

IN THE HIGH COURT OF FIJI AT LAUTOKA
APPELLATE JURISDICTION

Civil Appeal No: HBC 184 of 2014

(On Appeal from the Judgment/Ruling of the Master delivered on 10th March, 2017 in Lautoka High Court Civil Action No 184 of 2014)

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

APPELLANT-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.

RESPONDENT-DEFENDANT

Before : A.M.Mohammed Mackie- J
Counsel : Mr. A.K. Narayan, for the Appellant-Plaintiff
: Mr. Z. Lateef, For the Respondent-Defendant
Written Submissions: 09 March 2018 (Appellant-Plaintiff) 18 July 2018 (Respondent-Defendant)
Date of hearing : 18 July 2018
Date of Judgment : 1 October 2018

J U D G M E N T

A. INTRODUCTION:

1. This is a timely appeal arising out of the ruling made by the learned Master on 10th March 2017, subsequent to the hearing held before him for the assessment of damages payable to the Appellant-Plaintiff (the Plaintiff) by the Respondent – Defendant (the Defendant), as directed by the judgment entered by Brother Judge, Muhammad Ajmeer on 24 February 2015 in this action.

2. By the impugned ruling , the learned Master ordered;

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

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

B. BACKGROUND:

3. The Plaintiff, which is in the investment, development and construction business, having acquired the vacant possession of lot 6 in Certificate of Title 35924, depicted in deposit Plan 9135 and situated in the residential area of Denarau Island, by virtue of a Sale and Purchase Agreement (Ex-1) dated 17 February 2014 entered into with its predecessors in title, had on 8 April 2014, applied to the Defendant for development consent by paying required fees.

4. The Defendant Company in its duties, among other things, functions as a regulatory body for the development and other connected affairs of the properties within the Island of Denarau and grants consent for development as and when applications are made for that purpose.

5. At the time material to the said application by the Plaintiff, i.e. on 8 April 2014, the transfer process of the property in question (Lot-6) was in progress. It was finalised only on 13 August 2014 and the Plaintiff became the registered owner on 23 August 2014.

6. By its letter dated 6 June 2014, the Defendant refused to issue the development consent, citing that the Plaintiff was not the registered owner of the property and the **Deo Family Trust**, which is a major shareholder of the Plaintiff Company, was in arrears of levies to the Defendant, which was factually in respect of certain other properties.

7. The Plaintiff, having attempted to resolve the issue by way of few correspondences and even after informing the Defendant that the Plaintiff had become the registered owner of the property in issue on 23 August 2014, the Defendant still refused to issue the development consent alleging that the arrears of levies was pending. Accordingly, matter being not resolved, the Plaintiff on **11 November 2014** filed this action by way of originating Summons, supported by the affidavit of Vimal Deo, who is a director of the Plaintiff Company. The Plaintiff prayed for , inter-alia;

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 situated 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 (emphasis mine).*
 4. *.....*
 5. *The Defendant pay cost of this application and proceedings on a Solicitor/client full indemnity basis.*
8. On 24 February 2015, Muhammad Ajmeer-J delivered his judgment granting reliefs as per paragraphs 1,2,3 & 5 of the prayers to the originating summons, which are reproduced in the foregoing paragraph,.
9. Accordingly, the Defendant issued the development Consent to the Plaintiff on **03rd March 2015**, in compliance of the 2nd relief above.
10. It was after the hearing before the learned Master for the assessment of damages as per the 3rd relief above; the impugned ruling was delivered on **10 March 2017** dismissing the Plaintiff's claim for damages as stated in paragraph 2(1) above, together with an order for cost of \$1000.00. It is against this ruling the instant appeal is before me on the following Grounds of Appeal.

C. THE GROUNDS OF APPEAL:

11. The Appellant has appealed the Master's ruling on the following 08 grounds of appeal:
1. *The learned Master erred in dismissing the claim and assessment of damages on the basis of lack of pleadings in an Originating Summons process and/or in the absence of any objection as to the heads of damages on which evidence was led and/or in the absence of any submissions/closing address by the Respondent/Defendant on the conclusion of assessment of damages hearing.*
 2. *The Learned Master erred in dismissing the Appellant/Plaintiff's claims for damages on the grounds that the damage sought had not been pleaded or sufficiently pleaded when the pleadings if required was sufficient in view of the nature of proceedings.*
 3. *The Learned Master erred in failing to call on the parties to address the issues he raised in his Ruling as his basis for dismissing the Appellant/Plaintiff's claims for damages without clarification.*
 4. *The Learned Master erred in dismissing the Appellant/Plaintiff's claims for damages on the assessment hearing based on the lack of or sufficiency of pleadings in the absence of any request or applications for further and better pleadings from the Respondent/Defendant which should have been sought if there was any question of the*

