*
60. As per the averments in paragraphs 7 and 8 (a) of the Statement of Defence, and those of the Response thereto in paragraph 5 & 6 of the Reply to Defence, it has been tacitly admitted by both parties that the work at construction site was stopped in or around mid-October 2017, though they have accused each other for the breach of contract.
61. As the Plaintiff had not resumed the construction, despite being paid a total sum of **\$100,985.00** for the works that had been done, (last payment on it, being \$18,000.00, was paid on 18th December 2017), the Defendant treated and accepted the Plaintiff's conduct as repudiation of the Contract on receipt of the letter dated **12th January 2018 sent by Plaintiff's former Solicitors Messrs Pillai Naidu & Associates**. This letter was responded by the Defendant's Solicitors informing that the Defendant will now appoint a new builder to complete the building project.
62. Accordingly, it transpires that the Defendant was at liberty to appoint a new contractor around the mid part of January 2018. However, the Defendant's witnesses, namely, the Director, **Sushil Sharma** ("DW-1") and/ or the Defendant's Supervisor, **Jai Dev Prakash** ("DW-2") have not given specific oral and documentary evidence as to from when the new Contractor came in and when the works were completed, in order to assist the Court in determining the period of delay.
63. However, the overall evidence reveals that there has been some delay in the project, obviously caused by the conduct of the Plaintiff, but there is no sufficient evidence to accept that the delay persisted for 5 months as pleaded by the Defendant.
64. The Defendant's claim for damages is based on, (a) the alleged delay, (b) incurring further costs and expenses due to appointment of a new contractor and (c) loss of rental income caused by the delay.
65. The alleged additional expenses and the loss of rental income, as per (b) and (c) above, have to be recognized as the claim for special damages, which should have been specifically pleaded and proved. It has been neither so pleaded nor proved. In case of those alleged costs and expenses, though the Defendant in paragraph 6 of its

counterclaim had undertaken to provide full details of it at the trial, that burden of proof has not been discharged by the Defendant.

66. The case law authority in ***New India Assurance Company Ltd v Lal [2003] FJCA 25; ABU 0059. 2008 (13 March 2013)***, cited by the learned Defence Counsel in paragraph 2;34 of his written submissions (reproduced in paragraph 30 of this Judgment), can also be applied against the damages claim advanced by the Defendant.
67. The Defendant failed to adduce any documentary evidence in relation to the additional costs and expenses, allegedly, incurred owing to the appointment of a new contractor, and with regard to the loss of Rental income. The oral evidence of DW-1, with regard to the loss of rental income, was based on the present-days values. No documents whatsoever was submitted to substantiate it. The court cannot simply accept and act upon such evidences when deciding the award for damages.
68. However, on the careful analysis of the whole evidences adduced, this Court stands convinced that there has been a delay of around 3 months due to the breach of contract committed by the Plaintiff to the detriment of the Defendant.
69. Accordingly, considering the overall evidence, circumstances and the predicament that the Plaintiff was in, the Court decides to grant only a nominal sum of \$6000.00 (Six Thousand Dollars) being the damages for breach of contract on the part of the Plaintiff. Defendant's Claim for damages for the improper use of winding up process is dismissed as it did not proceed beyond the issual of Statutory Demand.

G. COSTS:


70. Despite receiving a sum of **\$18,000.00** on 18th December 2017 pursuant to its former Solicitors' letter dated 12th December 2017 marked as "**Dex-6**", in lieu of the sum of **\$91,015.00** demanded through the Statutory Demand Letter dated 24th November 2017 marked as "Dex-4" sent by the Plaintiff's former Solicitors threatening Statutory Winding up process, the Plaintiff still decided to file and proceed with this action against the Defendant claiming the alleged balance sum out of \$180,000.00.
71. The Plaintiff knew very well that it had not fulfilled the first scope of works, and had received the full sum payable for the actual works done. The Plaintiff also knew and/or ought to have known that it was not entitle to the full contract price when it had not completed the job as per the contract. However, considering the predicament that the Plaintiff was in and other circumstances, this Court orders the Plaintiff to pay the Defendant a sum of \$3,000.00 (Three Thousand Dollars) as the summarily assessed costs.
72. The Plaintiff's entire claim has to fail and should be dismissed. The Defendant's Counterclaim succeeds partially with an order for costs.

H. FINAL ORDERS:

1. The Plaintiff's action fails.
2. The Plaintiff's Statement of Claim and the Action filed on 11th April 2019 are hereby struck out and dismissed.
3. The Defendant's Counter-claim partially succeeds on the claim of Plaintiff's breach of contract, entered by and between the parties on 22nd June 2017.
4. The Defendant is entitled to recover from the Plaintiff a nominal sum of **\$6,000.00** (Six Thousand Dollars) as damages for breach of contract.
5. The Defendant shall also be entitled to recover a sum of **\$3,000.00** (Three Thousand Dollars) being the summarily assessed costs.

On this 30th day of June 2025 at the Civil High Court of Lautoka.




A.M. Mohamed Mackie.
Judge.
High Court (Civil Division)
Lautoka.

SOLICITORS:

**Messrs: SIDDIQ KOYA LAWYERS –BARRISTERS & SOLICITORS for the Plaintiff.
(Presently Messrs KRISHNA & COMPANY -BARRISTERS & SOLICITORS).**

Messrs: JANEND SHARMA LAWYERS – BARRISTERS & SOLICITORS- For the Defendant.