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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 80 of 2015

BETWEEN:

CHARLETT MILLEN

Plaintiff

-and-

[1] ISLAND MANAGEMENT LTD

[2] SHYLA KALI

[3] ISILELI KALI

Defendants

Assessment of damages

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Appearances: The plaintiff in person
No appearance by or for the defendants
Date of hearing: 8 October 2020
Date of judgment: 9 November 2020

Introduction

- 1 This is an assessment of damages following repudiation by the defendants of a sale of business agreement.

Background

- 2 By agreement dated 27 February 2015, the plaintiff, a Canadian resident, agreed to purchase, and the defendants agreed to sell, the business, its assets and shares, known as the Coconet Café in Vava'u. The contract price was Canadian \$25,000. The plaintiff paid a deposit of Canadian \$15,000 upon execution of the agreement. The agreed date for possession was two weeks upon the Plaintiff returning to Vava'u on 1 July 2015.¹ In that two week period, the parties agreed

¹ As varied by the parties.

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that the plaintiff would work without pay at the business with the second and third defendants in order to learn the operation of the business.

- 3 When the plaintiff returned to Vava'u, the defendants refused to hand over possession of the business. The plaintiff commenced proceedings for specific performance of the agreement.
- 4 On 23 June 2016, Paulsen LCJ held that the agreement was a valid contract between the parties, that the plaintiff had honoured the terms of the agreement and was ready, willing and able to complete, and that the defendants were in breach by their refusal to complete the sale and deliver up possession of the business and assets as agreed. He ordered the defendants to specifically perform the agreement within seven days on terms. He also dismissed the defendants' counterclaim.
- 5 The defendants failed to comply with the order for specific performance.
- 6 On 7 June 2017, upon the plaintiff's application, Paulsen LCJ discharged the order for specific performance and gave directions for the future conduct of the case on the basis that the plaintiff would seek to cancel the agreement and claim damages.
- 7 According to his Honour's ruling dated 18 March 2019 (with reasons on 11 April 2019), there followed "a series of procedural skirmishes requiring further rulings of the court, changes of counsel, ill-advised applications and tardiness by the parties which together led to considerable delays".
- 8 The second defendant left Tonga to return to the United States in June 2018. The third defendant is said to have deferred to the judgment of the second defendant. The first defendant was removed from the Register of Companies in February 2019. None of them have participated in the proceeding since a hearing on 3 August 2018.
- 9 The plaintiff proceeded against the second and third defendants. Notes and minutes of the court have been served upon their former lawyer, Mrs Tupou (now KC), upon her undertaking when granted leave to withdraw from the case in June 2018, that she forward all such documents to the defendants at their email

addresses until a notice of change of lawyer had been filed. No such notice has been filed.

- 10 The plaintiff amended her Statement of Claim to seek a declaration for cancellation of the agreement and an award of damages.
- 11 On 18 March 2019, Paulsen LCJ accepted the plaintiff's uncontested evidence that the defendants had failed to comply with the order for specific performance. It was also discovered that settlement could not proceed in any event as the defendants no longer had a lease for the business premises and no lease would be provided by the owner of the premises. The location of the business was unique and the principal reason for the plaintiff agreeing to purchase it.
- 12 His Honour was satisfied on the basis of the plaintiff's pleadings, evidence and other documents produced, that the defendants had repudiated the agreement and had no intention, and no ability, to complete it. He therefore declared the agreement cancelled. He further ordered that:
 - 12.1 the plaintiff was entitled to an award of damages against the second and third defendants consequent upon their breach of the agreement;
 - 12.2 damages be quantified at a later sitting of the court; and
 - 12.3 the second and third defendants pay the plaintiff's costs of the proceeding (insofar as they had not already been the subject of an earlier award), to be fixed by the Registrar, if not agreed.
- 13 Consequential directions were also made for the assessment of damages. On 9 August 2019, the plaintiff filed an Amended Statement of Claim together with a bundle of documents in support of her claims for damages. On 23 March 2020, the plaintiff filed a brief of evidence.
- 14 For reasons which are not presently relevant, the case was not able to be heard until the most recent circuit of this court to Vava'u.

Amended statement of claim

- 15 In her Amended Statement of Claim, the plaintiff claims damages for "fraudulent misrepresentation or alternatively, negligent misrepresentation ... made to the plaintiff and relied on by her and/or made to induce her to enter into the agreement and/or continuing representations after the court order for specific performance on 23 June 2016." She also claims, in the alternative, damages for breach of contract resulting from the defendant's repudiation of the agreement.
- 16 The heads and quantum of damages, costs and expenses claimed are:

| | Description | TOP\$ |
|------|--|------------|
| 16.1 | Loss of wages from 10 July 2015 to 20 April 2018 | 543,891.34 |
| 16.2 | Return of deposit of C\$15,000 (at the USD exchange rate of 1.966 on 3 March 2015) | 25,866.53 |
| 16.3 | Lost interest income | 8,334.80 |
| 16.4 | Airfares back and forth to Canada | 12,140.09 |
| 16.5 | Hotel expenses for court in June 2016 | 1,260.00 |
| 16.6 | Legal fees | 16,369.00 |
| 16.7 | Accounting fees | 722.20 |
| | TOTAL | 608,583.96 |
| 16.8 | General damages for emotional distress | 100,000 |
| 16.9 | Pre-judgment interest at 10% per annum from 10 July 2015 to the date of payment. | |

- 17 The balance of the pleading is presented more as a submission with references to texts on damages such as *Chitty on Contracts* (Sweet & Maxwell, 32nd edition) and the well-known principles from the decision in *Hadley v Baxendale*.² There is also a section entitled "Sanctity of Marriage" again with references to various texts and decisions, presumably to support the proposition that the Plaintiff's

² (1854) 9 Ex 341

claims for damages should include wages that could have been earned by, and other expenses incurred for, her husband.