Defendant being "kept in the dark" or not knowing the "quantum of alleged loss of rental income" and "the period of alleged loss" and further erred in failing to consider:

- 1. The period of loss was the delay in being able to commence and complete the construction;*
- 2. The Commencement of the period was already acknowledged and fixed by the Learned Judge in his Judgement of 24th February, 2015 and also by the Ruling of the Master dated 1st July, 2016;*
- 3. The Learned Master was required by the Learned Judge to assess the damages and did not require him to touch issues of liability for damages;*
- 4. The Learned Master failed to appreciate that the period of and loss of rental income were all matters of assessment and the claim was unliquidated in as much as at the time the proceedings were issued and referred for assessment neither the grant of approval for construction nor the completion of construction were known to any party.*
- 5. The Learned Master failed to appreciate that the potential rental from the property was not known the period covered would be during construction and completion which rental had to be assessed based on the evidence of various properties in the locality;*
- 5. The Learned Master erred in categorising the Appellant/Plaintiff's losses as being special damages or a claim for liquidated damages when they were not.*
- 6. The Learned Master erred in finding that the "Defendant has been prejudiced as a result of the pleading in its present form" when there was no confusion at the hearing and the Respondent/Defendant called evidence and witnesses in rebuttal and the evidence of admissions made by those witnesses and any prejudice (if there would have been any) was overcome by the Master's Ruling dated 19th May 2016.*
- 7. The Learned Master erred in the circumstances in finding "The pleadings are insufficient as a claim for special damages. The oral evidence and the submissions are not pleadings" when he ignored that evidence on relevant evidential matters at the hearing had been received without any or any material objections from the respondent/Defendant.*
- 8. The Learned Master's Ruling in dismissing and failing to assess damages and dismissing the Appellant's/Plaintiff's claim is wrong in principle and in all the circumstances of the nature of the proceedings and the evidence and if there were issues as to pleadings he dismissed any such issues by his Ruling dated 19th May 2016 and thereafter was functus and should have proceeded with assessment and/or in his Ruling of 19th May, 2016 given directions to overcome issues raised in his Ruling of 10th March, 2017 rather than revisit the issue again.*

12. I have carefully perused the contents of the written submissions filed by both the learned counsel and I am thankful to them for same.

D. DISCUSSION:

13. The parties are not at variance with regard to the procedures followed in filing the instant appeal and furtherance of it. I shall bear in mind that in the event the appeal is successful, my next task is to assess the damages and costs payable in terms of the Judgment already entered by M. Ajmeer-J and not to touch on the issue of liability.
14. When the impugned ruling dated 10th March 2017 is closely scrutinized, I find that the learned Master, during the hearing before him, seems to have predominantly focussed his attention to look into the propriety and/or the sufficiency of the pleadings, by categorising the damages claimed by the Plaintiff as **special damages**, instead of engaging in the exercise of assessing the damages, what the Plaintiff is entitled to have in terms of 3rd relief granted by the judgment dated 24th February 2015.
15. In addition to the above, the learned Master, having appraised his role in the assessment of damages, has proceeded to ascertain the nature of the damages claimed by the Plaintiff in the originating summons and that of the damages additionally claimed by way evidence during the hearing, finally to arrive at his conclusion that they are special damages and the Plaintiff cannot have relief as none of them had been pleaded or sufficiently pleaded.
16. The learned Master, having correctly identified as to what type of damages fall under the heads of special and general damages, has proceeded to decide that the Plaintiff's claims are special damages and it was not specifically pleaded, the Defendant was kept in dark and taken by surprise at the hearing before him. This decision of the learned Master, in my view, is bound to be absolutely correct, provided that the Plaintiff's claim for damages in this case fell under the category of special damages. It appears that the learned Master by the above exercise has exceeded his jurisdiction during the process of assessment of damages.
17. What the Plaintiff in its Originating Summons, apart from its substantial reliefs 1 and 2 therein, had asked for was the damages to be assessed, which is the **expected rental income** from the house it had planned to build on receipt of the development consent from the Defendant. In addition to the above the Plaintiff during the hearing before the learned Master had led evidence, supported by number of documents, on certain other expenses supposed to have **or** to be incurred, such as interest payable to the bank in relation to the loan obtained for the land in question, preliminary expenses on

provision of logistics to the building site and discrepancies in quoted prices for certain building materials and services, which too the Plaintiff appears to be claiming as damages it had to suffer due to the refusal of the Defendant to grant the development consent to build the intended house.

