IN THE HIGH COURT OF FIJI
[WESTERN DIVISION] AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No: HBC 190 of 2013

BETWEEN : **JUST DAIQUIRIS (FIJI) LIMITED** a limited liability company having its registered office at Unit A Goundar Road, Vuna Viavia Estate, Martintar, Nad.

1st PLAINTIFF

: **WARICK LEE McCALLION** of Muttama Estate, Martintar, Nadi, Company Director.

2nd PLAINTIFF

A N D : **AMIT SHARMA** of Lot 29, Waqavuka Road, Namaka, Nadi Subdivision, Business Manager.

1st DEFENDANT

: **GLENN CLIFFORD SMITH** of Lot 29 Waqavuka Road, Namaka, Nadi.

2nd DEFENDANT

: **TRIPLE 3 LIMITED** a limited liability company having its registered office at Jay Lal & Co., Chartered Accountant, Marine Drive, Lautoka.

3rd DEFENDANT

Before : Hon. Mr Justice R. S. S. Sapuvida

Counsel : Mr Eroni Maopa for the Plaintiff
: Mr Tomasi Tuitoga for the Defendant

Date of Judgment : 8th December, 2016

JUDGMENT

[1] The Plaintiffs instituted these proceedings by way of Writ of Summons dated 11 October, 2013 claiming the following reliefs against the Defendants:

(a) General Damages for Defamation;

(b) General Damages for loss of business;

(c) Interest;

(d) Costs;

(e) Further or any relief the Honourable Court deems just.

[2] The Defendants filed their Statement of Defence on 21 October, 2013 and the Plaintiffs their Reply to the Statement of Defence on 29 October 2013.

Background to the Case

[3] On 28th August, 2013 the 2nd Defendant wrote a letter to the Director of National Trade Measurements and Standard informing that the Plaintiff is manufacturing liquors below the required level of alcohol and selling them to Five Star Hotels and Retailers. The letter is reproduced as follows:

> *"28th August, 2013*
>
> *The Director National Trade Measurements and Standards*
> *Department of National Trade Measurements and Standards*
> *Ministry of Industry and Trade*
> *Naibati House*
> *9 Goodenough Street*
> *SUVA.*
>
> *Dear Sir,*
>
> ***Liqueurs produced by Warick Lee McCallion on behalf of Just Daiquiris Fiji Limited ("JDFL")***
>
> *6 sealed bottles of JDFL's Liquor products (marketed under the brand name "Just Liqueurs") were purchased at random and sent to Island Brewing Co. Limited for testing on 21st August, 2013.*
>
> ***Attached is a lab report produced by Island Brewing Co. Limited dated 26th August, 2013 detailing the alcohol content of the 6 liquors. These liquors are all clearly marked on the label as containing 21% alcohol. Out of 6 products tested, the results show that all 6 products are***

substandard and are being grossly misrepresented by JDFL in terms of alcohol content-one with alcohol content as low as 9.58%.
This deception by JDFL is extremely damaging to other products made in Fiji. It is extremely damaging to our tourism industry as these products are being sold to 5 Star Resorts right down to local bars/restaurants. It is also extremely damaging to the like business as us and Finest Liqueur Fiji who manufacture top quality products in Fiji made to world standards.

We urge you to take immediate and decisive action to lessen the damages already done by JDFL.

Yours faithfully

Glenn Clifford Smith
Director
CC: 1, Ministry of Tourism, Suva
2. Investment Fiji, Suva
3. Investment Fiji, Lautoka
4. Consumer Council of Fiji, Suva
5. Western Division Liquor Licensing Authority, Lautoka
6. Nadi Town Council, Nadi
7. Fiji Commerce Commission, Suva
8 Tourism Fiji, Nadi"

[4] By email dated 12th September, 2013 from the 1st Defendant Amit Sharma sent the following message to Glen Roberts.

"From : Amit Sharma
Sent : Thursday, 12 September 2013 11.06AM
To : glen.roberts@shangri-la.com
Cc : Nitesh.kumar@shangri-la.com
Bula Mr Dutt/Salvesh.

This is kindly to request to meet you and discuss issue of high importance. Recently we have discovered corrupt practices involving one of your beverage suppliers.
We have hard evidence against this and wish to present it to you in person.

Please confirm if 2pm tomorrow at Shangri-La suits you for this meeting.

If not, please advise a time convenient to you.

Vinaka.

Kind Regards,
Amit Sharma
Business Development Manager
Finest Liquor Fiji Ltd/Triple 3 Ltd"

[5] By letter dated 17th September, 2013 (PE-7) the Plaintiffs through their Solicitors replied to the letter by the 2nd Defendant addressed to the Director National Trade and Measurement and Standard as follows:

"17 September 2013

The Director National Trade and Measurements and Standard
Department of National Trade Measurements and Standards
Ministry of Trade and Measures
9 Gordon Street
Naibati House
SUVA.

Dear Sir

RE: LIQUORS PRODUCED BY JUST DAIQURIS FIJI LIMITED

1. *We act for Just Daiquiris Fiji Limited (the company) and Mr. McCallion.*

2. *We were given a copy of letter written by Mr. Glenn Smith on the company letterhead "triple 3 limited" dated 29th August 2013 address to your good self. We are instructed to response to the letter.*

3. *Our clients deny the allegation leveled against them by Mr Smith.*

4. *Our clients supply alcohol products on orders by well- known 5 Star Hotels in Nadi and the Coral Coast areas. Triple 3 limited is one of the competitors on the market with similar products.*

5. *For a number of years Tripple 3 limited was trying to 'intrude' or enter the market to influence our clients' customers with unethical business dealings. The letter dated 28th August, 2013 signed by Mr Smith is one of the examples.*

6. *Our clients' supplier of liqueur oversees supply and provide mixing instructions to be strictly followed and adhered to by the company. They verify and confirm that the liqueur and alcohol recipes are correct.*

7. *Our client only delivers the supply upon customers confirming their respective orders. Tripple 3 is not a customer but a competitor. How the 6 bottles of alcohol are in their possession is unknown to our client.*

