MARY CHOW –v- ATTORNEY-GENERAL

HIGH COURT OF SOLOMON ISLANDS
(F. O. KABUI, J.).

Civil Case No. 127 of 2000

Date of Hearing: 22nd August 2002
Date of Judgment: 06th September 2002

Mr A. Nori for the Plaintiff
Mr F. Waleanisia for the Defendant

JUDGMENT

Kabui,J. This is an application by Notice of Motion filed by the Plaintiff on 31st July 2002 for orders that the Defendant pay to the Plaintiff the sum of $ 4,825,626.00 plus costs. I had ruled on the question of liability against the Defendant on the ground of negligence in my judgment delivered on 7th May 2002. I left the assessment of damages to be determined at a later date plus costs. The Plaintiff's own assessment of damages was contained in an affidavit filed by the Plaintiff on 31st July 2002 supported by another affidavit filed by Mr. Quan on 21st August 2002. The sum of $4,826,626.00 that appeared in the Notice of Motion is the assessed damages by the Plaintiff. Lost revenue was put at $4, 459,622.00 up to the date of judgment whilst accruing interest on a loan from the bank was in the sum of $103,120.00. The total claim is the sum of $4,825,626.00. Counsel for the Defendant did not object to the affidavit evidence filed by the Plaintiff nor cross-examined the Plaintiff on the content of her affidavit. However, Counsel objected to the Plaintiff's assessment because, as he said, loss of revenue and accruing of interest on a loan had not been pleaded as special damages by the Plaintiff in her Statement of Claim. Counsel had let in the affidavit evidence perhaps inadvertently but said the evidence had proved nothing, if anything. In the Statement of Claim, the Plaintiff alleged that by reason of the Defendant's conduct, she suffered financial losses and damages that were continuing. The Plaintiff therefore claimed damages for negligence.

The Pleading claiming damages

In the Statement of Claim, the Plaintiff simply claimed, **"damages for negligence".** The Defendant however had omitted to ask for further and better particulars on the heads of damages being claimed. It perhaps did not occur to the Defendant that there was a need for further and better particulars. That omission can only be justified by an oversight on the part of the Defendant's Solicitor. As I have said, Counsel for the Defendant did not object to the affidavit evidence at the hearing on assessment of damages. Counsel, as I have said, had let in the affidavit evidence and then attacked it as having proved nothing because loss of revenue had not been pleaded. This is rather awkward a position to determine. This is a problem. The Defendant should have raised objection at the trial like it was done in **Hayward v. Pullinger** [1950] 1 A.E R. 581. Or, the Defendant could have applied for further and better particulars like it was done in **Monk v. Redwing Aircraft Company, Limited** [1942] 1 & 2 K. B. D. 182. The Court ruled in each of those cases that the pleading was defective and had to be corrected before trial. This is not the case here. Counsel for the Defendant saw this point only when he was served with the Plaintiff's affidavit filed on 31st July 2002 and saw therein the sum of $4,825,626.00 for the first time. By that time, it was too late to do anything than to object to the claim for special damage. The remaining step then was the assessment of damages. The question to be asked is what heads of damage for negligence are being sought. The answer to this question is bound to be difficult to give in clear-cut terms because of the distinction between general damages and special