The ultimate finding of the learned Master was that the damages claimed by the Plaintiff, in the originating summons and under various heads through the evidence during the hearing, are special in nature and since they had not been specifically pleaded in the originating summons, the Plaintiff cannot recover them as prayed for.

18. As a result, the Plaintiff is now left with no relief on its 3rd prayer, despite the judgment dated 24th February 2015 has categorically stated that the Plaintiff is entitled for damages to be assessed. The Plaintiff has faced with this predicament while the said judgment M. Ajmeer- J, dated 24 February 2015, remains intact by the intervention of a higher forum.
19. I, observe that all the grounds of appeal adduced on behalf of the Plaintiff are seem to be primarily revolving around the learned Master's findings to the effect that the Plaintiff's claim was for special damages and the pleadings are insufficient to claim such damages, which the learned counsel for the Plaintiff argues was not the duty, the learned Master was called upon to perform.
20. Before I proceed to deal with the grounds of appeal, it is pertinent to identify what is generally accepted to be the distinction between special damages and general damages. Special damages relate to the past monetary expenses incurred and which stood precisely calculated at the date of the trial, whilst general damages relates to all other items of damages whether monetary or non- monetary and need not be pleaded with precision .
21. In case of general damages, the amount is not prescribed or particulars are not given in detail in the pleadings .The judge after finding the liability may decide the quantum on his/ her own or may delegate the task of assessment of such damages to the Master.
22. Special damages always refer to expenses already incurred monetarily and the loss of earnings, which the claimant should have actually incurred and the amount should have remained determined at the date of trial. The next condition is that those damages should have been specifically pleaded with details and/or made known to the opposing party by the time the matter comes up for the trial. This can be done by amendments to the pleadings or disclosures as well prior to the trial.
23. General damages can include any anticipated future losses as at the date of the trial and claims for any other past, present or future non- monetary damages or loses. In

case of special damages, the claimant is expected to specifically plead and give particulars of it at the outset or when demanded, by way of amendments or disclosures prior to the trial. But, in case of general damages, usually the claimant is not expected to specifically plead or give particulars.

The above position was clearly stated as follows by Diplock- LJ in *Ilkiw -V- Samuel and Others* [1963] 1WLR 991 at page 1006:

"Special damages, in the sense of 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"

24. It is only when the damages ordered are general in nature; a Judge or a Master is usually called upon to perform the duty of assessment of damages. If the damages ordered are special in nature, such an exercise is not warranted as the quantum of damages always stands pleaded and subsequently decided in the judgment itself after the trial, however, subject to the approval of the amount so pleaded.
25. In order to ascertain the correctness of the final decision arrived at by the learned Master, I shall examine the merits of the above grounds of appeal, in the light of my above observations, the evidence led before the learned Master and the arguments placed before me by both learned counsel in their written and oral submissions.
26. In my view , a first and foremost determination by this Court as to under which category of damages the Plaintiff's claim in this action actually falls , will undoubtedly throw light in ascertaining the correctness of learned Master's ruling. This will also cut short my lengthy and hire splitting analysis in the exercise of my jurisdiction over this appeal.

SUBMISSIONS:

27. The learned Counsel for the Plaintiff in his exhaustive written and oral submissions, supported by number of convincing authorities, has highlighted as to where the learned Master has erred, particularly, in arriving at the findings as to that the Plaintiff's claim is for special damages, particulars of it should been pleaded, the defendant shouldn't have been kept in dark and it was taken by surprise at the hearing. Counsel submits that the learned Master has re-visited the judgment of Ajmeer- J and ended up dismissing the Plaintiff's claim for damages.

In relation to the above, the learned counsel argues further that the Pleadings in this action were commenced by way of originating summons, there was no call, either for the conversion of it as a writ action or for more particulars on the claim and the learned Counsel for the Defendant did not raise any objection at all before the Judge or the learned Master when the evidence was led under various heads for general damages, which need not have been specially pleaded.