8. *There was no complaint from our clients' customers in regards to the content of alcohol supplied by our client. Where Mr. Smith bought 6 bottles and from whom is unknown to us. Who directed the 6 bottles to be tested or it is only through Mr. Smith for his intention to sabotage our client's business operation?*

9. *The allegation against our client is a serious one. It has tarnished the company's reputation, its operations and Mr McCallion's name. Our clients reported the matter at Namaka Police Station to investigate the allegation made by Mr. Smith.*

10. *For your information there is a High Court Action being Civil Action No. 211 of 2011 pending at Lautoka High Court. In that action Mr Smith, his Accountant girlfriend and 4 other of his companies were alleged to have committed fraud on Pacific Vending Limited (PVL) (Mr. McCallion as a Director) by signing PVL cheques amounting to hundreds of thousand dollars, where Mr. Smith was a Director, and transferred money offshore. The funds from PVL was also used or fund Mr. Smith's other 4 companies operation.*

11. *There are other charges for illegal sale of liquor pending against Mr. Smith and his colleagues at Nadi Magistrates court.*

12. *There are numerous correspondences sent to various governmental authorities for their actions against Mr. Smith for violation of the law despite credible information supplied to them but it seems they are 'passing the bucks' that leads to 'injustice is seen to be done' in this matter.*

13. *Further we are instructed to institute defamatory against Mr. Smith for the false printed material that he circulated. We hope appropriate action is anticipated to be taken against Mr. Smith.*

Yours faithfully.
BABU SINGH & ASSOCIATES

Per.....
Cc Ministry of Tourism, Investment Fiji, Consumer Council, Western Division.
Western Liquor Board, Fiji Commerce Commission, Tourism Fiji Nadi"

[6] The above first 2 correspondences form part of the agreed facts in the pre-trial conference convened between the two parties.

The Pleadings

[7] According to the Plaintiffs' writ of summons and the statement of claim the Plaintiffs assert that the defamatory words stated in the 2nd Defendant's letter sent to The Director National Trade Measurements and Standards dated 28 August 2013 are as follows:

> *"Out of 6 products tested, the results show that all 6 products are substandard and are being grossly misrepresented by JDFL in terms of alcohol content-one with alcohol content as low as 9.58%.*
>
> *This deception by JDFL is extremely damaging to other products made in Fiji. It is extremely damaging to our tourism industry as these products are being sold to 5 Star Resorts right down to local bars/restaurants. It is also extremely damaging to the like business as us and Finest Liqueur Fiji who manufacture top quality products in Fiji made to world standards.*

[8] The Plaintiffs claim that by circulation of the aforesaid letter and email from the Defendants, the Plaintiffs lost some of their Five Star customers including the Sheraton and Sofitel Hotels. The 2nd Plaintiff claims that he is unable to calculate the monetary loss of business, but he claims "millions of dollars". The Plaintiffs in brief pray that as consequences of the aforesaid emails, the Plaintiffs suffer and continue to suffer financial loss, loss of business reputation and loss of sales.

[9] The Defendants by their statement of defence have mainly taken the following defences:

1. No defamation whatsoever caused to the Plaintiffs since the wordings in the questioned emails are true in substance and in fact by their natural and ordinary meaning.

2. Fair comment on matters of public interest

3. Qualified privilege.

The Agreed Facts

[10] The following facts are agreed between the parties according to the pre-trial conference minutes.

1. At all material times, the first plaintiff is a registered company having its registered office at Northern Press Road, Martintar and carrying on business of manufacturing alcohol beverages and supplying liqueurs.

2. At all material times, the Second Plaintiff is the Director and proprietor of the First Plaintiff.

3. The First Defendant is an employee of the Third Defendant.

4. The Second Defendant is the Director of the Third Defendant.

5. The Third Defendant is a limited liability company having its registered office at Jay Lal & Co. Lautoka and carries on business of manufacturing alcohol beverage and supplying of liqueurs.

6. The First Plaintiff and the Third Defendant are business competitors.

7. The First Defendant is the author of the email dated 12 September 2013 addressed to a Glenn Roberts and copies to Nitesh Kumar.

8. The Second Defendant is the author of the letter dated 28 August 2013 addressed to the Director of National Trade Measurements and Standard.

The Issues

1. What is the nature of the First Plaintiff's business and who are its customers?

2. Were the words in the Email referred, or were understood to refer or were capable of referring to the First Plaintiff and/or the Second Plaintiff?

3. Was the Email defamatory of the Plaintiffs?

4. If, which is denied, the Email were understood to refer to the First Plaintiff and/or the Second Plaintiff, was the Email understood to bear or were capable of bearing the meanings pleaded in paragraphs 11 of the Statement of Claim (inclusive of particulars).

5. Whether, by way of innuendo the Email meant that the Plaintiffs are:

   (a) Thieves
   (b) Dishonest
   (c) Trustworthy
   (d) Involved in cheating its customers
   (e) Engaged in the supply of the beverages which are of inferior products.
   (f) Engaged in a profession that has been used to demean and discredit them.
   (g) Manipulating its customers

6. Was the Letter understood to bear or were capable of bearing the meanings pleaded in paragraph 15 of the Statement of Claim (inclusive of particulars).

7. Was the Letter fair comment on matters of public interest – namely, the alcohol contents of liqueurs produced in Fiji by the Plaintiffs as pleaded in paragraph 17 of the Defence?

8. In their natural and ordinary meaning, was the Letter true in substance and in fact as pleaded in paragraph 18 of the Defence.

9. Was the Letter published on an occasion of qualified privilege as pleaded in paragraph 19 of the Defence?

10. Whether the Letter defamed the Second Plaintiff and put him to public ridicule and intended to sabotage the Second Plaintiff's business operations?

11. Was the Letter copied to any other entity? If so, who was the letter sent to and was it read at all?

12. Whether the Defendants have put the Plaintiffs in public ridicule and tarnish the names and business reputation of the said Plaintiffs?

13. Whether the Plaintiffs are entitled to general damages, interest and costs

as pleaded in the Statement of Claim?

The Trial

[11] The Plaintiffs called the evidence of two witnesses. They were the 2nd Plaintiff Mr. Warick Lee MacCallion (**PW-1**) and Mr. Taniela Soko (**PW-2**). The Defendants did not call witnesses. Yet, they tendered marked documents in evidence during the trial.

