IN THE COURT OF APPEAL OF BELIZE A.D. 2010

CIVIL APPEAL NO. 1 OF 2010

BETWEEN:

DMV LTD **Appellant**

AND

TOM L. VIDRINE **Respondent**

—

BEFORE:

The Hon. Mr Justice Mottley	**-**	**President**
The Hon. Mr Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr Justice Morrison	**-**	**Justice of Appeal**

Eamon H. Courtenay SC and Ms Priscilla Banner for the appellant
E. Andrew Marshalleck SC and Mrs Magali Marin Young for the respondent

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8 June, 20 October 2010

MOTTLEY P

[1] I have had the opportunity to read the judgment of Morrison JA. I agree with it and have nothing to add.

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MOTTLEY P

SOSA JA

[2] I concur in the reasons for judgment stated, and orders proposed, in the judgment of Morrison JA, which I have read.

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SOSA JA

MORRISON JA

Introduction

[3] In a considered judgment given on 11 December 2009, Muria J found that the respondent was in breach of an agreement dated 31 August 2006 for the sale of certain land on Ambergris Caye to the appellant. The learned judge accordingly gave judgment for the appellant and ordered that there be specific performance of the agreement by the completion of the sale and transfer of title to the land by the respondent to the appellant. However, Muria J refused the appellant's further claim for damages in addition to specific performance, on the ground that the appellant "[had] failed to specifically plead the loss (special damages) it alleges to have suffered in this case". This appeal is the appellant's challenge to the judge's refusal to award it damages in addition to specific performance.

The factual background

[4] In view of the relatively narrow issue with which the appeal is concerned, the factual background can, so far as it is relevant, be stated shortly, but before doing so I should identify the parties. The respondent is a businessman and a resident of San Pedro on Ambergris Caye. He is also the proprietor of several parcels of land on Ambergris Caye. The appellant is a limited liability company incorporated and existing under the laws of Belize.

[5] By an agreement in writing dated 31 August 2006, described as a "Purchase Agreement", the respondent agreed to sell and the appellant agreed to purchase certain lands on Ambergris Caye, described as Tracts 1, 3, 4 and 9, for a price of US $1.3 million. In addition, the agreement gave what it described as a "first option" to the appellant, in consideration of a payment of US $800,000.00, to purchase a further tract of land (a beachfront lot), described as Tract 2, for the additional price of US $2.2 million. The agreement called for this option to be exercised before 31 October 2006 and, if exercised, for the option price to be applied to the total purchase price and for the sale of Tract 2 to the appellant to be completed by payment of the balance of the purchase price of US $1.4 million by 31 December 2006. Upon completion, the agreement also provided for vacant possession of Tract 2 to be given to the appellant by 31 January 2007.

[6] The sale to the appellant of Tracts 1, 3, 4 and 9 was duly completed and on 31 August 2006, in purported exercise of the option to purchase Tract 2, the appellant paid to the respondent the sum of US $800,000.00. On 14 December 2006, the appellant gave notice in writing to the respondent of its intention to complete the purchase of Tract 2 before 31 December 2006, by the tender of the balance purchase of US $1.4 million. A dispute then arose between the parties, with the respondent contending that what the Purchase Agreement granted to

the appellant was not an option to purchase, but a right of first refusal to purchase Tract 2 in the event that the respondent were to decide to sell it.

The litigation

[7] The parties having failed to resolve this dispute, the appellant promptly filed suit against the respondent (on 17 January 2007), claiming specific performance of the agreement and damages for breach of contract, "in lieu of or in addition to specific performance". In its first amended statement of claim (dated 7 February 2007), the appellant pleaded that it was ready, willing and able to perform its remaining obligations under the agreement and that by virtue of the respondent's breach of contract it had suffered loss and damage. The appellant also pleaded as follows (at para. 13):

> "The Defendant before the execution of the Purchase Agreement at all material times knew that the Claimant intended to develop a tourist resort and that Tract 2 forms an integral part of the resort project and that part of the revenues of the resort was to be used to finance and manage a high school for children from low income homes."

[8] In his defence (filed on 21 February 2007), the respondent denied that the appellant had suffered any damage as claimed, and stated that while he was aware of the appellant's proposed development of a "tourist/condos resort" on Tracts 1, 3, 4 and 9, any plans that the appellant had for Tract 2 "had to be potential up to the entering of the Agreement, because the Claimant was given but a right of first refusal as regards Tract 2."

[9] There was considerable evidence before Muria J, which was not disputed by the respondent, that by the time the dispute between the parties the appellant had put together extensive development plans for the property, which included

the building of condominiums and a project to be known as 'Ma 'Lo Ha Resort & Marina'. Indeed, it appeared that considerable work had already been done by the appellant on the planning and design phases of the project, the obtaining of building approvals and carrying out of site clearance and preliminary building activity.

[10] Among the documentary material disclosed by the appellant before the commencement of the trial were detailed five and ten year income and expenditure projections for the intended resort as a casino and a hotel, if it had been bought. There was also a document headed "Ma 'loha project damages", which purported to represent expenses incurred on the project between 22 December 2006 and 30 October 2007. This document (No. 55) showed a total of BZ $32,782,008.74.

[11] In his brief opening of the case for the appellant when the trial commenced before Muria J on 25 March 2009, Mr Fred Lumor SC, who then appeared, referred to the "substantial documentations" that had been filed on the appellant's behalf. The following exchange then took place (transcript of proceedings, page 443 of the Record of Appeal):

> "MR. LUMOR: Yes, my Lord. And, my Lord, the other issue is that in the lots of the documents which are disclosed the documents which are obviously inadmissible are the drafts of agreement which were not signed by the parties. Those are obviously inadmissible. Now, are bring in sometime by the party to exchange during negotiation. And, my Lord, the final thing is to say that if, and I emphasize if, we are to success would then apply to the court for assessment of damages. Thank you, my Lord.
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> THE COURT: Mrs. Young, is there anything you wish to say?

