**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**CIVIL JUR1SDICTI'ON**



***CIVIL ACTION NO.: HBC 505 OF 2004***

**BETWEEN;** **MARJORY GAY THOMAS** Trading as **LIGHTHOUSE RESTAURANT**

***PLAINTIFF***

**AND:** **THE COMMISSIONER OF POLICE**

***FIRST DEFENDANT***

**THE ATTORNEY-GENERAL OF FIJI**

***SECOND DEFENDANT***

**Mr. G. O'Driscoli for Plaintiff**

**Ms D. Buresova for Defendants**

**Date of Hearing:** **16th May 2006**

**Date of Judgment:** **16th June 2006**

# ASSESSMENT OF DAMAGES

Marjory Thomas operated a restaurant known as Lighthouse Restaurant in Suva. On 11th November 2004 police officers, wrongfully believing that she had no liquor licence, seized liquor from her Restaurant. They did not close the restaurant altogether. On 31st January 2005, this court ordered the return of seized liquor to the plaintiff. The plaintiff is claiming for loss of income in the sum of $140,000.00 during the period 11th November 2004 to 31st January 2005.

**Did the plaintiff have 35 bookings?**

Right at the outset of trial, the plaintiff was faced with considerable difficulty. She had alleged that during that period of closure she had 35 bookings for functions and she expected to make $140,000.00 from these functions. She was asked by the court to bring her diary where she noted the bookings for functions. She produced a diary for 2003 alleging the records were there. That diary hardly assists her. So the booking diary which allegedly existed in the beginning of her evidence in chief failed to materialize. Simply to assert that she had so many bookings does not assist the plaintiff much.

I was not at all impressed by the plaintiff's evidence. A person who claimed that she had been in restaurant business since 1995 failed to provide any convincing record of her past successful performance. She is claiming a substantial loss of $140,000.00 profit for the short period of 82 days. A person making so much profit from a restaurant business would need to purchase fairly large quantities of groceries and liquor. At least she could have produced records of purchases as-evidence of the size of her outlay and expenses. She said she kept no bank accounts. Evidence of her banking records for previous years for the relevant months would have given the court a good indicator of how much gross earnings she had. Lack of a bank account which is so fundamental a necessity for any business operation let alone the alleged large scale of plaintiff, points in the direction that the plaintiff had no large scale operations. Even if she had no bank accounts, what about her tax returns which again would have provided the court with some figures to work out the losses. Tax returns would have shown her gross earnings for the year and all expenses and percentage profits could easily be calculated. Ail I have is her unsubstantiated statement that she made 60 percent profit.

**The plaintiff must provide sufficient details of loss:**

A plaintiff who claims substantial damages must be able to satisfy the court as to the quantum of damages. Simply giving figures is not enough. As

Lord Goddard stated in Bonham Carter v. Hyde Park Hote! Ltd. - (1938) 6 TLR 177 at 178 -

> *"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars, and, so to speak, throw them at the head of the court saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it."*

In Ratcliffev. Evans - (1982) 2 Q.B. 524 Bowen L.J. stated at p. 532-3 -

> *"As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligent principles. To insist upon more would be the vainest pedantry."*

McGregor on Damages 16th edition at page 236 suggests that where precise evidence is obtainable, the court naturally expects it. The proof required is not one of absolute certainty but one of reasonable certainty looking at the circumstances of the case.

As I have stated earlier, I am not satisfied with the broad assertions of the plaintiff and as to the extent of confirmed bookings she had. Sanjiv Kirpa! had sworn two affidavits to be used as his evidence in chief. According to those affidavits he had booked the Lighthouse for engagement function on 11th January 2005 and for a wedding anniversary function on 22nd January 2005. His testimony in court was he had .booked Lighthouse for his engagement on 26th November 2005. The other function had fallen through. The other credible evidence I had was from Sharon Forster. She had booked the Lighthouse for a function and was going to spend about $7,000.00 on it.

Further evidence I had was from Krysteile Lavaki a daughter of the plaintiff who stated that she had booked the Lighthouse for a Christmas Party for her class on 3rd January 2005. It was a class of 54 or 55. This would be during school holidays. She stated that she expected 100 to attend. This is holiday time and students scattered all over the place and the numbers are purely speculative. She is the daughter of the plaintiff. The motive to assist and exaggerate is obvious. Hers in my view would be a small scale function if there was to be one. ! doubt there would be 100 attending the function. I would place the total number at about 40 and total amount likely to be spent at no more than $1,200.00.

These are the only three functions about which there is some evidence. The gross expected income would have been from the three functions a sum of $15,200.00 Even if I give the plaintiff a generous 50 percent profit, this would come'to $7,600.00.

The plaintiff in her evidence in court stated that the liquor seized was valued at $5,700.00. This was returned to her. I do not believe her when she says that some of the returned liquor could not be used. This is not stated in her statement of claim. However, I do believe that she could have made a profit by selling the liquor if it had not been seized. Once again she produced no invoices of her purchases. Doing the best I can, I would award her loss of profit of $2,000.00 on it.

**Duty to Mitigate:**

The restaurant had not been ordered to be closed by the police. They only took away the liquor. She could still have continued to sell food. However, of her own accord she totally shut the place down and now expects the defen&iant to pay damages for that. She had a duty to mitigate damages. I am not minded to allow for this loss, as it was self inflicted.

**Can ! allow Punitive Damages?**

Mr. O'Driscoll in his oral submission asked for punitive damages. He said it is loss of business and good will. However, loss of business is already incorporated in my earlier assessments.

Punitive damages must always be pleaded together with facts relied upon to support them - Order 18 Rule 7(3). Exemplary damages must be pleaded in **the** body of the statement of claim not only in the prayer. The purpose is clear - *to* prevent defendant being taken by surprise during trial and to extend the parameters of discovery during summons for directions. Accordingly I do not award punitive damage as they were not pleaded.

Interest:

**The** court has **a** discretion to award interest on the damages awarded and I allow interest at 6 percent per annum from the filing of the writ to the date of judgment.

**Costs:**

The plaintiff is entitled to her costs. I note that liability was admitted. I award her costs which I summarily fix in the sum'of $2,000.00.

Final Orders:

There is to be judgment for the plaintiff in the sum of $9,600.00 together with interest at 6 percent per annum from 16th November 2004 to today. I also order costs which I summarily fix in the sum of $2,000.00.

**Should higher costs be awarded if a case fit for Magistrates Court?**

As a postscript I must add that recently this court has come across a number of cases where huge damages are prayed for without basis. In such cases if counsels had assessed the evidence properly they should have realized that the case was proper one for Magistrates Court. In future parties who bring such cases to High Court will after trial get costs on a scale appropriate to

Magistrates Court. There is no reason why the defendant or defendants should suffer higher costs simply because the plaintiff elects to come to High Court. Such conduct by plaintiffs is also counter productive to effective case management in the High Court.

[ Jiten Singh ]
JUDGE

At Suva
16th June 2006