[12] Plaintiffs relied and tendered the following documentary evidence at the trial:

i. Mixing instructions – **PE-1 (a),(b),(c)**
ii. Email from Hauraki BCL dated 16th September 2013 – **PE-2**
iii. Two Email correspondences from Amit Sharma – **PE-3**
iv. Copies of two letters from Allan Linton-Smith – **PW-4(a), (b)**
v. Copy of Certificate of analysis dated 15th October 2014 – **PE-5**
vi. Letter from Triple 3 Ltd to the Ministry of Industry and Trade dated 28th august 2013 – **PE-6**
vii. Letter from Messrs Babu Singh & Associates to the Ministry of Trade and Measures dated 17th September 2013 – **PE-7**

[13] The Defendants produced the following documentary evidence.

i. Copy of a letter from Island Brewing Co. to Pacific Embroidery Limited dated 26 august 2013 – **DE-1**

ii. Copy of email from Amit Sharma to Glen Roberts dated 12 September 2013 – **DE-2**

iii. Copy of email from Nitesh Kumar to Amit Sharma dated 12 September 2013 – **DE-3**

iv. Copy of letter from Koronivia Research Station to Meghji Trading Limited together with analysis Results dated 8 November 2013 – **DE-4**

Plaintiffs' Case

Witness 1 – Mr. Warick Lee MacCallion (PW-1)

[14] PW-1 (2nd Plaintiff) is the CEO of Just Daiquiris (Fiji) Limited ("**2nd Plaintiff Company**"). He stated that from 2004 he was in the manufacturing business

with the Second Defendant. The 1st Plaintiff Company started its operation in December 2011 following a fall out with the Second Defendant.

[15] He stated that the products made by the 1st Plaintiff Company earned around $40,000.00 per month and that the essences which make the alcoholic contents are worth thousands of dollars. He said that the 1st Plaintiff Company manufactured all beverages, alcoholic and non-alcoholic. The 1st Plaintiff Company's customers included five star resorts, backpackers and restaurants. He stated that the five star resorts were Warwick Fiji, Sheraton, Naviti, Outrigger and Shangri-la. According to his evidence the products are supplied by the 1st Plaintiff Company as per order. The 1st Plaintiff Company will make the ordered beverages, have it checked, signed and delivered within 2 days. The Plaintiff Company then waits 30 days for the payment.

[16] He stated that there were never any serious complains received from customers. The only one received was in relation to the colours of the liqueurs and nothing about the alcohol contents. He further stated that the alcohol contents/essence are typed out clearly and stuck on the bottles and that the bottles are double checked before delivery.

[17] While giving evidence he identified **PE-1A, PE-1B and PE-1C** as the mixing instructions. He then identified **PE-2** and stated that the analysis report was sent from their supplier in Auckland to Margret Joseph the Operating Manager at the 1st Plaintiff Company. He stated that as the result of the letter and the e-mail sent by the Defendants, the Plaintiff Company had to go into "damage control mode" due to the seriousness of the allegations.

[18] PW-1 identified the contents of **PE-4A** and **PE-4B** being confirmation that Allan Linton Smith came to Fiji and demonstrated a new method of analysing alcohol using the Alscolyser. He said **PE-4B** also contains alcohol test results on a selection of the Plaintiff Company's products. He identified **PE-5** as test results of Galaxy products tested by Allon Linton Smith.

[19] PW-1 stated that they had no idea as to how the bottles i.e. the subject of **PE-3** and **PE-6** were taken to Island Brewers for testing. Their products, as he says were only sold at resorts. He stated that the 1st Plaintiff Company had suffered in terms of loss of revenue and customers. However, the Plaintiffs were unable to call such evidence to show any loss of revenue and evidence of a single customer who refused to buy their products. Those customers as **PW-1** says included Sheraton, Outrigger, Beachcomber and Sonaisali Resort. But, the Plaintiffs were unable to prove this with acceptable evidence other than just the oral statement

of **PW-1**. He also said in his evidence that he got information that the Defendants' Sales Representatives were saying that Plaintiffs' were doing corrupt practices, but Plaintiffs were unable to bring evidence to prove the statement.

[20] Furthermore, **PW-1** stated that the 1st Plaintiff's products were superior to those of the Defendants. He went on to say that all of these incidents i.e. the letter **PE-6** and the email **PE-3** were fired by the Second Defendant and that the actions of the Defendants have undermined his products and damaged his reputation.

[21] In cross examination, PW-1 accepted that the letter, **PE-6**, was based on the lab report from Island Brewing Company dated 26 August 2013. He further accepted that the **DE-1** is the report from Island Brewing Company dated 26 August 2013 that was referred to in the letter **PE- 6**. He also accepted that the Plaintiff Company sold those products listed in **DE-1**. He said that there is nothing in **PE-1A**, **PE-1B** and **PE-1C** that suggested the document belonged to the Plaintiff Company or was intended for the 1st Plaintiff Company. He further admitted that there is no logo or signature in the three documents hence there was no authenticity to them. Thereby he confirmed that the email **PE-3** was sent on 12 September 2013. He also confirmed that it was sent to Mr Dutt and Salvesh. He admitted that the email was addressed to someone else (Dutt and Salvesh) but was received by a Nitesh Kumar. He also could not confirm whether Dutt and Salvesh received the email. There is no evidence for this. He admitted that Nitesh Kumar was the person who emailed him saying that the 1st Plaintiff Company has been accused for corrupt practises.

[22] In cross examination, he also confirmed that the 1st Plaintiff Company together with other companies supply beverages to Shangri-La's Fijian Resort. At first, he denied knowing any other company that supplied Shangri-La's Fijian Resort. Later he named Triple 3, Kings, Paradise Beverages, Coca-Cola and Ashabai as other suppliers. Then he admitted that the products listed in **PEX-4B** are those of the 1st Plaintiff Company. He also admitted that the tests referred to in **PE-4A** and **PE-4B** was conducted on 13 March 2014. He further admitted that the batch tested in 2013 as per **DE-1** were not the ones tested in 2014, as per **PE-4A** and **PE-4B.** Furthermore he admitted that there is nothing in **PE-4A** and **PE-4B** to suggest that they were the same batch as the ones in 2013. He also admitted that there was nothing in **PE-5** that confirmed the manufacturers of the products tested.