MRS. MARIN YOUNG: Well, my Lord, whether evidence is admissible or not is for Your Lordship's discretion. I think the parole rule is as it is well known has many exceptions and it is a matter for your Lordship as to whether many of the exchanges correspondence by email in the bundle will be admissible. So to blankly stating are inadmissible, my Lord, I fell that I need to correct that.

THE COURT: I take your point. At the end of the day whatever evidence is given whether it is accepted or rejected it is a matter for the court."

[12] On that note, the trial commenced and, over a two day period, evidence was taken from two witnesses for the appellant and three on behalf of the respondent, including the respondent himself. The second witness for the appellant was Mr Vernon Wilson, a director of the appellant company. During this witness' examination in chief, Mr Lumor sought to have admitted in evidence as exhibits the documents referred to at para. [10] above, after Mr. Wilson had identified and given a brief description of each of them. Mrs Marin Young, who appeared for the respondent at the trial, objected primarily on the basis that there was no evidence that Mr Wilson himself had prepared those documents or, even if he had, that he had the necessary expertise to do so. Further, Mrs Marin Young pointed out, no reference had been made to these documents by Mr Wilson in his detailed witness statement.

[13] Mr Lumor responded to this objection by saying, firstly, that the issues raised by Mrs Marin Young were essentially matters for cross-examination, by which an attempt would no doubt be made to persuade the court that they were of no weight and were therefore not reliable. But, secondly, Mr Lumor said this:

> "… the documents at this stage is [sic] being produced to show that the claimant had suffered damages, but the quantum of the damages is what we applied at the beginning that if we are successful then we would have to come back to the court for the assessment. At the moment these documents are to show that we had a project carrying out because of your conduct and therefore we suffer loss" (transcript, page 523 of the Record).

[14] Muria J ruled that the documents were relevant to the claim and should therefore be admitted, although he did allow himself the comment that "the weight to be attached is another matter…because on the run they may not be as strong as one would like" (transcript, page 524 of the Record). The documents were accordingly admitted as exhibits 53 – 57. Thereafter, Mr Wilson was cross-examined by Mrs Marin Young at some length, but without any reference to these documents.

[15] At the conclusion of the evidence, it was agreed that the parties would present their closing submissions to the judge in written form. In his submissions (dated 29 April 2009) on behalf of the appellant, Mr Lumor identified the issues for the judge's decision as (i) whether the Purchase Agreement dated 31 August 2006 gave the appellant an option to purchase Tract 2 and whether the sum of US $800,000.00 paid was consideration for this option, and (ii) whether the appellant was entitled to damages in addition to the equitable remedy of specific performance.

[16] On the second issue identified by him, Mr Lumor then went on in his submissions to refer to the evidence given on behalf of the appellant with regard to the planned scope of the project and also to the exhibits. These documents, it was submitted, highlighted the extent of the project and "represented some of the returns of the investment and the revenues that were expected had the project gone through." This aspect of the submissions then concluded as follows:

> "The documentary evidence, i.e. exhibits 54-58 of the Claimant's bundle, [there was some confusion in the actual numbering of the exhibits, as in admitting the documents as exhibits the judge referred to them – correctly - as nos. 53 – 57, but it is clear that Mr Lumor was here referring to the same documents] are in evidence before the Court as proof that damages have been suffered by the Claimant, as a result of the breach of the contract by the Defendant. They were tendered to prove the amount of those damages, as that aspect of the matter will be determined if and only if liability is established. We respectfully submit that the damages phase of this case can be submitted on affidavits. Or, if the Court desires, the Claimant will also be ready, willing and able to present oral testimony on the issue.
>
> It is the Claimant's submission that based on the evidence before the Court that the Court ought to award damages to the Claimant to be assessed."

[17] Mrs Marin Young also addressed the issue of damages in her written submissions dated 20 April 2009, in which she identified the issues in the case as (i) whether the Purchase Agreement gave the appellant an option to purchase or a right of first refusal; (ii) whether, if an option was given, the court could order its specific performance, and (iii) whether the appellant had "in fact proved that it suffered any damages or that [the respondent] is liable to pay damages".

[18] As regards damages, the respondent pointed out that although exhibits 53 – 57 showed projected loss of profits for the operation of a casino and a hotel, the appellant had not pleaded that it intended to build a casino. The respondent also complained that exhibit 55 listed what were essentially items of special damages, which ought as such to have been specifically pleaded and particularized. More generally, the respondent also complained that the claim for

loss of profits ought also to have been, and was not, particularized. And finally, the respondent submitted that in the absence of any application at the case management conference, the pre-trial hearing or at the trial for damages to be assessed separately, the court had no power at this stage to separate the issues of liability and damages.

Muria J's judgment

[19] Muria J found that the Purchase Agreement had created an option to purchase, which had been exercised by the appellant by payment of the sum of US $800,000.00 as consideration for the grant of the option. The judge found that the respondent had therefore breached the contract by refusing to complete it according to its terms and that the appellant was entitled to an order for specific performance, which was made accordingly. With regard to damages, however, the judge said this:

> "54. Having anxiously considered the submissions on this aspect of the case, I respectfully accept the position as contended for by Mrs. Marin Young on behalf of the defendant. In order for the Court to ascertain whether the claimant suffered damages and the quantum of such damages, it is incumbent on the claimant to plead and particularize the specifics of the damages suffered. This is an obligation on the claimant, consistent with its obligation under part 8, in particular, Rule 8.7 of the **Supreme Court Civil Procedure Rules 2005**. This, in turn, will enable the defendant to respond fairly to the facts upon which the quantum of damages claimed by the claimant are based. Without pleading and particularizing the items of loss suffered, the court is unlikely to be in a position to determine whether or not damages have been proved and therefore, not in a position to grant damages as

claimed. See **Mayne and McGregor on Damages**, 12th Edn. (1961) page 13.