Counsel for the Defendant throughout his oral and written submissions, among other things, has mainly argued that the damages claimed by the Plaintiff were special in nature and therefore, the particulars of it should have been specifically pleaded or at least notified to the Defendants instead of taking the Defendants by surprise at the hearing.

MERITS OF THE GROUNDS OF APPEAL

28. I find that the grounds of appeal 1, 2, 3, & 4 are seem to be mainly dealing with the learned Master's finding on the alleged inadequacy of pleadings. Therefore, I will deal with those grounds of appeal in common.
 - 28.1. The Plaintiff commenced this action on 11th November 2014 by way of originating summons moving mainly for (1) *A declaration that the Defendant's refusal to issue a development consent was unreasonable, unjustified, without any legal basis and wrong in law,* (2) *An order that the Defendant forthwith issue the development consent* (3) *The Defendant do pay damages to the plaintiff to be assessed.* The judge accordingly granted the above all three reliefs together with an order for cost also to be assessed.
 - 28.2. There has not been any application, complaint or demand by the Defendant about the inadequacy of pleading or particulars of it warranting the conversion of the action as a writ action or at least a direction/ decision by my brother judge M. Ajmeer, for such a conversion on his own finding to that effect. Obviously, in the light of the contents found in the pre-litigation correspondences between the parties and according to the averments in the affidavit of both the parties filed before the judge, I don't find any serious issues to have existed to warrant a writ action in place of the one in hand or for subsequent call for further particulars.
 - 28.3. The Solicitors for the Defendant have accepted the propriety of the pleadings before the judge, acted on them and allowed the judgment to be entered as per the originating summons. Accordingly, the Defendant issued the consent for the development on 3 March 2015.

28.4. The remaining issue before the Judge was only on the claim for damages, which the Plaintiff had prayed in paragraph 3 of the prayer to the originating summons as follows.

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

28.5. Accordingly, Ajmeer –J in paragraphs 39 and 40 of his judgment decided the liability for damages as follows, still relying on the evidence adduced by way of affidavit and the contents of the documents attached thereto.

“[39] Whether the plaintiff is entitled to damage. The plaintiff seeks damages to be assessed as refusal to grant has caused delay in the construction and this has led to loss of potential income for the plaintiff. In para 13 of its affidavit in support the plaintiff states that:

‘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 owes 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.

[40] Award of damages is a private law remedy. To obtain an award of damages it is necessary that the plaintiff has suffered a private law wrong such as breach of contract. An award of damages may also be granted on the ground that the defendant has acted wrongfully in refusing to grant development consent. The plaintiff has proved a causal link between the wrongful decision and the loss suffered. The plaintiff applied for development consent to build a residence to rent it out and earn income. The consent has been refused wrongfully by the defendant. The refusal to grant consent has caused delay in the construction. The plaintiff suffers loss as a result of the defendant’s wrongful decision. I feel the plaintiff is entitled to an award of damages. I would therefore order the defendant to pay damages to the plaintiff to be assessed”

28.6. The averments in paragraph 13 of Vimal Deo’s supporting affidavit and the contents of the documents annexed thereto seem to have satisfied Ajmeer-J to award damages and to order for same to be assessed as the Plaintiff had pleaded. When the learned Judge has arrived at a finding that the Plaintiff is entitled for damages to be assessed, I don’t think it is permissible for the learned Master, who was assigned with the task of assessing the damages in terms of the judgment, to re-visit the judgment and the pleadings on which it stands and to probe into the propriety or adequacy of it.

28.7. If the defendant was in need of more particulars of the alleged loss of rental income, the paragraph 14 of Vimal Deo’s affidavit also was sufficient to give such more

particulars. This paragraph 14 seems to have escaped the attention of the learned Master. Additionally, the Defendant was put on notice by the letter VD- 5, sent by the Plaintiff on its own and letters VD--7 and VD--9 sent by Plaintiff's Solicitors to the Defendant, all prior to the commencement of this litigation, which have given sufficient notice about the damages the Plaintiff is destined to suffer on account of Defendant's refusal to issue the consent.

Further, the directors of the Defendant Company and its officers, who had the correspondences with the Plaintiff Company, are not outsiders. The Defendant being the regulatory body in charge of entire Denarau Island for its management, maintenance and approval of the applications for consent, among other functions of it, the officers of it were well aware or ought to have been aware of the value of the respective lot 6 situated therein and the rental it could have fetched during the time material, had there been a house on land with their timely granting of consent.