[23] PW-1 admitted that the email **DE-2** had the same date and time as the email in **PE-3**. He accepted that the email in **DE-2** stated the email sent to Nitesh Kumar earlier was not intended for Nitesh Kumar. It was addressed to Dutt and Salvesh and was intended for Fiji Hideaway Resort.

[24] The email **PE-3** was received by Nitesh Kumar who on the same day sent a replying email response to Amit Sharma/First Defendant saying that there was no Salvesh working there and that the proper forum for complaints of corruption is FICAC.

[25] PW-1 accepted that the batch used for the testing as per **DE-1** could have been purchased from a resort.

Witness 2 - Mr.Taniela Soko (PW-2)

[26] According to **PW-2** he is a Mixologist and has been working so for three years. He admitted when questioned by Court that he has no educational qualifications or expertise whatsoever in Mixology. He stated that the alcohols are mixed by recipe and that there are two persons who usually work together. He stated that recipes are sent from overseas which are placed into a special file and used by the Plaintiff Company. **PW-2** stated that the recipe that appeared in **Exhibit PE-1A** and **PE-1B** are the main instructions. He claimed that it is their instructions as he sees it every day. He said that the mixing and bottling process which included mixing, bottling labelling and packaging. He stated that they use an Alco Meter to check the alcohol content. The Alco Meter is like a thermometer and has certain reading on it to measure alcohol content.

[27] In cross examination, he accepted that no batch of alcohol have the same alcohol content. He confirmed that the alcohol content never goes below 40%. According to him, the recipe used as per **PE-1A** and **PE-1B** are old recipes. He then confirmed that there was no way of confirming the results as per **PE-4B** because he did not test the batch used.

[28] The Defendants did not call any witnesses apart from the documents marked & tendered through the Plaintiffs' witnesses during their cross examinations.

[29] I shall now deal with the issues before this Court to be decided by this judgment.

The Issue of Defamation

[30] It is widely accepted legal norm that in order to succeed in a case for defamation it is necessary for the Plaintiff to prove that the words or the particular act concerned were "published of him or her or of group of people" as the case may be. There is no onus lies with the Defendant to prove otherwise. It is however, finally the duty of the Court to decide and rule whether or not the disputed form of act or the words of the Defendant are capable of having a libellous meaning.

[31] A similar opinion was succinctly given in **Vere v Chairman of Disciplined Services Commission [2001] FJHC 314; [2001] 1 FLR 328 (5 October 2001)**. The Court quoted ***Sadgrove* v *Hole*** (1901) 2 KB 1 A.L. as Smith M.R stated:

> *"The Plaintiff in order to succeed in the action must prove a publication of and concerning him of the libellous matter, and if he does not satisfy the onus of proof which is on him in this respect, there is no cause of action."*

[32] In **Rabuka v Fiji Daily Post Company Ltd [2005] FJHC 174; HBC0511j.2000s (8 July 2005)** Justice Pathik said:

> *To establish a cause of action in defamation it must be shown that the defamatory words of and concerning the plaintiffs have been published. There are three aspects to this requirement, namely, (a) the nature of defamatory statement; this I have already stated hereabove, (b) the way in which it refers to the plaintiff; this has already been done, and (c) the means by which it was published; here it was through the newspaper as already stated.*

[33] Justice Pathik also quoted Lord Reid in the judgment in *Lewis* v *Daily Telegraph Ltd* [1964] A.C. 234 where Lord Reid stated:

> *"There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs... What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer*

from them, and that is also regarded as part of their natural and ordinary meaning... Generally the controversy is whether the words are capable of having a libellous meaning at all, and undoubtedly it is the judge's duty to rule on that."

Analysis

[34] The evidence for the Plaintiffs confirms that the 1st Plaintiff Company manufactures beverages of both alcoholic and non-alcoholic and this was not an issue. The 2nd Plaintiff Mr. MacCallion (**PW-1**) is the Director of the 1st Plaintiff. According to **PW-1**, the 1st Plaintiff Company had 80 to 90 customers in Fiji and around the Islands. This included Five Star Resorts, backpackers and restaurants which included Warwick Fiji, Sheraton, Naviti, Outrigger and Shangri-la.

[35] However, from the evidence for the Plaintiffs does not show any complaint from his customers or other retail shop regarding their products or alcohol level in their products. This was neither revealed from the Defendants since the Defendants did not call witnesses to give evidence. The evidence for the Plaintiffs shows the 3rd Defendant Company is in direct competition in business with the 1st Plaintiff Company. There was no denial that the letter dated 28th August, 2013 **(PE-6)** was written by the 2nd Defendant addressed to the Director National Trade Measurements and Standards and copied to 8 other government departments. This was one of the admitted facts between the parties.

[36] The email **(PE-3)** sent by the 1st Defendant to Glen Roberts and copied to Nitesh Kumar shows that the author 1st Defendant was requesting a meeting to discuss the corrupt practices by one of their beverages suppliers. The email continues among other things "Please confirm if 2pm tomorrow at Shangri-La suits you for this meeting". This email was sent by the 1st Defendant at 10.23am on 09/12/2013 but in **DE- 2** the 1st Defendant sent the same message earlier at 10.20am on 09/12/2013. Exactly at 10.39a.m on 09/12/2013 Mr. Nitesh Kumar replied to the 1st Defendant's email informing him that there is no *Dutt* with him. In that email he reminded the 1st Defendant that there is huge competition in the market and he has no interest with the other supplier's competition. If there is corrupt practice being discovered to report to FICAC or the authorities concern. At 11.06a.m on 09/12/2013 the 1st Defendant sent his apology to Glen Roberts and copied to Nitesh. Kumar for sending such message in error as it was intended for Fiji

Hideway Resort and it was sent by his Secretary. At 12.50pm on 09/12/2013 Mr Nitesh Kumar forwarded the email message to the Plaintiff on the email address gracetitifanua@justdaquirifiji.com and wrote:

> *" FYI .....this supplier is blaming your company for corrupt practices. Thanks.*
>
> *Nitesh Kumar, Purchasing Manager*
> *Shangri-La Fijian Resort & Spa*
> *Yanuca Island, Sigatoka. "*