55. The claimant's obligation to plead and particularize the specifics of the special damages it claims has been reiterated in **McGregor on Damages**, 28th Edition, where the learned author states at paragraph 27-005:

"Special damages must be specifically pleaded and evidence relevant to it cannot be adduced if only general damages have been pleaded, since the purpose of special damage is to present surprise at trial by not giving the Defendant prior notice of any item in the claim for which a definite amount can be given in evidence …"

56. Lord Donovan reaffirmed the position in **Perestrella v Companhia Limitada v United Paint Company Ltd** [1969] 1 W.L.R. 570 where he said:

"The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as special damage or special damages but is no more than an example of damage which is "special" in the sense that fairness to the defendant requires that it be pleaded."

[20] The learned judge therefore concluded that, because the appellant had not pleaded or particularized its special damage, it was not entitled to recover

damages. Instead of doing this, the judge found, the appellant "adopted the course of putting into evidence, by way of exhibits, the list of quantified items of loss alleged to have been suffered…without giving the defendant the benefit of knowing in advance what those losses are, in a pleading."

The appeal

[21] In its amended grounds of appeal dated 7 June 2010, the appellant set out the bases of its dissatisfaction with Muria J's judgment as follows:

> "(1) The Learned Trial Judge erred in deciding that Rule 8.7 of the Supreme Court Civil Procedure Rules 2005 imposes an obligation on the Appellant to "particularize the specifics of damage suffered" to be entitled to general damages.
>
> (2) The Learned Trial Judge erred in deciding that the Appellant was not entitled to general damages for failing "to plead and particularize the specifics of the special damages" it claimed.
>
> (3) The Learned Trial Judge erred in refusing to award the Appellant general damages on the grounds that "special damages have not been pleaded nor particulars thereof have been particularized".
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> (4) As to (1), (2) and (3) above, the Learned Trial judge erred by failing to recognize:
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> i) That in the exercise of the Court's equitable jurisdiction, the Court ought to comply with sections 32, 37 and 38 of the Supreme Court of Judicature Act, Cap. 91.

ii) That on the pleadings and on the evidence, the Appellant was entitled to general damages or equitable damages to be inquired into or assessed as a consequential relief in addition to an order of the specific performance whether pleaded or not.

iii) That by virtue of Sections 32 or 37 of the Supreme Court of Judicature Act, Cap. 91, the Appellant was entitled to an order for an inquiry as to damages as a consequential order in addition to an order for specific performance by virtue of the equitable jurisdiction of the court founded on the Chancery Amendment Act 1858 (Lord Cairns' Act).

(5) The Learned Trial Judge erred in failing to exercise his discretion and to give a direction that, as the Appellant's claim was successful on liability, damages ought to be assessed based on affidavit to be filed by the parties an/or on the evidence already before the court."

[22] The respondent for his part, although not challenging the judge's order for specific performance against him, filed a respondent's notice (dated 10 January 2010), in which he urged this court to uphold the judgment on the alternative basis that there was "no evidence as to loss to have supported an award of damages in any event".

The submissions

[23] With regard to ground 1, Mr Courtenay SC, who had not appeared in the court below, submitted that the judge had erred in law when he made a ruling as to special damages without addressing the issue of whether the appellant was

entitled to general damages, which had been pleaded. He submitted that while rule 8.7 of the Supreme Court (Civil Procedure) Rules 2005 ("the CPR") did oblige a claimant to set out the facts of its case, it did not require that the specifics of general damages should be particularized in a statement of case, as is usual in the case of special damages. In this regard, Mr Courtenay drew attention to the cases of **McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775** and **Eastern Caribbean Flour Mills Ltd v Ormiston Ken Boyea** (St. Vincent and the Grenadines Civil Appeal No. 12 of 2006, judgment delivered 16 July 2007), both of which exemplified, he submitted, the modern approach to pleadings in the post-CPR era.

[24] Taking grounds 2 and 3 together, Mr Courtenay submitted that the judge had failed to distinguish requirements of pleading in respect of special damages from those in respect of general damages, and as a consequence applied the standards applicable to the former to the appellant's claim, which was in fact for the latter. In order to demonstrate this distinction, Mr Courtenay referred us to an extract from Halsbury's Laws of England (4th edn (Reissue) Vol. 12(1), para. 812) and to the cases of **The Susquehanna [1926) AC 655** and **Stroms Bruks Aktie Bolag v Hutchinson & Hutchinson [1905] AC 515**.

[25] Mr Courtenay submitted that the appellant's claim in the instant case fully satisfied the test of remoteness applicable to breaches of contract and as a result the judge, by not considering the claim for general damages, had not given effect to the compensatory principle which entitled the appellant to be placed in same position it would have been in if the respondent had not breached the contract.

[26] On ground 4, Mr Courtenay directed our attention to the statutory powers of the court pursuant to sections 32, 37 and 38 of the Supreme Court of Judicature Act ("the SCJ Act"), on the basis of which he submitted that Muria J ought to have considered not only the appellant's entitlement to the equitable remedy of specific performance, but whether it was also entitled to general

damages or equitable damages on the evidence. In this respect, we were referred to an extract from Chitty on Contracts (29th edn, 2004, Vol. 1, para. 27-078) and to the cases of **Price v Strange [1978] Ch. 338**, **Johnson v Agnew [1980] AC 367**, **Ford-Hunt & Another v Raghbir Singh [1973] 2 All ER 657** and **Gloucester House v Peskin (1961) 3 WIR 375**.

[27] And finally, on ground 5, Mr Courtenay submitted that, an application having been made at the trial by Mr Lumor in his opening for damages to be separately assessed in the event that the appellant succeeded on liability, Muria J ought to have given directions as to the manner in which general damages would be assessed, whether on the basis of the evidence adduced at the trial or on affidavit evidence. In support of this submission, we were referred to rule 16.4 of the CPR and to the cases of **St Kitts Development Corporation v Golfview Development Ltd et al (**St Christopher and Nevis Civil Appeal No. 15 of 2004, judgment delivered 31 March 2005), and **Emanuel Rock v Theresa Jolly** (Commonwealth of Dominica Civil Appeal No. 10 of 2006, judgment delivered 17 May 2007).

