IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0046 of 2004S
(High Court Civil Action No. HBC 380 of 1999S)

BETWEEN:

1. SHAILEND SHANDIL
2. ISLAND NETWORK CORPORATION LIMITED

Appellants

AND:

AIR FIJI LIMITED

Respondent

Coram: Ward, President
Henry, JA
McPherson, JA

Hearing: Tuesday, 12 July 2005, Suva

Counsel: Mr N. Lajendra] for the Appellants

Ms R. Lal]
Mr. D. Sharma] for the Respondent
Mr. R. Naidu]

Date of Judgment: Friday, 15 July 2005, Suva

JUDGMENT OF THE COURT

---

[1] The plaintiff, which is the respondent to this appeal, conducts the business of an airline operator carrying passengers to various parts of the Fiji Islands and beyond. The first defendant is a journalist employed by the second defendant which carries on the business of a news broadcaster.

[2] On 24 July 1999 an aircraft owned by the plaintiff crashed in the course of a flight in Fiji causing the death of the 15 passengers and two crew members on board. Ten

days later on 3 August 1999 the defendants broadcast a news item stating that another of the plaintiff's aircraft en route to Moala in Lau had "managed to make safe landing.... after its right propellor suffered a mechanical failure mid-air." The aircraft was also reported to be currently undergoing repairs by company engineers who were flown to the island with spare parts. The same report was broadcast again on 3 August and once more on 4 August 1999.

[3] On 13 August 1999 the plaintiff issued a writ accompanied by a statement of claim claiming damages for defamation against the two defendants. In December of that year an application in the High Court to strike out the statement of claim was unsuccessful, the plaintiff being ordered to amend as it did by alleging the full text of the broadcast in para. 8 of its pleading. To it there was added in para 9 an allegation that the natural and ordinary meaning of the words broadcast in the context in which they were published was that the defendant:

(i) Did not have airworthy aircraft or

(ii) Operated aircraft which were unsafe to fly in; or

(iii) That were prone to serious malfunction; or

(iv) Operated an aircraft which suffered a serious malfunction to its propellor in mid - flight on 3 August 1999.

Paragraph 10 alleged that the words spoken of the plaintiff or its aircraft were false and untrue and para. 11 that the plaintiff had suffered damage and loss to its credit and business reputation.

[4] For some reason the defendants failed to deliver a defence to the statement of claim and on 29 January 2001 the plaintiff was held to be entitled under 019, r3 of the High Court Rules to enter interlocutory judgment against the defendants with damages to be assessed, which was done on 16 March 2001. The damages were assessed on 23 June 2004 after a hearing before Pathik J. at a total of $200,000 , comprising general damages of $80,000 and special damages of $120,000, against

both defendants, together with interest at 5% from 3 August 1999 to judgment. This appeal is brought by the defendants against that assessment.

[5] On the appeal before us, Mr Lajendra of counsel for the defendant appellants submitted that his clients were entitled to contest not only the quantum of the damages awarded, but also the question of the defendant's liability, and a number of challenges to it were made in the defendants' written outline before us. We, however, considered that on the appeal the defendants were limited to contesting the amount of the assessment of damages awarded. We will now state our reasons for that conclusion.

[6] Not much guidance is to be found in textbooks on the practice following the entry of a default judgment for damages to be assessed. Originally where the damages claimed were unliquidated a writ of inquiry issued to the sheriff to summon a jury to make the assessment. Due to manpower shortages during World War I the use of juries for this purpose was suspended in England and never resumed. The present Fiji High Court rule reflects that alteration in practice as it has come to us from England. Nevertheless, it is helpful to look at the course followed under the old writ of inquiry. Tidd's Practice of the Court of King's Bench is an early work of authority, which refers to the matter. In the 7th edition of 1821, the author says (vol. 1, at 600):

> *"Letting judgment go by default is an admission of the cause of action: And therefore where the action is founded on contract, the defendant cannot give in evidence that it is fraudulent."*

[7] The authority cited in support of this proposition is a decision reported in **Strange** *of* ***East India Company v. Glover*** in 1 St. 612; 93 ER 733, decided in the 11th year of King George I, which would place it as long ago as about 1724. The writ of inquiry there came before Pratt CJ in the King's Bench, who is reported as having "refused to let the defendant in to give evidence of fraud" on the part of the plaintiff because, by suffering judgment by default, the defendant had admitted the contract to be as

the plaintiff had pleaded it; "and now they were only upon the quantum of damages." Although old, the decision is none the worse for that, and is supported by authority in the United States, where, as might be expected, there is a considerable number of decided cases to similar effect. See Freeman on Judgments (15th ed: 1925), vol 3, para 282, at 2663, where it is said that "default admits all of the traversible allegations of the declaration" and so "precludes any showing of defensive matters."