[37] When Mr. Nitesh Kumar replied to the email at 10.39 a.m. informing that he has no interest on the email and advised the 1st Defendant to report to FICAC and relevant authority, the 1st Defendant then sent another email at 11.06am to retract his previous email as follows:

> *"From : Amit Sharma*
> *To : Glen Roberts*
> *Sent : Thursday 12th September 2013; 1106am*
> *Cc : Nitesh Kumar*
>
> *Bula Mr Roberts/Nitesh*
>
> *The email was send to you was intended for Fiji Hideway Resort. It was an error made by my Secretary. I humbly apologized for this action. Kindly discard the email sent previously. Once again any convenience caused is highly regretted."*

[38] The trail of emails sent by the 1st Defendant state the author as Amit Sharma, Business Development Manager Finest Liquor Fiji Ltd/Triple 3 Limited. They do not show any other names or the name of any Secretary who had generated such emails on behalf of the 2nd or the 3rd Defendants.

[39] On the above trail of emails from the 1st Defendant, it is ambiguous for anyone to say that it shows consistent intent to defame the Plaintiffs in those messages. The initial message from the 1st Defendant was sent twice, 10.20am and then 10.23am, on the same day to Glen Roberts and copied to Nitesh Kumar. It confirms the email addresses and the place, Shangri-La, for the meeting place to discuss the corrupt practices. However, the trail does not state about the Plaintiffs.

[40] In a case of defamation as I discussed earlier it is the duty of the Defendant too to prove that the statements published are true and well founded as that of the Plaintiffs to prove the defamatory nature of the statements and those were published of him or them.

[41] The Defendants do not deny the publication of the statements.

[42] Then the Court needs to observe whether or not the publication is defamatory and, of the Plaintiffs.

[43] In the letter PE- 6 sent to the National Trade Measurements and Standards, the 2nd Plaintiff is introduced as the manufacturer of Liqueurs which is not correct. The 2nd Plaintiff is the Director of the 1st Plaintiff. Since the 1st Plaintiff is a company, it is charged with manufacturing of Liqueurs.

[44] Hence, the Court has to carefully scrutinize the two publications according to the pleadings and as per the evidence lead at the trial. The two publications are:

1. The letter dated 28th August 2013 (PE-6).
2. The email correspondences (PE-3).

The Letter – PE-6

[45] The PE-6 is addressed to The Director National Trade Measurements and Standards with copies to 8 other public/ government institutions.

[46] The Plaintiffs must prove that the PE-6 was sent to and received by the intended parties. I cannot find any evidence led during the trial to prove that the letter PE-6 was actually received by the Director of National Trade and Measurements and Standard. The onus is with the Plaintiffs to prove the publication of the words which is a paramount importance in a case of this nature. Since there was no such evidence from the Plaintiffs, the Plaintiffs have failed to perform the said obligation of proving the publication. There was no evidence either to prove a subsequent action taken by the receiver of the PE-6. Hence, the Plaintiffs failed to prove the letter PE-6 was received by the respective addressees stated in it and of course whether it is defamatory.

[47] The most important question of whether the words contained in the letter were defamatory or not is the duty of the Court to determine. **Lewis v Daily Telegraph Ltd [1964] A.C. 234.** At 235 **" in a libel action the judge must rule**

whether the words are capable of bearing each of the defamatory meanings, if there be more than one, put forward by the plaintiff, whether expressly pleaded or not, if such meaning is alleged to be inferred from the natural and ordinary meaning of the words used"...

[48] The duty of the Court further extends to see the contents of the letter and decide whether they were capable of having a libellous meaning in it. If the words in it are true and the ordinary meaning of them are true in substance then the plaintiffs can claim no damages for defamation.

[49] The key witness for the Plaintiffs the PW-1 has not adduced any evidence to prove that he or the 1st Plaintiff has been put to public ridicule or that there was any intent to sabotage his business operations. PW-1 stated that the 1st Plaintiff Company's reputation had been damaged following the publication of the letter. He further stated that they received numerous phone calls from customers and that meetings had to be arranged with customers. No other evidence apart from his oral statement was provided on the above. Moreover, even though he said that the letter PE-6 was published, nothing was revealed in evidence to prove the fact as to how the publication was done. PW-1 was unable to explain and prove as to how the reputation of the 1st Plaintiff was damaged.

[50] The Plaintiffs did not adduce evidence of the communications from other parties regarding their knowledge of the contents of the letter. However, even if evidence was brought in this regard, the Court cannot accept such evidence as they were never formally pleaded by the Plaintiffs.

[51] Therefore, the Plaintiffs were neither able to provide a shred of evidence to prove that it was put to public ridicule nor did lead any evidence to establish the intention of the Defendants to sabotage its business operations and to defame the Plaintiffs by making of letter PE-6.

<u>The Email Correspondences – PE-3</u>

[52] The email thread **PE-3** is the other document on which the Plaintiffs are relying on to prove the defamatory nature of acts done by the Defendants. However, it is pertinent to observe that there was no evidence led during the trial to prove that the Email **PE-3** was understood to refer or was capable of referring to the 1st Plaintiff and/or the 2nd Plaintiff. As a matter of fact there is even confusion as to whom the email was intended for and who actually received it. **PW-1** did admit that the names stated in the email as intended recipients were Dutt and Salvesh. The Defendants have not denied that the email was sent to Nitesh Kumar and Glen Roberts. However, it is quite clear from **DE-2** that the email was sent by mistake to them and was an error in sending the email to Nitesh Kumar and

Glen Roberts. The Email in **DE 2** is dated 12 September 2013 the same date in which the other email in **DE**-2 the subject of this proceeding was sent and contained an apology for sending the email as it was meant for someone else.

[53] The email in **DE-2** was in response to the email in **DE-3** sent by Nitesh Kumar. A closer look at the contents of the email in **DE-3** confirms however that there is no mention of the Plaintiffs in it. Moreover, the email stated that there was no Salvesh working at Shangri-la and that the right forum for complaints of corrupt practises was to FICAC. Furthermore there is no proof whatsoever that the email was actually received by the intended recipients i.e. Dutt and Salvesh. Therefore, the Court has to simply say that the Plaintiffs have not established publication.