[28] Mr Marshalleck SC, who had also not appeared below, appeared with Mrs Marin Young for the respondent on the appeal. In their detailed skeleton argument, they sought first of all to trace the history of the equitable jurisdiction in Belize since, it was submitted, "the appellant's appeal assumes that Lord Cairns' Act 1858 was enacted in Belize".

[29] There then followed a detailed and obviously painstakingly researched account of the enactment of Lord Cairns' Act in England in 1858 and the new jurisdiction which it conferred on the Court of Chancery to award damages, in addition to the equitable remedies of injunction and specific performance. The respondent's submissions then tracked the fortunes of Lord Cairns' Act, through the preservation of the jurisdiction it conferred (notwithstanding the formal repeal of the Act) by the Civil Procedure Act 1883, to its current incarnation in section 50

of the Supreme Court Act 1981. These developments were contrasted with the situation in Belize, where, it was submitted, "our equitable jurisdiction has evolved differently and is expressly conferred by statute", in that, although Lord Cairns' Act was never enacted in Belize, section 38 of the SCJ Act made provisions "very similar" to Lord Cairns' Act (albeit with some material differences).

[30] The respondent's submission was therefore, as I understood the argument, that Lord Cairns' Act empowered the court to award damages, "even if specific performance was the only remedy claimed, as the jurisdiction under [the Act] was indeed very wide in that it gave the court the power to substitute the remedy or to add damages for delay". By contrast, so the submission went, section 38 of the SCJ Act "is very different in regards to when the court may grant remedies and in that it makes it very clear that the remedy that [a claimant] may be entitled to and their claim must be properly brought before the court".

[31] To demonstrate this distinction, the respondent contrasted some observations of mine with regard to the effect of section 38 in **Fukai et al v Aura Marina Vargas** (Supreme Court Civil Appeals Nos. 27 and 28 of 2008, judgment delivered 30 October 2009, at paras. [57] – [58]), with the position in other jurisdictions which have adopted statutory provisions closer in terms to section 2 of Lord Cairns' Act.

[32] With regard to the damages claimed by the appellant in the instant case, Mr Marshalleck contended that, although the appellant had not characterized its claim as being either for special or general damages, or equitable damages, what Muria J found, in effect, was that the claim was in fact for special damages and ought as such to have been specifically pleaded. All of the items included in the appellant's exhibits 53 – 57 were in the nature of special damages "since they arise from the special uses to which the specific property was to be put and were all capable of precise calculation and had been incurred prior to trial". It

was therefore submitted that, "on a true construction of the claimant's Statement of Case including the witness statements", there was no claim for general damages and Muria J was accordingly correct in his conclusion that the damages claimed were in the nature of special damages and ought as such to have been pleaded with particularity.

[33] As to the matter of separating the question of liability from the assessment of damages, Mr Marshalleck submitted that no application for an order for bifurcation of the trial in this way had been made at the appropriate time by the appellant and that there was accordingly no basis upon which the judge could have made an order to this effect. We were referred on this point to rules 16.4 and 26.1(1) (9) of the CPR. In any event, it was submitted, orders for bifurcation of the trial were only exceptionally made for good reason shown, so that, even if this court found it possible to make such an order at this stage, there was no basis in the material submitted to the court to justify such an order. In this regard, Mr Marshalleck relied on a decision of Barrow JA, sitting as a single judge of the Eastern Caribbean Court of Appeal, in the case of **Craig Reeves v Platinum Trading Management Ltd** (St Christopher and Nevis Civil Appeal HCVAP 2008/04, judgment delivered 20 May 2008), and Blackstone's Civil Practice 2008, pages 795 – 796.

The issues

[34] The grounds of appeal and the very helpful submissions of counsel on both sides give rise in my view to the following issues for the court's consideration:

(i) Did Muria J have the power to make an award of damages in addition to specific performance?

(ii) Did the appellant make a claim for damages, and, if so, what was the nature of the damages claimed?

(iii) What are the requirements of CPR with regard to the pleading of damages?

(iv) Did the appellant make any application for the trial of a separate issue of quantum? And, in any event, ought the judge to have made a direction for the trial of a separate issue of quantum?

(i) Damages in addition to specific performance

[35] Prior to the passing in England of the Chancery Amendment Act 1858, more commonly knows as Lord Cairns' Act, courts of equity had no jurisdiction to award damages in lieu of or in addition to an order granting an injunction or a decree of specific performance. So a plaintiff in an action for an equitable remedy, which was at that time perforce brought in the Court of Chancery, would generally speaking, even if successful, be obliged to seek his remedy in damages as a separate matter in the common law courts. As Lord Esher MR observed in **Chapman, Morsons & Co v The Guardians of the Auckland Union [1889] 23 QBD 294**, 297-298, a case to which we were referred by Mr Marshalleck, "Lord Cairns' Act was passed to meet that difficulty, and was one of those enactments that have from time to time been passed to prevent the necessity for double proceedings". (See also the judgment of Hallinan CJ in **Gloucester House v Peskin**, at page 377, where the background to, and the effect of, Lord Cairns' Act are well summarized).

[36] The very necessity for the welcome mitigation that Lord Cairns' Act provided sprung, of course, from a deeper mischief, which was the system of

separate courts which continued to exist in England up to the end of the third quarter of the nineteenth century (as to which, see Snell's Equity, 31st edn, paras. 1-15 to 1-17). That deeper mischief was, as is well known, finally addressed by the Supreme Court of Judicature Acts 1873 and 1875 ("the Judicature Acts"), the main purpose of which was to amalgamate the various superior courts into one Supreme Court of Judicature, which was directed to administer both law and equity, albeit in separate divisions (in relation to these developments, Snell quotes from Pollock, 'Leading Cases Done into English Law', 1892, p. 57: "The Courts that were manifold dwindle To divers Divisions of one" – see Snell, op cit, at para. 1-17).