damages. McGregor on Damages, by Harvey McGregor, 5th Edition, 1988 admits that the distinction between general damage and special damage in contract and tort is technical and can be confusing indeed. I am not going to attempt any discussion on that distinction between the two in this case. Apart from that, the terminology used by the Plaintiff in the Statement of Claim makes it more difficult to make out what heads of damages the Plaintiff had in mind. The affidavit evidence proving loss of revenue and accruing interest on a loan was clearly inconsistent with the claim for damages in the Statement of Claim. Whilst paragraph 32 in the Statement of Claim speaks in terms of financial losses and damages being suffered by the Plaintiff on a continuing basis, the relief claimed were damages for negligence without specifying heads of damage and their particulars. The Defendant was completely taken by surprise by the claim for $4,825,626.00 at the assessment hearing. This fact is borne out by the affidavit filed by the Commissioner of Lands on 19th August 2002. The Plaintiff did not produce any evidence of general damages at the assessment hearing if indeed that was the intention of her claim in the Statement of Claim. Indeed, there was no damage done to the Plaintiff's premises nor to her stock of trade so as to attract general damages in the first place. The intended compulsory acquisition of the Plaintiff's premises never took place. Loss of revenue and accrual of interest on a loan from the bank were consequential losses that in my view ought to have been specially pleaded. I am aware of what Slade, J. said in **Longdon- Griffiths v. Smith and Others** [1950] 2 A.E.R. 662 in terms of a lenient approach by the Court in that case on the question of interpreting a rather ambiguous pleading. That case was about a libel suit before a jury trial. The jury found against the defendants. The jury then returned a verdict for £250, general damages and £625, special damages. Slade, J. distinguished **Hayward v. Pullinger** and **Monk v. Redwing Aircraft Co. Ltd.** cited above. His Lordship ruled that the pleading was in the common form in defamation cases to indicate general damages for defamation followed by special damages. At page 678, His Lordship said, **..."I agree that where no special damages are claimed the defendant is well advised to let sleeping dogs lie, and he can hardly be expected to ask for particulars of the claim for special damages where none is alleged. Where the statement of claim suggests the probability that a claim for special damages is intended, I think it is a question of degree whether the statement of claim does not put forward a claim for special damages, albeit without the particulars which the rules of pleading strictly require, or whether it is so nebulous that the defendant can treat it as not being a claim for special damages at all. A statement of claim is supposed to be delivered with full particulars, but it is a rule which is more honoured in the breach than in the observance. Therefore, I find that there is here a claim for special damages, though I do not intend anything I have said to indicate that there can be laxity in pleading special damage, and still less that such laxity can justify insufficient discovery of documents. A defendant is not to be left to secure by means of discovery by interrogatories information which he ought already to have got by discovery of documents. This case has involved difficult questions and important questions of law, and I did not think it right that the plaintiff should run the risk of my having taken a wrong view on a point which I consider to be at all a technical one, and therefore, although I hold that special damage is pleaded in this statement of claim, and, therefore, it was not necessary to amend, I invited counsel for the plaintiff to apply for leave to amend para. 8 of the statement of claim, and he did so. Having heard counsel for the defendants, I gave leave for the amendment to be made, which only goes to the question of costs. I am satisfied that this is a case where an amendment can be made without a shadow of injustice to the defendants"...** . This is clearly an exception to the rule about pleading special damages. The position was however different in **Ilkiw v. Samuels and Others** [1963] 2 A.E.R. 879. In that case, the plaintiff sued the defendant for damages based upon negligence. The trial judge found for the plaintiff and assessed general damages at £4,077. However, the figure of £77 was agreed as special damages as loss of wages four months after the accident. However, there was evidence at the trial to show that the plaintiff had suffered loss of earnings to the extent of about £200 a year for eight years plus 466 days off work during that period. It had appeared that the figure of £4,077 was a reflection of the inclusion of special damage in the award of general damages. The plaintiff never pleaded special damage. On appeal the award was reduced to

£2000. At page 886, Willmer, L. J. said, ..."**Another, and to my mind rather worse, difficulty arose out of the way in which the case was conducted. I have already indicated that special damage was agreed at £77. That special damage was agreed on the basis of a loss of wages for a period of four months following the accident. No other claim for special damage was ever put forward in all the eight years between the accident and the time when the action was tried. In spite of that, however, when the case came to trial, some evidence was admitted (although some mild objection was registered) to show that, throughout the eight years that had elapsed since the accident before the trial, this man had been suffering from loss of earnings to the extent of about £200 a year, and also that in the course of those eight years he had had no less than 466 days off work for the purpose of receiving treatment for his injuries and the results of this injuries**".... At page 887, His Lordship continued, ..."**But the case which has been put forward (and which, I think, succeeds) is that, whatever the judge may have said, he must in effect have allowed substantially the whole of the loss of wages claimed over the past eight years as a quantified sum. What is said is that he has in effect awarded that as though it were special damage which had been properly pleaded. I am driven to the conclusion that the judge must have done something substantially like that, for I find it difficult to see how otherwise he could possibly have arrived at the figure of £4,000 which he awarded by way of general damages. As I have already indicated, this does not strike me as a case in which there is much room for any large sum to be awarded in respect of future loss of earnings, having regard to the age which this plaintiff had already attained. In the circumstance, as it appears to me, the very large figure which the judge arrived at must either have contained a very substantial (although concealed) element of past loss of earnings, which were never pleaded as special damage, or else the figure awarded is a wholly erroneous estimate of the plaintiff's loss. On either view, this court would be not only justified in interpreting, but bound to interfere**"... . Again, at page 890, Diplock, L. J. said, ..."**As regards the question of damages, I would put it in this way. Special damage in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularized. In this case special damages were so pleaded and particularized at the sum of £77 odd. Shortly before the trial, the special damage (as so particularized) was agreed at £77 by letter. 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 one can recover in an action only special damage which has been pleaded, and, of course, proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like £2,000-at any rate, a very much larger sum than £77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at at the sum of £77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be**"... . Danckwerts, L. J. agreed as well on this point. (See also my judgment in **Frazer Patty and Isabel Development Authority v. James Tikana**, Civil Case No. 197 of 2000). It may well be argued that **Ilkiw v. Samuels** cited above was a case where nothing was pleaded at all as special damage whereas in this case damages for negligence was pleaded by the Plaintiff. This argument clearly reinforces the exception created by **Longdon Griffiths v. Smith** cited above. However, Lord Donovan in **Prestrello Ltda v. United Paint Co. Ltd.** [1969] 1 W L R 570 having stated the need to plead special damage at all times, said at page 580, ..."**What amounts to a sufficient averment for this purpose will depend on the facts of the particular case, but a mere statement that the plaintiff claims "damages" is not sufficient to let in evidence of a particular kind of loss which is not a necessary consequence of the wrongful act and of which the defendant is entitled to fair warning.**