28.8. By the above pronouncement of the learned Judge, the Plaintiff was entitled for damages to be assessed. The Defendant could not have been heard to say before the learned Master that the particulars in the originating summons were not adequate. For more reasons to be stated below, I find that the damages that the Plaintiff became entitled to recover were general damages and not special damages. The way in which the Plaintiff's 3rd relief is drafted in the originating summons to the effect "The Defendant pay damages to the Plaintiff to be assessed" itself demonstrates that the damages asked by the Plaintiff is none other than the general damages. Because, when the damages claimed is general in nature only, the question of assessment arises.

28.9. I would say that though the action was commenced by way of originating summons, the process of assessment of damages has taken place in the manner followed under the writ of summons. There was a full-scale hearing before the learned Master. More importantly, when the evidence was led before the learned Master on various headings to assess the damages, no objection was raised by the learned counsel for the Defendant on the propriety or sufficiency or particulars of pleadings for the alleged damages.

The learned Master need not have, necessarily, considered claims under all the headings or allowed entire amount claimed under a particular heading. He had the liberty to decide the entitlement of the Plaintiff under those headings, the quantum and the time period since the exercise of any assessment involves both the time and the amount. Though, the judgment stipulated that the plaintiff is entitled for damages from the date of refusal, the learned Master could have verified whether the Plaintiff had in fact suffered damages from the day one of the refusal of consent.

29. The next important point that mainly touches the grounds of appeal 1 to 4 and others as well to certain extent, is the difficulty the Plaintiff, obviously, it had in quantifying the amount of the damages and the period of time it was destined to suffer as a result of the continued refusal of the consent. On the other hand, the Plaintiff did not know how long the approval of building Plan was to take at the Local Authority and how long the construction will take for it to be completed and be ready for occupation. At the time of filing action, the plaintiff was only in a position to show how much of rental income it would have fetched. Paragraph 14 of the affidavit of Vimal Deo shows how much of rental he could have received, which was substantiated in comparison with the rentals the Plaintiff claimed to be receiving out of its other properties within Denarau.
30. As far as the evidence on the damages under other heads are concerned, for which there was no iota of objection by the learned defence counsel, I observe that the Plaintiff had not in fact paid out any specific amount in monetary form, except for the claim of paying interest to the ANZ bank over the loan facility obtained for the purchase of the land in question. This in any event should fulfil certain other requirements to fall under the assessment, which I will discuss during the assessment by me.
31. Plaintiff's witness, Wimal Deo, had given clear evidence about the rental income that his Company would have earned, had the construction been completed with consent being granted by the Defendant in time.
32. In view of the above , the learned Master's finding, that there was no sufficient pleadings, no particulars given, the Defendant was surprised at the hearing after being kept in the dark , the damages were not quantified and they were special damages, will not hold water. Had the learned Master given an opportunity to the Plaintiff's learned Counsel , after filing of the Defendant's belated and non-served written submission , the learned Master would have been rightly guided in arriving at his decision before dismissing the Plaintiff's claim for damages, after the assessment hearing.
33. The next most attention grabbing and meritorious ground of appeal, out of the remaining grounds of appeal from 5 to 8, is the 5th one according to which, the learned counsel for the Plaintiff argues, that the learned Master erred in categorising the Plaintiff's losses as Special Damages, when they were not according to the learned counsel, with which I do not hesitate to agree.
34. As the learned Master had pointed out, the damages claimed by the Plaintiff had not been quantified at the time of filing the action. The time period, during which the Plaintiff suffered damages, had also not been pleaded. The learned counsel for the

Defendant bases his argument mainly on the above aspect of the learned Master's finding, which I would with all due respect say is wrong for the simple reason, among other things, that the amounts of losses and the time period bound to suffer were not known and the Plaintiff was not in a position to quantify or predict the exact total amount to be pleaded as special damages.