[8] For these reasons, we consider that it is not open to the defendants, on this appeal from the assessment of damages in the High Court, to challenge the judgment given against them, as distinct from the amount assessed.

[9] Turning to the issue of damages, the prayer for relief in the amended statement of claim seeks: (a) general; (b) special; and (c) punitive damages, as well as interest from the filing of the writ. His Lordship in the court below awarded $80,000 as general damages, and $120,000 as special damages. He declined to award punitive or exemplary damages, and no cross-appeal has been brought against this ruling. The defendants' appeal is directed to the award made under both categories (a) and (b) above.

[10] One of the difficulties in assessing damages for libel is that the categories of general and special damages are not completely well defined nor altogether mutually exclusive. Nevertheless, it is settled that some general damages are assumed to flow from the mere publication of defamatory matter. In the case of an individual, this extends to feelings of hurt, anxiety, and loss of self-esteem that naturally follow from the publication. But, by their nature, corporations cannot suffer injury of this kind. As Lord Reid said in *Lewis v. Daily Telegraph Ltd*.[1964] 1 AC 234, 262:

> *"A company cannot be injured in its feelings, it can only be injured in the pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured."*

To this it should be added that, as Lord Keith acknowledged in ***Derbyshire County Council v. Times Newspapers*** [1993] AC 534, 547, consequential restrictions on credit, and the effect on employee morale, are also matters to be considered in assessing the impact of defamatory statements on the capacity of a corporation to conduct its business successfully.

[11] It is well settled that an action of libel will lie at the suit of an incorporated trading company in respect of a libel calculated to injure its reputation in the way of its business without proof of special damage. See ***South Hetton Coal Company Limited v. North-Eastern News Association Ltd***. [1894] 1 QB 133. In Fiji, the broadcasting of words, if defamatory, is governed by the law of libel: Defamation Act 1971 (Cap.34, section 3).

[12] The plaintiff was without proof of actual loss therefore entitled to general damages for the injury caused by the defamatory matter published about it in the course of its business. It was not, however, entitled to compensation for the loss suffered in the way of hurt feelings and the like, which would have been recoverable by an individual defamed in similar circumstances. Unlike human beings, corporations do not lie awake at night reflecting on the iniquities of life. Except to the extent that they suffer patrimonial loss, corporations cannot recover compensation for it. This has the effect of limiting some of the impact that would otherwise be covered by an award of general damages in favour of an individual, which are sometimes catered for by what are called "aggravated compensatory damages", as discussed, in ***Random House Australia Pty Ltd. v. Abbott*** [1999] 94 FCR 296, affirming 149 FLR 367 (Australian Capital Territory Sup. Ct.)

[13] It was therefore open to the plaintiff here to recover damages for its "general loss of business, as distinct from the loss of this or that known customer": ***Ratcliffe v. Evans*** [1892] 2 QB 524, 533. As Bowen LJ recognized there, for this purpose evidence of a "general decline of business" is admissible." In this instance, the

plaintiff set out at the hearing of the assessment to prove a decline in business. It called as witnesses both Mr McDonald, the Chief Executive of the plaintiff company, and Mr David Pitt, who is a chartered accountant and manager of the company's finance. The main complaint of Mr McDonald was the reference in the broadcast to "a mechanical failure mid-air" and to the aircraft having to make an "emergency landing" In fact there is no express reference in the broadcast matter to an emergency landing; but it is pleaded as such in the particulars given in the amended statement of claim Not having defended the claim, the defendants may have to live with that overstatement in the plaintiff's pleading even if it involves an attribution to the published defamatory matter of a somewhat strained version of the "ordinary and natural" meaning of the words.