[37] With the enactment of the Judicature Acts and the vesting in judges of the High Court of all the jurisdiction which was previously vested in or exercisable by the courts of Chancery and the common law courts, the court of Chancery ceased to exist as a separate court and Lord Cairns' Act was therefore repealed and removed from the statute books by the Statute Law Revision and Civil Procedure Act 1883. However, the proviso to that Act provided expressly that the repeal should not affect any jurisdiction or principle or rule of law or equity established or confirmed by any enactment so repealed. These developments were lucidly summarized in the well known judgment of Viscount Finlay in **Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851, 861-862**, to which we were also referred by Mr Marshalleck.

[38] The effect of these provisions was that, as Viscount Finlay went on to observe (at page 863), the repeal of Lord Cairns' Act notwithstanding, "the law which it lays down still exists." In **Serrao v Noel 15 QBD 549, 559**, Baggallay LJ expressed the view that "…every remedy necessary for doing complete justice in an action in any division of the High Court is provided by the Supreme Court of Judicature Act 1873, s. 24, subsection 7", and in **Chapman, Morsons & Co v The Guardians of the Auckland Union**, Lord Esher MR considered (at page 299) that "the repeal [of Lord Cairns' Act] was not with the intention of taking

away any of the powers given by the Act in a Chancery action, but because it was considered that the Judicature Acts re-enacted those powers, and therefore that Lord Cairns' Act had become obsolete, and might be repealed."

[39] Thus, in addition to the fact that the jurisdiction conferred by Lord Cairns' Act was regarded as having survived its formal repeal in 1873, it seems clear that the provision in section 24(7) of the Supreme Court of Judicature Act was also regarded as having substantially re-enacted the powers given by Lord Cairns' Act. Section 24(7) was subsequently re-enacted in England by the Supreme Court of Judicature (Consolidation) Act 1925 (as section 43) and is now to be found, in virtually identical form, in section 38 of the SCJ Act, which provides as follows:

> "38. The Court, in the exercise of the jurisdiction vested in it by this Act, shall, in every cause or matter pending before it, grant, either absolutely or on such terms and conditions as the court thinks just, all such remedies whatever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter, so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of those matters avoided."

[40] On the basis of this provision, as well as of section 18 of the SCJ Act, which confers on the Supreme Court of Belize the jurisdiction vested in the High Court of England by the Supreme Court of Judicature (Consolidation) Act 1925, I would therefore conclude, in agreement with the respondent, that the Supreme Court of Belize "is expressly empowered to fully deal with a cause that contains both legal and equitable claims and to grant all such remedies in a claim that has been properly brought forward".

[41] I accept, as seems clear and as Mr Marshalleck submitted, that Lord Cairns' Act, as such, or so-called, never became part of the laws of Belize (for the reason advanced by Mr Marshalleck, which is that the Imperial Laws (Extension) Act, extended to Belize only those laws enacted in England up to 1 January 1899, by which time Lord Cairns' Act had already been repealed in England). However, in the light of the history which I have attempted briefly to trace in the foregoing paragraphs, I am quite unable to attribute any particular significance to this fact, given the plenitude of powers inherited by and given to the Supreme Court of Belize, by the clear provisions of the SCJ Act.

[42] But I would also adhere to the view I had expressed in **Fukai et al v Aura Marina Vargas** (at para. [57]) that, although section 38 of the SCJ Act clearly empowers the court to grant "all such remedies whatever as any of the parties…may appear to be entitled to…", it is for "a claimant claiming damages to prove his case, both with regard to the fact of damage and as to its amount".

[43] And finally on this point, I also accept, as I must, that the power of the court to award damages must be subject to any applicable rules of pleading or procedure, which are to be found in the case of Belize in the provisions of the CPR.

[44] Before leaving this aspect of the matter, I must acknowledge a substantial debt of gratitude to all three judgments delivered by the Federal Supreme Court (Hallinan CJ, Lewis and Marnan JJ) in **Gloucester House Ltd v Peskin** (supra). That was a case in which the applicability of Lord Cairns' Act to Jamaica where, as in Belize, the Act had never been enacted, was extensively canvassed by the court, which also reached conclusions to the same general effect as those I have expressed on the point in this judgment.

[45] My conclusion on this issue is therefore that, subject to the questions of pleading and proof to which I shall shortly come, Muria J did have the power to award damages in addition to specific performance in this case.

(ii) <u>The claim for damages</u>

[46] It seems clear that paragraph 13 of the appellant's statement of claim (see para. [5] above) was intended to address the question of damages and in the prayer to the statement of claim the appellant asked for "damages for breach of contract in lieu of or in addition to specific performance". The appellant contends that the evidence tendered by it in support of this claim (exhibits 53 – 57) were in respect of general damages, while the respondent maintains that these were in fact items of special damages.

[47] A number of authorities were cited by counsel on both sides on the distinction between special and general damages. This is how Halsbury's (Laws of England, 4th edn (Reissue) Vol. 12(1), para. 812) states the position:

> **"812. 'General, 'special' and 'consequential' damages**. A distinction is frequently drawn between the terms 'general' and 'special' damages, which terms have different meanings according to the context in which they are used. In the context of liability for loss (usually in contract), general damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss: here, general damages are those losses, usually but not exclusively

> non-pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages, in this context, are those losses which can be calculated in financial terms. A third distinction between the two terms is in relation to pleading: here, special damage refers to those losses which must be proved, whereas general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the plaintiff is required only to assert that such damage has been suffered".

[48] The appellant also relied on **The Susquehanna** and the following dictum of Lord Dunedin (at page 661):

> "If there be any special damage which is attributed to the wrongful act that special damage must be averred and proved, and if proved, will be awarded. If the damage be general then it must be averred that such damage has been suffered, but the quantification is a jury question."