35. The Plaintiff had led the evidence of two witnesses marking documents from Ex-01 to Ex-20 showing various figures claiming that the damages were due from the date of refusal of the consent, which date had been accepted by the learned Master by his interlocutory ruling dated 01 July 2016. According to paragraphs 10 to 13 of the said ruling, the learned Master has fully recognized the essence of the judgment before him and had particularly indicated that he is bound by that judgment.
36. I have highlighted in several foregoing paragraphs as to what is known and recognized as special damages. At the expense of repetition, I would say that special damages would include the expenses that had occurred monetarily and stood quantified at the date of trial by specifically pleading with such particulars or being duly disclosed before the trial. However, the final amount to be granted to the Plaintiff on such special damages will be decided in the substantial judgment itself leaving no room for subsequent assessment.
37. Pleadings in this case appear to have been very clear and concise. The defendant need not have been misled or subjected to prejudice before the Master during the assessment hearing, which is meant for not to test and try whether the Plaintiff is entitled or not for damages, but to do an estimate with the active participation of the parties involved to decide the quantum that is justly due to the Plaintiff as per the judgment already entered.
38. Pleadings are said to be similar to the Human Skeleton and the necessary flesh and blood needed are mainly added during the trial. This exercise of adding flesh and blood, it means the substantiating the claim by evidence, has taken place at the hearing concerned without any objection being raised by the learned defence Counsel.
39. In view of all what I have adumbrated above, I find all the grounds of appeal are full of merits and the main argument taken up by the learned Counsel for the Defendant that the damages claimed by the Plaintiff are special in nature has to necessarily fail.
40. With all due respect to the learned Master, I find that his decision to dismiss the Plaintiff's claim and failure to assess the damages on the grounds that the Plaintiff's claims were for quantifiable special damages and those damages should have been specifically pleaded, are wrong and cannot withstand the meritorious grounds of appeal and the healthy arguments advanced by the learned counsel for the Plaintiff.

E. ASSESSMENT OF DAMAGES:

41. With the above outcome, the next burden falls on this Court is the assessment of damages, for which task I have to rely on both the oral and documentary evidence led before the learned Master, the submissions made before me by the counsel for both the parties and the relevant principles and practices, if any, that govern the subject.

LOST NUMBER OF MONTHS:

42. I have carefully gone through the oral evidence led in this regard and the contents of the documents tendered in support of it. The period calculated by the learned Counsel for the Plaintiff, to ascertain the lost rental income, is 17 months commencing from 06.06.2014 being the date of the refusal of consent, till 31.10.2014 being the date the House was ready for occupation.
- 42.1. The total lost rental for 17 months at the rate of \$ 8,000.00 per month, according to the Plaintiff, is \$ 136,000.00 and from this amount a sum of \$ 56,000.00 is deducted for 7 months being the period, allegedly, taken for the construction of the House. Accordingly, the Plaintiff claims \$80,000.00 as lost rental for 10 months.
- 42.2. Prior to my assessment on the quantum of the lost rental per month, let me decide on the time period the Plaintiff is entitled for rent. Admittedly, the Plaintiff was not the owner of the land in question on 6 June 2014, which is the date of refusal of consent and it was on 23 August 2014 all the transfer formalities were completed according to the paragraph 3 of Vimal Deo's affidavit.
- 42.3. Thus, the Plaintiff would not have been entitled and/ or able to obtain any rent till the month of August 2014, even if the consent had been given on or before 6 June 2014 and a House had existed in lot 6 by any magic or miracle prior to August 2014. Because no one would have come forward to take a house on rent from a person or entity who was not the owner. Thus, the Plaintiff loses around 3 months and the recoverable rental should be calculated from the month of September 2014, however, subject to the deduction of the time period to be consumed for the construction. With this, the Plaintiff's period of entitlement for rental is reduced to **14 months**. The learned Counsel for the Plaintiff in his written submission dated 21 January 2015 and Mr. Vimal Deo in his evidence, vide page 209 paragraph 5, have accepted that the Plaintiff is not entitled to receive rental for the period when the Plaintiff is not the owner.
- 42.4. Then comes for consideration is the time period spent on the construction of the House. The Plaintiff does not come out with the date of commencement of the construction. However, in the evidence of Wimal Deo there is an admission that the

work continued even after the lease agreement was signed with the tenant David Brown, on 26 August 2015 and occupation commenced only from 1st November 2015. The consent of the Defendant was given on 3 March 2015 after the Court order. The Plaintiff does not produce any evidence with regard to the submission of the building Plan and application to the Nadi Local Authority for approval and whether the approval for same was given or not for the construction.