[14] In addition to the loss of income said to have resulted from the publication, Mr McDonald said in evidence that it "put additional pressure on my staff's morale... . additional pressure on management, additional doubt in people's minds whether or not they should travel, and a whole series of additional 'damage control issues' that we had to put in place to try and fix up this problem." It may be accepted that some such losses occurred. The plaintiff, however, found it impossible to quantify these losses in any specific way. Evidently no record was kept or attempted of the plaintiff's outlays or disbursements in these categories, which in the circumstances is perhaps not surprising. The result is, however, that they can be used only as some evidence to support the award of $80,000 for general damages rather than as proof of any specific loss sustained by the plaintiff in consequence of the defamatory broadcast.

[15] From this we turn to the matter of special damages, for which an amount of $245,383 was claimed and $120,000 awarded. In this instance the plaintiff relied on the evidence of Mr Pitt. He gave evidence that for the period from 3 August 1999 (the date of the first publication of the defamatory statement) to 31 December 1999, the total revenue received by the plaintiff was $4,655,151, compared with

$5,984,954 for the same period in 1998. This it was said demonstrated a loss of revenue in 1999 of $1,329,803 or 22.1% compared with the same period of the previous year (1998) of revenue, and at a time which had otherwise been one of increasing income and prosperity for the plaintiff.

[16] Mr Pitt then made a comparison of revenue of $311,605 for the period 24 July 1999 (the date of fatal accident) to 3 August 1999 with the revenue of $380,521 for the same days 24 July to 3 August in 1998, which showed a decline of $68,916 or 18.11% in 1999. Deducting this from the total percentage loss of 22.1%, he attributed the difference of 4.1% to the impact of the defamatory publication on 3 and 4 August 1999. He than applied 4.1% to the 1998 revenue for the period 3 August to 31 December, producing a damages figure of $245,383, which was reduced by Pathik J. to $120,000, but without specific reasoning being given for it.

[17] As an exercise in accounting, the calculation is no doubt accurate; but, from the standpoint of assessing the damages caused by the defamatory publication, it is in our view not an adequate method of proving the actual loss resulting from that particular event. For one thing, it assumes that the incidents (the fatal accident on 24 July, and the defamatory publication on 3 August) each contributed a constant or steady percentage of the loss of revenue sustained throughout the period in 1999 under review. In fact, the impact of the fatal crash and the adverse publicity surrounding it was likely to have overwhelmed and outlasted any effect brought about by or associated with publication of the defamatory matter on 3 and 4 August 1999. News of a mechanical failure that caused no crash or loss of life and produced no graphic photographs or vivid personal stories of human loss or suffering is obviously much less memorable or long-lasting in its impact on human perceptions of events. In addition, the method of calculation adopted leaves out of account all other social and political factors and events as possible operating causes of the loss of income sustained.

[18] For these reasons, we consider that the plaintiff's reliance on Mr Pitt's method of calculating its special damages was not sufficient to establish them as a matter of proof either in law or in fact. The evidence tends to show a likely but impermanent loss of goodwill or reputation in relation the plaintiff's business, but not one that is capable with any precision of being disentangled from the consequences of the earlier and fatal incident. In these circumstances the case presents as one in which an award of general damages is the only appropriate method of compensating the plaintiff for the wrong done to it.

[19] General damages are at large and, because of this consideration, appellate courts are traditionally reluctant to disturb such awards. The award here of $80,000 on that account is, we think, somewhat high; but, taking account of other matters including, for example, that the defamatory matter was broadcast on three occasions over two days apparently without any real attempt to check its accuracy, we consider that the amount of the award for general damages as compensation for injury to goodwill should be left to stand. On the other hand, we do not accept that the plaintiff succeeded in proving its special damages or actual loss to the extent of $120,000 or at all. To the extent that the evidence of Mr Pitt suggested that the plaintiff's loss of revenue may have been in part due to the defamatory publication, we consider that it is already adequately compensated for by the existing award of $80,000.

[20] The result will therefore be that:

(1) The appeal is allowed with costs fixed at $500.

(2) The amount of damages assessed and awarded in the High Court on 23 June 2004 is varied by reducing it from $200,000 to $80,000.

Ward, President

Henry, JA

McPherson, JA

Solicitors:

Messrs. Patel Sharma and Associates, Suva for the Appellants
Messrs. Jamnadas and Associates, Suva for the Respondent

D:\WD\WIN\USHA\ABU0046U.04S