[49] In my view, the items disclosed and tendered in evidence by the appellant as exhibits 53 – 57 do not all readily fit into one category or another. On the one hand, exhibit 55 (to which the respondent drew particular attention), for instance, does seem on the face of it to relate to special rather than general damages: it details expenditures already incurred by the appellant between 22 December 2006, which is just about the point at which the defendant intimated that he did not regard himself as bound by the Purchase Agreement to complete the sale of Tract 2 to the appellant, and 31 October 2007.

[50] But on the other hand, several of the other exhibits, although setting out in detail precise figures for income and expenditure by the proposed hotel and casino operations for five to ten years into the future, are obviously no more than

projections, based on the hypothesis that the resort would in due course have been built and would have obtained the hoped for level of operation within a reasonable time. On the face of it, the numbers set out this latter category do not appear to have been intended to do more than to provide a basis from which the court might in due course be asked to extrapolate an appropriate figure to award to the appellant as general damages. At all events, it does not strike me as clearly as it did Muria J that the figures set out in all of the exhibits could only relate to special damages.

(iii) <u>The pleading requirements of the CPR</u>

[51] In the extract from his judgment set out at para. [19] above, Muria J concluded that the appellant was under a duty "to plead and particularize the specifics of the special damages it claims…" This obligation, the judge observed, was "consistent with [the appellant's] obligation under Part 8, in particular, Rule 8.7 of the [CPR]".

[52] Rule 8.7 of the CPR provides as follows:

> "8.7 (1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimants relies.
>
> (2) Such statement must be as short as practicable.
>
> (3) The claim form or the statement of claim must identify or annex a copy of any document which the claimant considers is necessary to his or her case.

(4) Where the claim seeks recovery of any property, the claimant's estimate of the value of that property must be stated.

(5) The statement of claim must include a certificate of truth in accordance with Rule 3.12."

[53] Rule 8.9 may also be relevant. That rule sets out additional requirements as regards claims for personal injuries and provides (in rule 8.9(8)) that the claimant in such cases "must include in, or attach to, the claim form or statement of claim a schedule of any special damages claimed".

[54] It is therefore clear that, save in respect of personal injury claims, there is no explicit requirement in the rules that obliges a claimant "to plead and particularize the specifics of the special damages it claims…" The further question that then arises is whether such a requirement, which was, on the authorities, plainly part of the pre-CPR pleading rule-book, survives the introduction of the CPR and falls to be implied in rule 8.7, as Muria J effectively held that it did.

[55] Mr Courtenay very helpfully referred us in this regard to an important passage from the judgment of Lord Woolf MR in **McPhilemy v Times Newspapers Ltd and others (**at pages 792 – 793):

> "The next point to which I would refer arises out of the pleadings in this case. I do not, in my following comments, suggest that the existing pleadings are other than in the form which is commonly adopted by libel practitioners. However, undoubtedly considerable time, energy and money have been incurred in producing those pleadings and the question that arises is whether this scale of expenditure is necessary or desirable. An indication of

the scale is provided by the fact that the reply is already in a reamended form. There have been two substantial separate hearings before high Court judges solely concerned with pleading issues. I refer to the Judgment of Astill J of 5 February 1997, as to the meanings that the words complained of are capable of bearing, and the judgment of Eady J of 30 July 1998 which gives rise to this appeal.

The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules. The Practice Direction to r 16, para. 9.3 (Practice Direction – Statements of Case CPR Pt 16) requires, in defamation proceedings, the facts on which a defendant relies to be given. No more than a concise statement of those facts is required.

As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest."

[56] While it is true that **McPhilemy** was a case of libel, to which special (and especially complicated) rules of pleading have traditionally attached, it seems clear that Lord Woolf MR intended these observations to be of general application and they were cited as such, with obvious approval, by Lord Hope of Craighead (at para. [50]) in **Three Rivers District Council v Bank of England (No. 3) [2001] 2 All ER 513**. Lord Hope also remarked (at para. [49]) that "a balance must be struck between the need for fair notice to be given on the one hand and excessive demands for detail on the other". (See also The White Book Service 2005, para. 16. 0. 2, where Lord Woolf MR's guidance in **McPhilemy** is fully set out in the editorial introduction to the rules dealing with statements of case.)

[57] In **Eastern Caribbean Flour Mills Ltd v Boyea**, Barrow JA commented (at paras. [43] – [44]) on Lord Woolf MR's statement and Lord Hope's subsequent observations as follows:

> "[43] Lord Hope's reproduction and approval of the exposition by Lord Woolf MR in **McPhilemy v Times Newspapers Ltd** on the reduced need for extensive pleadings now that witness statements are required to be exchanged, should be seen as a clear statement that there is no difference in their Lordships' views on the role and requirements of pleadings. The position, as gathered from the observations of both their Lordships, is that the pleader makes allegations of facts in his pleadings. Those alleged facts are the case of the party. The "pleadings should make clear the general nature of the case," in Lord Woolf's words, which again I emphasize. To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I

understand to mean pleadings with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader's case.

[44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings. The issue in the **Three Rivers** case was the need to give adequate particulars, not the form or document in which they must be given. In deciding that it was only the pleadings that she should look at to decide what were the issues between the parties the judge erred, in my respectful view. If particulars were given, for instance, in other witness statements the judge was obliged to look at these witness statements to see what were the issues between the parties. It follows, in my view, that once the material in Mr. McCauley's witness statement and Report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore, admissible. The proposition applies equally to the contents of the documents identified at Tabs 31 and 33."