- 42.5. Even if it is assumed that the construction started in March 2015 soon after the receipt of the consent from the Defendant as per the Court order, the construction would have continued till the end of September 2015 as per the evidence of Vimal Deo, who said construction took 7 Months. If the construction had been completed by the end of September 2015, Plaintiff need not have wasted one Month (October 2015) without rent, if the Houses were on high demand. Wimal Deo's evidence that the construction was completed around August 2015 cannot be accepted. If it is so the construction should have commenced in February 2015 even before the consent was given in March 2015. Accordingly I conclude that the construction has taken a period of time not less than 8 months.
- 42.6. Even if the consent had been given in June 2014, the Plaintiff would have been legally entitled to build only from September 2014. In that event the period for the construction should run from September 2014 till April 2015 taking full 8 Months period.
- 42.7. Therefore, the Plaintiff's lost period for rental due to Defendant's refusal to give development consent, is only 6 Months out of the remaining 14 Months mentioned in sub paragraph 42.3 above. To be precise, when 8 month's period is deducted from October 2015 (including October) it will end up in March 2015 (including March). So the remaining period the Plaintiff becomes entitled for lost rental is only 6 Months counted downwards from February 2015 till September 2014 (including both Months)
- 42.8. To put the above simply.

Total period of delay from 6th June 2014 till October 2015-----17 Months
 Less 3 Months for not having title (June 2014 to August 2014----**03 Months**
 Balance-----14 Months
 Less construction period (from March 2015 to Oct. 2015-----**08 Months**
 Balance period from February 2015 till September 2014-----06 Months

- 42.9. Thus, the total period the Plaintiff lost rental on account of the Defendant's refusal to issue development consent is only **6 Months**.

LOST AMOUNT OF RENTAL:

43. Wimal Deo's evidence is that he was able to give the premises for \$8,000.00 per Month with the lease agreement being entered on 26 August 2015. He relies on 3 similar lease agreements entered into for his other 3 properties, namely Higgins on 20 May 2015 for \$7,500.00, with Baleals Fiji Ltd on 20 August 2015 for \$7,500, and with Mr. Neil Palmer on 23rd November 2015 for \$12,000.00 respectively.
- 43.1. Even if the Plaintiff had got the development consent from the Defendant in June 2014, the Month from which the Plaintiff could have legally commenced to construct was September 2014. Then with the 8 Months period of time for construction, the Month from which the Plaintiff could possibly have started renting was May 2015. The rental he has fetched for another property from Higgins in May 2015 is \$ 7,500.00. The rental he has got for the property in issue in the Month of November is \$8,000.00. There is a time gap of around 5 Months. The so called valuation report cannot be accepted without same being formally proved by calling the author of it. This seems to have been prepared even without visiting the premises. I am inclined to consider the rental prevailed in May 2015 for the assessment in relation to the House in question.
- 43.2. Having taken to account all the above factors, I decide the Monthly rental that the Plaintiff would have fetched in May 2015 for the House in Lot 6 as \$ 7,500.00 per month. In my estimate the Plaintiff lost rental from May 2015 till October 2015 due to the Defendant's refusal to issue the consent.
- 43.3. **Thus, the amount recoverable by the Plaintiff as lost rental is $\$7,500 \times 6 = \$45,000.00$.**

INTEREST ON LOAN TAKEN

44. The Plaintiff claims \$ 700.00 being Lone admin fee for 7 months from 29 August 2014 till 28 February 2015 and a total sum of \$ 15,137.08 being 4.25% interest on the Loan facility for the period from 31 August 2014 till 28 February 2015. This gives the grand total of **\$15,837.08**.
- 44.1. It is to be observed that the above period commencing from 29 August 2014 till 28 February 2015 did not fall within the rental earning period for the House in question. Even if the Plaintiff had commenced the construction without any issue being raised over the consent, the above period from 29 August 2014 till 28 February 2015 would have been the construction period and the Plaintiff could not have relied on the rental income to pay this interest claimed by the Plaintiff. The Month from which the Plaintiff could have started earning rental for the premises in question was May 2015,

after finishing the construction in April 2015, having commenced it in September 2014 after becoming the legal owner.

- 44.2. Thus, the amount, purportedly, paid by the Plaintiff as interest and charges to the bank for the period from **August 2014 to February 2015** as above cannot be assessed as damages suffered on account of the refusal for consent.

ESCALATING COST OF CONSTRUCTION DUE TO DELAY:

45. The Plaintiff's witness Mr. Wimal Deo in his evidence tendered several quotations and invoices claiming a total sum of \$ 9,941.80, being the purported price differences of certain building materials and services he had to obtain for the construction.