[54] The Defendants submit that the contents of the email were never meant for the person who read it, namely Nitesh Kumar. What aggravated the matter was the fact that Nitesh Kumar was the person who forwarded the email to the Second Plaintiff and alleged that the Defendants have accused the Plaintiffs for corrupt practises.

[55] Then, perusing the chain of emails (**PE-3, DE-2 and DE-3**) it shows that there is nothing in the email that mentioned or referred to the Plaintiffs. PW-1 stated in evidence that it was Nitesh Kumar who informed him that the Plaintiffs have been accused of corrupt practices. It is pertinent to see that there was no evidence whatsoever led during the trial to confirm that the email by Nitesh Kumar to the Plaintiffs was in fact true. This takes the Court to think of the question, as to how Nitesh Kumar confirmed that the email **PE-3**, the subject of this proceeding was really referring to the Plaintiffs. Only Nitesh Kumar could have confirmed as to how he decided the former, but he was not called as a witness. Therefore, the Plaintiffs cannot establish any defamatory form attached to **PW-3**. It was Nitesh Kumar who originated the defamatory comments on the Plaintiffs in **PE-3** and not the Defendants.

[56] There were many other beverage suppliers that supplied liquors to Shangri-la Resort. This was confirmed by **PW-1** in his evidence. How is it then possible for the Plaintiff to state that the Email had in fact referred to them? If the Plaintiff is saying that the email from Nitesh Kumar confirmed it, then Nitesh Kumar should have been called as a witness to testify that the email was indeed referring to the Plaintiffs. He was not called as a witness. However, the email **PE-3** does not state any name of a supplier of liquors. Then even if Nitesh Kumar was called to give evidence, he cannot implicate the names of Plaintiff/s being the supplier referred to by the Defendants in it since the email **PW-3** does not refer to an identified and specific supplier.

[57] The Defendants have submitted that in **Vere v Chairman of Disciplined Services Commission** (supra), the Court quoted the case of **Knupffer v London Express Newspaper (1944) AC 116** by Viscount Simon L.C. which laid out the test to determine whether the words could have referred of the Plaintiff. The quote is produced below:

> *"There are two questions involved in an attempt to identify the Appellant as the person defamed. The first question is a question of law - can the article, having regard to its language, be regarded as capable of referring to the Appellant? The second question is a question of fact - does the article, in fact, lead reasonable people, who know the Appellant, to the conclusion that it does refer to him."*

[58] In view of the above guideline, the Defendants submit that the email, having regard to its language, cannot be regarded as capable of referring to the Plaintiffs. Furthermore, it cannot lead reasonable people, who know the 1st Plaintiff, to the conclusion that it does refer to him or the 2nd Plaintiff Company. There was no such evidence led during the trial to prove it.

[59] The Defendants further submitted that there was no evidence led during the trial to provide reasons of special facts and circumstances which show that the words can be reasonably construed as relating to the Plaintiff. Such requirement was discussed in the case of **Vere v Chairman of Disciplined Services Commission** (supra), when the Court quoted the case of **Bruce v Odhams Press Limited (1936) 1 KB 697** Greer L.J. which stated:

> *"Defamatory statements which are in the air, as it were, and do not appear by their words to refer to the Plaintiff, have got to be made referable to the Plaintiff by reasons of special facts and circumstances which show that the words can be reasonably construed as relating to the Plaintiff."*

[60] In the case of **Sharma v Halabe [2013] FJHC 307; HBC534.2006 (25 June 2013)** adopted the same principles as **Vere v Chairman of Disciplined Services Commission** (supra)

[61] Therefore, the Court finds that the Plaintiffs have failed to prove the publication of the email and/or that the email contained libellous matters concerning the Plaintiffs. Then there cannot be a cause of action for the Plaintiffs arising out of

the email against the Defendants. The onus was always on the Plaintiffs to prove that the publication of the libellous matter concerned them.

[62] Defendants have further submitted that there can be no innuendo attached to the email because there was no evidence adduced to prove that the email referred or would have taken to have referred to the Plaintiffs.

[63] Furthermore, even if the email referred to the Plaintiffs (however the Defendants deny this) the claim based on a legal or true innuendo cannot succeed because the Plaintiff has failed to prove that there is some extrinsic fact to create the extended meaning.

[64] This was concisely discussed in **Chand v Fiji Times Ltd [2009] FJCA 1; ABU0035.2007S (17 February2009)** at paragraph 27:

> *Legal or true innuendo is simply one specific basis upon which an action for defamation may be established: Grubb v Bristol United Press. An action based on a legal or true innuendo cannot succeed unless it is proved that there is some extrinsic fact to create the extended meaning....*

[65] The Defendants submit that there was inconsistency in the evidence led by the two witnesses for the Plaintiffs. The 1st Plaintiff **PW-1** stated in his evidence that there was no mechanism of testing alcohol percentage for liqueur in Fiji. However, **PW-2** who was employed at the 1st Plaintiff Company, testified that there was an apparatus that was used by the 1st Plaintiff Company that tested the alcohol percentage in liqueurs. In his evidence he stated that the apparatus worked similarly to a thermometer as it gives readings of alcohol percentage. **PW-2** also stated that the company always tested for the alcohol percentage during the mixing and packaging processes.

[66] The Court finds that **PW-2** had no qualifications whatsoever in the area of mixing alcohols. This was admitted by him in evidence saying that even though he called himself a Mixologist, he has no such qualifications to be a mixologist. Therefore, he cannot be regarded as an expert witness. Above all, according to him it reveals that the 1st Plaintiff Company does not maintain a standard method of mixing liqueur before they supply their products to the customers. It was **PW-2** the one with no qualification or expertise on the subject who mixed the alcohol at 1st Plaintiff's Company. Then the fact is very clear that the letter **PE-6** carries some weight and truth in its content as claimed by the Defendants.

[67] Hence, the **PE-1A, PE-1B and PE-1C** bear no weight. Because, **PW-1** in evidence admitted that there was nothing in those documents to actually prove that the mixing instructions were really addressed to them or show where the instructions originated from.