Not only was there no mention at all of loss of profits in the statement of claim in the present case but also, as has been pointed out, the case pleaded was inconsistent with such a claim. We agree with the view of the trial judge that the plaintiffs were not entitled without

amendment to lead evidence of this loss"... . That was a case where the plaintiff in the statement of claim alleged that by reason of the defendant's conduct, the plaintiff suffered loss and damage. The plaintiff then pleaded special damage and provided particulars of the special damage followed by the words **"and damages".** An attempt by the plaintiff to amend the statement of claim to include a claim for loss of profits was rejected by the trial judge on the ground that it had not been pleaded. The Court of Appeal dismissed an appeal on that point on the ground that the amendment being sought had changed the nature of the claim. In this case, the Plaintiff's claim was simply stated as **"damages for negligence"**. The facts of this case are such that an averment such as this would not be sufficient to plead special damage. In fact, as I have said, the pleading is inconsistent with the affidavit evidence filed by the Plaintiff to prove her claim for special damages. The pleading was too general and too ambiguous to attract evidence to prove anything in this case.

What then should be done in this case?

I have taken much time to research this case to find what I think is the correct answer. Unfortunately, Counsel on both sides did not assist much in this regard. The problem here is that the Plaintiff had omitted to plead any special damage in the Statement of Claim and yet at the trial for assessment of damages, produced evidence of special damage. The Plaintiff did not apply for an amendment of the Statement of Claim to include her claim for special damage. Counsel for the Plaintiff might have thought that it was unnecessary to do so because Counsel for the Defendant pointed out the omission to plead special damage after evidence of that had already been admitted at the trial. I feel that if I rule against the Plaintiff on this point, there would be injustice against the Plaintiff. The Defendant is liable to pay damages to the Plaintiff otherwise my judgment against the Defendant on 7th May 2002 on liability is meaningless to the Plaintiff. True, the Plaintiff was at fault in not being able to specify damages correctly against the Defendant but that is a procedural mistake on the part of the Plaintiff. Should the Plaintiff suffer the consequence and be denied relief? In the first place, Order 22, rule 3 read with Order 69 of the High Court (Civil Procedure Rules) 1964 **"the High Court Rules"** imposes no penalty in terms of denial of justice for non-compliance of rules of practice. A similar position was echoed as long ago by Buckley, L. J. in **In re Robinson's Settlement** [1912] 1 Ch. 717 and later in **Pirie v. Richardson** [1927] 1 K. B. 448. The same position was applied in Australia by the High Court in **Gould Birbeck and Bacon v. Mount Oxide Mines Ltd.** (1916) 22 C. L.R. 490 and later in **Banque Commercial S. A. and Akhil Holdings Limited** (1989-1990) 169 C. L.R. 279. At page 293, Dawson J. said, **..."Pleadings are but a means to an end and not an end in themselves and, as was pointed out in Pirie v. Richardson (41), the rule prescribes no consequence for the failure to observe it"... .** At pages 296-297, His Honour continued, **It is, of course, the purpose of pleadings to define the issues between the parties so that they may know the case which they have to meet and in order that the proceedings upon trial may be conducted in an orderly fashion by reference to those issues. The defined issues provide the basis upon which evidence may be ruled admissible or inadmissible upon the ground of relevance. But modern pleadings have never imposed so rigid a framework that if evidence which raises fresh issues is admitted without objection at trial, the case is to be decided upon a basis which does not embrace the real controversy between the parties. Special procedures apart, cases are determined on the evidence, not the pleadings. It is incumbent upon the trial judge to see that the pleadings or particulars are amended so that the record reflects the proceedings as they have been conducted, but his failure to do so will not result in the invalidity of those proceedings:"...** . That case was cited by Merkel, J. in **Nguyen v. Minister for Immigration, Local Government and Ethnic Affairs and Another** (1996) 66 F. L. R. 239. After citing at page 243 the words of Mason, C. J. and Gaudron, J. (page 286) that ..."**the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidently, to define the issues for decision,"**... . Merkel, J. at page 243, said, ..."**Although, "incidentally," pleadings define the issues for decision, it is important that that**

incidental purpose does not become a vehicle which prevents the administration of justice from being achieved in a particular case. Accordingly, subject to ensuring procedural fairness, the Court has a role in ensuring that a case is decided on the evidence rather than on the pleading. That role will vary according to the circumstances of the particular case"... . In that case, Merkel, J. found at the hearing that the evidence showed that the grounds for review of the Minister's delegate's decision were wider than those pleaded by the applicant. Bearing in mind the justice of the applicant's case and others of similar nature and the human rights implications, Merkel, J. decided to relist the matter for mention to allow the applicant to apply for leave to amend. Being conscious of his action, Merkel, J. at page 244 said, ..."**I am conscious of the fact that my decision may be seen to constitute a more interventionist role on the part of the Court than is appropriate in a civil proceeding"**... . I will do so likewise in this case to achieve justice in favour of the Plaintiff. As said by Merkel, J. above the role the judge plays will be determined largely by the facts of each case. I will adjourn this case to a date to be fixed to allow the Plaintiff to seek leave to amend her Statement of Claim to include her claim for special damage as shown by her evidence. I will hear both parties at the next hearing date. Costs reserved.

F. O. Kabui
Judge