[58] I have already expressed doubts as to whether, in the instant case, all of the material relied on by the appellant in exhibits 53 – 57 relates solely to special damages (see para. [50] above). But even if those doubts are unfounded, I am clearly of the view that, in the light of these authoritative judicial statements of the modern approach to pleading particulars, Muria J fell into error in treating the absence of particulars of special damages in the statement of claim as a complete bar to consideration of the appellant's claim for damages. In the first place, the only express requirement in the rules for particulars in the form of a

schedule of the special damages claimed is in respect of actions for personal injuries (rule 8.9(5)) and I cannot regard it as without significance that the framers of the rules chose not to impose a similar requirement in all cases. Secondly, Lord Woolf MR's judgment in **McPhilemy** makes it clear that failure to provide particulars in the statement of claim is not necessarily fatal, since "In the majority of proceedings **identification of the documents upon which a party relies, together with copies of that party's witness statements**, will make the detail of the case the other side has to meet obvious" (emphasis supplied).

[59] In the instant case, it seems to me to be clear from a reading of para. 13 of the amended statement of claim (in which it is averred that the respondent was at all material times aware of the appellant's proposed use of the land being purchased, including Tract 2) and para. 14 (in which it is averred that the appellant had suffered loss and damage) that it was being alleged that that loss flowed from the breach of contract pleaded by the appellant. That this is how the respondent himself understood the claim appears clearly from para. 11 of the defence which is in the following terms:

> "11. The Defendant denies that the Claimant has suffered any damages, especially since the 31st August, 2005, the Claimant has been in possession of Tracts 1, 3, 4 and 9 and there has been no significant development or use of this land, and as regards Tract 2, the Defendant repeats that the Claimant could only be let into possession of the said property to develop the same if he had exercised the right of first refusal."

[60] Further, in his witness statement dated 4 September 2007, Mr David Bane, a director of the appellant, stated that "it was always our intention to use the property to build condos and property development, and more particularly so, a project to be know as Ma 'Lo Ha Resort and Marina", and further that the

respondent had in fact been given a copy of the appellant's proposals "and had at that time expressed his joy at being a part of such a significant development for his properties." Mr Bane stated further that by the time the appellant became aware that the respondent did not intend to complete the sale, there was already "tremendous momentum behind the project" and that, as a result of the respondent's breach, the appellant had lost contracts with potential investors. Mr Bane's witness statement concluded with the assertion that he would never have "entered into a purchase contract and invest millions of dollars into a project that would ultimately be in someone else's control".

[61] Pursuant to an order for standard disclosure made on 24 May 2007, the appellant served its original list of documents, comprising 34 items in total, on 19 June 2007. Some of the material disclosed in this list appears to support the appellant's pleading in para. 13 of the first amended statement of claim that the respondent was from the outset aware of its plans for development of the entire property, including Tract 2.

[62] Then, on 17 September 2007 (that is, two weeks after the date of Mr Bane's witness statement), the appellant served an additional list of documents (numbered 35 – 58), in which were included the documents (which were also attached) upon which it sought to rely at the trial in support of its claim for damages. This is how the documents which were subsequently tendered and admitted as exhibits 53 - 57 were described in the list:

> "53. Email dated 5th June 2007 re investment performance and loss as of 6th May 2007
>
> 54. Copy of spreadsheet re Ma 'loha Projected damages
>
> 55. Copy of Ma 'loha Income Statement

56. Copy of Ma 'loha hotel Model

57. Copy of Ma 'loha Casino income statement."

[63] Taking Mr Bane's witness statement and the contents of the additional list of documents filed by the appellant together, it seems to me that the objective of fairness to the defendant, which is what, as Lord Donovan stated in **Perestrella e Companhie Limitado v United Paint Company [1969] 1 WLR 570**, (one of the authorities relied on by Muria J), underpins the requirement that particulars of special damages should generally be pleaded, has been amply met in this case. It is also of interest to note that in that case, Lord Donovan went on to observe (at page 580), that "The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case".

[64] But before leaving this aspect of the matter, I must enter two caveats. The first is that, by my conclusion on the sufficiency of the pleading in the circumstances of this case, I do not wish to be taken as sanctioning any general departure, in cases not concerned with personal injuries, from either the well established distinction between special and general damages or the generally accepted manner of pleading them. As Lord Woolf MR said in **McPhilemy** (at page 793), pleadings "are still required to mark out the parameters of the case that is being advanced by each party" and there will in the majority of cases be no good reason for, or advantage in, gratuitous inventiveness in this regard. The second caveat is that I would equally not wish anything that I have so far said as regards the damages claimed by the appellant to be taken as indicating any view, one way or the other, as to whether I consider the evidence proffered in support of them to be a sufficient basis for an award of damages in all the circumstances of the case. Issues such as causation and remoteness (as well as questions such as whether the respondent had any foreknowledge of the appellant's intention to establish a casino) all remain entirely at large.

(iv) The trial of damages as a separate issue

[65] Rule 16.4(1) of the CPR provides as follows:

> "16.4 (1) This Rule applies where the court makes a direction for the trial of an issue of quantum.
>
> (2) The direction may be given at –
>
> (a) a case management conference;
>
> (b) the hearing of an application for summary judgment; or
>
> (c) the trial of the claim or of an issue, including the issue of liability."

[66] Rule 16.4(3) goes on to provide that, once a direction for the trial of an issue of quantum has been given, the court must exercise its case management powers and give directions as to disclosure, service of witness statements, expert reports and the use of affidavit evident, while rule 16.4(4) provides for the scheduling of the assessment of damages.

[67] In **Craig Reeves v Platinum Trading Management Ltd**, Barrow JA considered (at para. [14]) that, while an order for the separate trial of an issue "is entirely within the range of case management orders that the court may make, such an order should normally be made at the case management conference fixed following the filing of the defence". And in any event, notwithstanding the enabling powers of the rules, the editors of Blackstone's Civil Practice 2008 state (at para. 59.57) that "Such orders are regarded as exceptional, and are only

made where a clear demarcation line between issues of liability and quantum can be drawn".