The Defences

Fair comment on matters of public interest

[68] The Defendants seek cover under the defence of fair comment on public interest.

[69] They submitted what was observed by the Court of Appeal in **Ali v Thompson [2012] FJCA 12; ABU0029.2010 (16 March 2012)** regarding the defence of fair comment, where it summarised the requirements stated by Lord Nicholls of Birkenhead in **Albert Chang and Another v Tsey Wai Chun Paul (Court of Final Appeal, Hong Kong)** as follows:

> 1. *The comment must be on a matter of public interest;*
>
> 2. *The comment must be recognizable as comment as distinct from an imputation of fact*
>
> 3. *The comment must be based on facts which are true or protected by privilege.*
>
> 4. *The comment must be explicitly indicated at least in general terms, what are the facts of which the comments are being made.*
>
> 5. *The comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views. It must be germane to the subject matter criticized.*

[70] The same was adopted in **Fiji Times Ltd v Vayeshnoi [2010] FJCA 35; ABU002.2008 (16 July 2010)** and **Patel v Gosai [2014] FJCA 37; ABU0037.2012 (24 March 2014)**.

[71] The Defendants also relying on the statement made by Lord Nicholls of Birkenhead in **Reynolds v Times Newspapers Ltd and Others [2000] UKHL 57;**

(2001) 2 AC 127 and as was quoted in **Fiji Times Ltd v Vayeshnoi** (supra), where it was held;

> *"Traditionally one of the ingredients of this defence is that the comment must be fair, fairness being judged by the objective standard of whether any fair-minded person could honestly express the opinion in question. Judges have emphasized the latitude to be applied in interpreting this standard. So much so, that the time has come to recognize that in this context the epithet "fair" is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. It cannot be used as a cloak for mere invective. But the basis of our public life is that the crank, the enthusiast, may say what he honestly thinks as much as the reasonable person who sits on a jury. The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it": see Diplock, J in Silkin* v *Beaverbrook Newspapers Ltd [1958] I WLR 743,747.*

[72] The supply of beverages, as it is the substance of the issue in the instance case alcohol/liqueur, directly affects the public and a large part of the tourism industry.

[73] The Defendants submit that it is important in the trading sphere especially Fiji's viable tourism economy that alcohol/liqueur produced for such purposes adhere to international and proper standards. To do otherwise would reflect on the quality of products made in our country and would have calamitous consequences for country's trading potentials and the tourism market as a whole.

[74] Furthermore, the Defendants submit that the comment is based on facts which are true. The Second Plaintiff gave evidence that it was indeed their products that were tested as per **DE-1**. The contents of the letter **PE-6** are based on the findings in **DE 1**. The Defendants reiterate that the test was conducted by Island Brewery Limited a manufacturer of beverages in Fiji. The contents of the letter explicitly indicate the facts of which the comments are being based. There was no opposing evidence contracting the findings of Island Brewery Limited.

[75] Therefore, I accept that the Defendants have the right to fair comment as they did so by sending the letter **PE-6** to the relevant authorities. If a genuine

complainant is prosecuted under the law of defamation for complaining of corrupt practices of another and award damages against, then the corrupt practices will freely be in operation despite the danger and the bad effect of it to any given society as there will not be such complaints in fear of potential prosecutions which is a very bad precedence.

Qualified privilege

[76] The Defendants have taken the qualified privilege as a defence to their publication of the letter **PE-6** and the trail of emails **PE-3.**

[77] Court of Appeal in **Ali v Thompson** (supra) at paragraph 22 neatly explained the test for the occasions of qualified privilege as follows:

> *The occasions of qualified privilege could broadly be classified into two. First is where the maker of the statement has a duty (whether legal, social or moral) to make the statement and the recipient has a corresponding interest to receive it. Second is where the maker of the statement is acting in pursuance of an interest of his and the recipient has such a corresponding interest or duty in relation to the statement. The facts of this case fall into the second category.*

[78] The Defendants further submit and adopt the aspects of the law cited by Lord Diplock in **Horrocks V Lowe** as quoted in **Ali v Thompson** (supra) at paragraph 25 which states:

> *"The motive with which a person published defamatory matter can only be inferred from what he did or said or knew."*
>
> *"What is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, "honest belief". [page 27 of the record]*

[79] The Court of Appeal in relying on the authorities stated that it is not necessary for the Respondents/Defendants to prove that the matters stated in the letter are in fact true in order to establish the defence of qualified privilege (see paragraph 25 of the judgement).

[80] The Defendants submitted and I accept that the letter was published on an occasion of qualified privilege. The author of the letter the Second Defendant had a social and legal duty to make the statement and the recipient the Department of National Trade Measurement and Standards had a corresponding interest to receive it.

[81] The Department of National Trade Measurement and Standards enforces *National and Trade Measurement Decree 1989*. The Decree in summary provides for:

i. Control and use of measuring instruments through periodic inspections. This is to establish whether or not such instruments furnish fair and just measure readings and the units of measure used are in compliance with the prescribed Fiji legal Units of Measurement.

ii. Licensing of measuring instruments, repairers and sellers;

iii. Maintenance of Fiji's Primary, Secondary and Reference Standards of Measurement;

iv. Marking and Labelling of pre-packed articles;

v. Checking accuracy of purported quantity in pre-packed articles.

[82] Furthermore, the Department of National Trade Measurement and Standards also enforces the *Trade Standards and Quality Control Decree 1992*. The Decree, in summary intends to:

i. Ensure that goods and services sold are of an acceptable and uniform standard;

ii. Remove from the market place any dangerous and unsafe goods;

iii. Ensure that warning statements are issued on any dangerous or unsafe goods.

[83] In terms of the above mentioned functions of the Department of National Trade Measurement and Standards, the Defendants submit that the Defendants had a duty to publish the letter to the Department and the Department had an interest in receiving the same.

[84] The Defendants also submit that the publication of the letter **PE-6** was done in positive belief in the truth of what was published. In careful scrutiny of the evidence, it is clear that the contents on the letter **PE-6** were based on the test which was conducted by Island Brewery Limited which is **DE-1**.