45.1. It is to be observed that all first 3 price quotations, showing the lower prices in respect of the materials and services, have been obtained in the month of April and May 2014. These quotations are dated even prior to the refusal of the consent and the Plaintiff's ownership being finalized in August 2014. There was no evidence for the existence of a building Plan approved by the local authority for the period covered by the said quotations. Undoubtedly, the Plaintiff could not have benefitted out of the quoted prices therein.

45.2. However, the Plaintiff may have suffered some amount of loss under this head due to the delay of 6 months as stated above and escalation of prices. But, certainly it cannot be in comparison with the prices prevailed during the Months of April and May in 2014. Hence, I disallow the damages to be assessed under this head as there is no sufficient evidence before the Court to arrive at a correct figure.

MOBILIZATION & DEMOBILIZATION AND RE-ESTABLISHMENT:

46. Plaintiff asks for a total sum of \$ 13,100.00 being the purported cost of for the provision and erection of required logistics at the proposed construction site and subsequent removal of them on the demand made by the Defendant Company.

46.1. Plaintiff's witness Mr. Deo says that these facilities were provided by a Sister Company, namely Deo Constructions Ltd, where he is also said to be a director, on the understanding the relevant cost involved would be paid later. However, I find that these works have been attended on the Plaintiff's own risk, even before the receipt of the consent from the Defendant and the Plaintiff Company became the owner of the Land in question and prior the required approval from the Local Authority concerned.

46.2. The Defendant cannot be held responsible for this expenses on which the Plaintiff took risk. Accordingly, I decide this claim of the Plaintiff cannot be a subject for assessment of damages.

INTEREST:

47. The Plaintiff moves for interest at 13.5% on a total sum of \$ 118,878 .88 for the period from 6 June 2014 to 27 June 2018. Total interest claimed is \$ 65,157.51. Since the amounts claimed under different headings during the hearing before the learned Master are not subjected for assessment by me for the reasons stated above, no interest can be granted for same.

Though, the Plaintiff may well be entitled for interest on the assted lost rental income of \$ 45,000.00 for a period of 6 Months, the Plaintiff in the originating summons had not asked for interest on any award of damages. The Court is not bound to grant a relief that was not prayed for. The judgment has not awarded interest. Accordingly, Plaintiff's claim for assessment/ award of interest is disallowed.

COSTS:

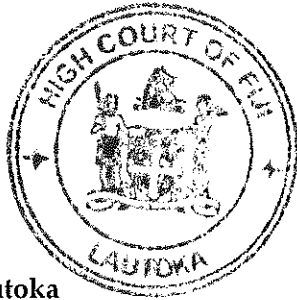
48. Justice Ajmeer in his judgment has ordered for the costs to be assessed on the solicitor / client indemnity basis. The amount claimed by the Plaintiff as damages was \$118,878.88 and \$ 65,157.51 as interest on it totalling to \$184,036.39. The Plaintiff moves for \$ 30,000.00 as costs.

This Court has finally granted only \$ 45,000.00 being the lost rental for 6 months. The proceedings before Justice Ajmeer were by way of originating summons. It was not a protracted one. However, the hearing before the Master and this Court has taken a considerable period of time. The Plaintiff has given sufficient warning about the indemnity costs. Therefore, considering all the circumstances and the submission made by the learned counsel for the Plaintiff on this subject, I decide a sum of \$ 15,000.00 as costs would do justice to the parties in this case.

Accordingly, the total sum payable by the Defendant unto the Plaintiff under my assessment is Sixty Thousand Fijian Dollars (\$ 60,000.00), **which** is made up of \$ 45,000.00 as damages for lost rental and \$ 15,000.00 as costs.

F. FINAL OUTCOME

1. The appeal is allowed.
2. The ruling of the learned Master pronounced on 10 March 2017 is set aside.
3. In my assessment, the Plaintiff shall be entitled for \$ 45,000.00 being the lost rental for a period of 6 months commencing from May 2015 till October 2015.
4. The total cost payable by the Defendant unto the Plaintiff is assessed as \$ 15,000.00.



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A. M Mohammed Mackie
JUDGE

At Lautoka
01 October 2018.

Solicitors:

For the Appellant/ Plaintiff: M/s. A. K. Narayan Lawyers

For the Respondent/Defendant: M/s. Z. Lateef for Lateef & Lateef Lawyers