[68] In **St Kitts Development Corporation v Golfview Development Ltd and another**, there was no order for the separate trial of an issue of quantum. However, the trial judge, after hearing the evidence in the case and pronouncing judgment in favour of Golfview on its counterclaim, scheduled an assessment of damages for a subsequent date and ordered counsel for the parties to file written submissions for the purpose of the assessment. Before the date for the assessment, solicitors for Golfview filed (unilaterally) additional witness statements for use in the assessment and, at the hearing, the judge upheld an objection to the use of those statements and directed that the assessment should be conducted on the basis of the evidence already adduced at the trial. On an appeal from this ruling by Golfview, it was contended that the scheduling by the judge of a date for the assessment of damages amounted to an order pursuant to rule 16.4 of the Eastern Caribbean CPR (which is in terms identical to rule 16.4 of the CPR) for the trial of a separate issue of quantum of damages and that the judge had accordingly erred in refusing to allow Golfview to rely on the additional witness statements that had been filed on its behalf.

[69] Rawlins JA (Ag), as he then was, sitting as a single judge of the Eastern Caribbean Court of Appeal, dismissed Golfview's appeal, holding that there had been no application on its behalf at the appropriate time for the trial of a separate issue as to quantum and that the judge had given no such direction. Rawlins JA (Ag) considered that all that had happened was that the trial judge had acceded to Golfview's request that the court should determine liability and then set a date for the assessment of damages, which it was entirely within the judge's discretion to do. In these circumstances the judge had correctly declined to permit Golfview to rely on the additional witness statements at the assessment hearing.

[70] Subsequently, in **Emanuel Rock v Theresa Jolly**, the Eastern Caribbean Court of Appeal referred to **St Kitts Development Corp. v Golfview** with approval. In that case, in which no order had been made for the trial of a separate issue as to quantum, the trial judge nevertheless issued directions for a separate assessment hearing after the trial and also gave leave to the parties to file additional affidavit evidence for the purpose of the assessment. On appeal it was contended that the judge had erred and that, in the absence of an order bifurcating the trial of liability and damages, it was expected that both issues would have been determined at the end of the trial without a split hearing. Dismissing the appeal, Rawlins JA (in a judgment concurred in by Barrow JA and Penn JA (Ag)) said this (at para. [39]):

> "…it is desirable that, where no prior bifurcating order was made, liability and quantum of damages should be determined after one trial and in a single judgment or order. Notwithstanding that it lies within the discretion of a judge, a bifurcating order with directions to the parties to file additional evidence for a separate assessment hearing should very rarely be made at a stage as late in the process as was done in the present case. Such an order should not be made where a party would suffer prejudice thereby."

[71] In the result, the court considered that the judge's order permitting the filing of additional affidavit evidence had caused no prejudice and ordered a new trial to determine quantum only on the evidence already admitted at the earlier trial and the additional evidence for which permission had already been given by the judge.

[72] In my respectful view, these decisions of the Eastern Caribbean Court of Appeal have much good sense to commend them. It seems to me that, as Rawlins JA held in **St Kitts Development Corp. v Golfview**, notwithstanding the fact that no order has been made by a judge in accordance with rule 16.4 for the

separate trial of an issue as to quantum of damages, it is entirely within the discretion of a trial judge to direct that the actual assessment of damages be scheduled for some later date, after the question of liability has been determined, but on the evidence already adduced at the trial. Such a direction does not in fact engage the power given by rule 16.4 to direct the trial of a separate issue of quantum at all. But the decision in **Emanuel Rock v Theresa Jolly** also suggests that, although the rules clearly contemplate that an order for bifurcation of the trial should be made at case management or at the outset of the trial, it is equally a matter for the discretion of the trial judge to consider whether such an application should be granted, even if made at a late stage of the proceedings, provided always that the making of such an order will not cause prejudice to one or other of the parties. In this regard, I think that it is relevant to bear in mind that what rule 16.4(2)(c) provides is that a direction for bifurcation of the trial can be made either before or at the trial, so that it is a matter that remains open for consideration by the trial judge throughout the trial.

[73] In the instant case, no application for the separate trial on the issue of damages was made at the case management conference and neither, the respondent submitted, was any such application made at the trial itself. In the result, the respondent contended that not having made any such order before judgment, Muria J became functus and could thereafter no longer make such an order.

[74] I do not think that there can be any doubt that, in respect of this aspect of the matter, as Mr Courtenay frankly conceded, “the case was marshalled in an untidy way”, both before and during the trial. Not only was no application for a separate trial on damages made at the case management conference, but Mr Lumor’s intimation to the court in his opening of his wish to deal with the issues of liability and damages separately was never properly followed up, either by Mr Lumor himself or, more importantly, by the judge. So at the end of the day the appellant was left without a ruling from the judge on how the obviously important

issue of damages was to be dealt with and, as it turned out, the judge himself foreclosed any further pursuit of this question by his decision, without any further input from the parties as regards Mr Lumor's request, that damages had not been properly pleaded.

[75] With the greatest of respect to the judge, I cannot regard this result as fair to the appellant in all the circumstances of this case. For even if there were no apparent exceptional or unusual features in the case to have justified the making of an order for the separate trial on the issue of quantum of damages (and no reasons were advanced by Mr Lumor for his request to the judge to deal with the issue of damages separately), the appellant was nevertheless entitled to a ruling on the matter one way or the other, it having been raised by Mr Lumor at the very outset of the trial. And even if the judge did not regard Mr Lumor's intimation as an application for the separate trial of the issue of quantum, there seems to me to have been no reason why counsel for the parties should not have been invited by the judge, once he had made his ruling on liability, to address him on the question of damages, albeit on the evidence already adduced by them.

Conclusion

[76] For all the reasons stated in this judgment, I therefore consider that the appellant has made good its contentions on all four issues in the appeal, which must accordingly be allowed, with costs to the appellant to be agreed or taxed. In all the circumstances, I would remit the matter to the trial judge for him to hear submissions from counsel on both sides at the earliest possible date and to determine the way forward in the case in the light of the observations made in paras. [72] – [75] above.

MORRISON JA