[85] In **Ali v Thompson** (supra) the Court in paragraph 27 stated that to defeat the defence, the Plaintiff should prove that the writing of the letter was actuated by express malice of the Plaintiffs. For this, there was no evidence adduced at the trial to prove malice to defeat the defence.

[86] In **Chand v Fiji Times Ltd** (supra), the Court of Appeal in upholding the decision of the High Court agreed with the principles adopted by the Judge in the High Court at page 36 as follows:

> *The fundamental principle is that the defence will not succeed if the meaning that is proved to be true is a materially less serious meaning than that which the words are held to bear.*
>
> *The judge added:*
>
> *Such a defence will succeed if it is proved that the sting or substance of the defamatory words is true, or if the words contained two or more charges, it is proved that some are true and those not proved do not materially injure the Plaintiff's reputation. The defendant is also entitled to rely upon incidents which occurred after the date of publication in order to establish the defence of justification.*

[87] In the case at hand, the factual matters contained in the letter had been sufficiently established so to enable truth as a defence to stand. The evidence established that the sting and substance of the letter was true and or substantially true. The facts contained in the letter were sourced from a lab report provided by Island Brewing Limited **(DE-1)** following a test conducted on a batch of the Plaintiffs' products. There was no evidence by the Plaintiffs to counter or prove that the test results as per **D-E 1** were false. The Second Plaintiff **PW-1** accepted that the 1st Plaintiff Company sold those products listed in **DE-1**.

[88] Therefore, the Defendants are absolutely covered by the immunity of qualified privilege to publish the letter **PE-6** and the emails **PE-3**.

Can the Plaintiffs claim Damages?

[89] The Plaintiffs are seeking from this Court General Damages for Defamation and General Damages for loss of business.

[90] The Defendants submit that the Plaintiff is not entitled to any damages in relation to the email PE-6 given that the Plaintiffs did not prove on the balance of probabilities that it referred to the Plaintiffs. I have discussed this issue earlier in this judgment and I accept the argument of the Defendants that the email **PE-6** has nothing to deal with the Plaintiffs and that the whole thread of emails was not generated by the Defendants against the Plaintiffs.

[91] The Plaintiffs have also failed to prove that the contents of the letter **PE-6** caused injury to its reputation/goodwill. The Plaintiffs have failed to establish any monitory loss caused to them as a result of the Defendants publication.

[92] Hence, the Defendant cannot be held liable for Defamation and then any award or consideration of damages is an exercise in futility.

[93] However, it is worth remarking in **Uren v John Fairfax & Sons Pty Ltd [1967] 117 CLR** and quoted in **Rabuka v Fiji Daily Post Company Ltd** (supra) where Windeyer J stated:

> *"It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money."*
>
> *"This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries. Quite obviously, the award must include factors for injury to the feelings, the anxiety and uncertainty undergone in the litigation, the absence of apology, or the reaffirmation of the truth of the matters complained of, or the malice of the defendant. The bad conduct of the plaintiff himself may also enter into the matter, where he has provoked*

the libel, or where perhaps he has libelled the defendant in reply. What is awarded is thus a figure which cannot be arrived at by any purely objective computation. This is what is meant when the damages in defamation are described as being "at large"." (emphasis added).

[94] It is also worth noting Lord Reid's comments in *Lewis v. Daily Telegraph Ltd.* [1964] 1 AC 234, 262 and quoted in *Shandil* v *Air Fiji Ltd* [2005] FJCA 25; ABU0046.2004S (15 July 2005);

> *"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."*

[95] The Defendants have submitted the case of **Air Fiji Ltd v Shandil [2004] FJHC 298; HBC0380J.1999S (23 June 2004)** where the Court quoted the case of **Hong v Lee Kuan Yew & Anor and other appeals [1998] 1 SLR 97 (CA)** which stated:

> *"Special damage for the purpose of the law of defamation may be defined as any material or temporal loss which is either a pecuniary loss or is capable of being estimated in money. Thus, for example, a plaintiff is entitled in an action for defamation to recover as special damage any pecuniary loss suffered as a result of losing his employment or a contract because of the publication of the defamatory matter. Furthermore, special damage can include the loss not only of a specific contract or of any specific customers but also a general loss of business. Where, however, the plaintiff wishes to claim special damage he must give particulars of his loss in the pleadings and give discovery of any relevant documents. (emphasis mine)*

[96] In the instance, I would say that the claim for General Damages for loss of business is without merit as there was not a shred of evidence adduced to even substantiate the claim. Furthermore, the 1st Plaintiff PW-1 said the loss is in millions of dollars. The Plaintiffs have failed or forgotten to bring evidence to prove any such loss or damage caused to them. The other scenario is that the

claim for loss of business should really have been claimed under special damages. Nevertheless, the Plaintiff has failed to plead it in the pleadings or prove it at the trial and therefore, my view is that the Court need not even discuss the topic of damages in this case.

Conclusion

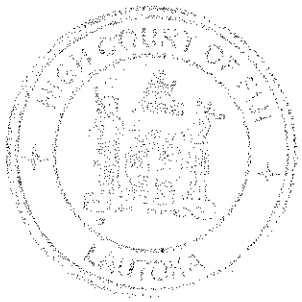
[97] The Plaintiffs in this case have failed to prove that the Defendants had in fact defamed them and/or that the Defendants are liable for defamation.

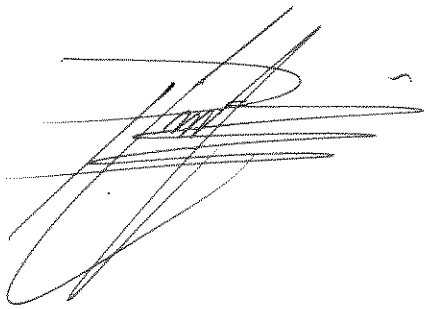
[98] Therefore, the claim made by the Plaintiffs against the Defendants for defamation of Plaintiffs should stand dismissed.

Final Orders of the Court

1. The writ of summons and the statement of claim of the Plaintiffs are struck out and dismissed with costs summarily assessed at a sum of $3000.00 payable to the Defendants by the Plaintiffs.

2. The costs shall be paid within 21 days from this judgment.





R. S. S. Sapuvida

[JUDGE]
High Court of Fiji

On the 8th day of December, 2016
At Lautoka