- 18 The claim for lost wages, which is the single largest component of the plaintiff's claim, is explained as follows:

"12. After consultation with Jonathan Roberts of Moore Stephens Markhams in Auckland NZ, Tu'akilaumea Manu of 'Uta'atu & Associates in Nuku'alofa and Caryl Jones of Jones Business Services Ltd in Neiafu it has been determined that expectation loss cannot be calculated due to the lack of information about the business and its past financial records. As there are no public financial records for Tom and the corporations and the Defendant has not provided financial history of the business, an accountant could not be found to calculate a reasonable summation of net profits lost during the breached contract period.

13. The breached contract period is calculated from July 10, 2015 (the agreed-upon start date) and April 20, 2018 (the date the plaintiff applied to cancel the order for specific performance).

14. Due to the fact that expected net earnings from that business could not be calculated and considering the distance travel [sic] to earn wages it has been agreed that the net wage loss in Canada should be calculated as a cost.

15. Wage loss is valid as the distance and cost to travel from Canada to Tonga to attend court during this time period would have rendered it impossible for the plaintiff to both work in Canada and be available to attend court appearances. Husband wages is valid as it is unreasonable to separate wife from husband during this time and would put undue stress on marriage. Dog travel is valid as the plaintiff brought her dog in their first trip to Vava'u expecting not to travel back to Canada.

16. Loss of wages should be allowed as the plaintiff had spent amounts for living expenses without the benefit of an income while waiting for their rights in a different country which would have put them into a position they would have been in (in Canada) had the contract never been made.

17. The remaining items are explained in the attached bundle calculated by Jones Business Services."

- 19 At paragraphs 20 to 28, the plaintiff pleads that her claim for lost wages was reasonably foreseeable by the defendants at the time of entry into the agreement. The plaintiff also pleads that she tried to mitigate her losses by returning to Canada to work between 24 December 2015 and 20 June 2016 when she then returned to Tonga to attend court. During that period, her husband remained in Canada to earn money for savings and to pay for her daily expenses in Tonga after receiving the court order for specific performance. He then moved to Tonga

at the end of October 2016 in the expectation that the agreement would be completed.

- 20 The pleading goes on to state that in November 2017, the plaintiff opened a delicatessen business in their home after an extended search found no reasonable retail location. They 'did not earn a positive income' in the first year of that business and instead had to rely on financial support from the plaintiff's father in Canada.
- 21 The prayer for relief includes, among others, an order for "garnishment or other such order to facilitate collection of damages, costs, interest and any other amounts owing".

Plaintiff's evidence

- 22 The Plaintiff's brief of evidence confirmed the substance of the allegations in her Amended Statement of Claim albeit, as one might expect, in more detail.
- 23 During her evidence before me, the plaintiff again confirmed the contents of her pleading and brief of evidence and sought to explain the various heads of her claim by reference to the bundle of documents which had been previously filed and have been referred to above. That evidence and the information contained in the Plaintiff's documents in support may be summarized as follows:
- 23.1 The plaintiff borrowed the Canadian \$15,000 deposit from her father. She is yet to repay him. Their agreement included that she pay him interest of 10% per annum. He has maintained his demands for repayment of the principal and interest on a regular basis, including the day before the hearing before me.
- 23.2 In relation to the airfares claim, the Plaintiff and her husband (and their dog) first arrived here in Tonga in July 2015. Upon not being able to secure the business, they returned to Canada in December 2015. In June 2016, the Plaintiff came back to Vava'u for the court proceedings in which the order for specific performance was made. She and her husband decided that she would stay in Tonga to 'enforce her rights' in anticipation of the order being honoured and her being able to complete the sale and take

over the café business. In October 2016, her husband and their dog flew from Canada to Vava'u, where they have all lived since. The orders made in June 2016 included that the second and third defendants pay the plaintiff's flight from Canada to Tonga for that court proceeding. The current claim is for all other flights for the plaintiff, her husband and their dog, between Canada and Tonga, totaling approximately \$12,000.

- 23.3 The plaintiff and her husband have remained in Tonga since October 2016 because she said that they had "lost everything and there was nothing to go back to". They sold their house in Canada and applied the modest profit from that to paying for their living expenses here while waiting for the outcome of the court proceedings.
- 23.4 The reason they decided to stay and endeavour to forge a new life in Vava'u was mainly because the plaintiff's father was in retirement, he was not in good health and their collective investment was designed to assist him in terms of some return as well and the protracted nature of the court proceedings. They also suffered "a big string of bad luck" in July 2016 when everything they owned was put on a shipping container but which was lost between Vancouver and Tonga, with no insurance cover. After applying the proceeds of the sale of their house, funds advanced by the plaintiff's father, and what they have been required to spend on lawyers in this proceeding, they had no choice but to remain here and seek to establish their own business in order to fund their lifestyle here. After establishing a delicatessen business and later the 'Hideaway Café' business, the Covid-19 pandemic hit, significantly impacting the tourism and hospitality industries in Tonga and, especially, Vava'u.
- 23.5 The documents relied upon by the plaintiff include a letter referred to above from Jones Business Services dated 1 August 2019. The opening paragraph to that letter explains that Caryl Jones had been asked to review the plaintiff's costs in relation to the proceeding as a result of obtaining judgement on 18 March 2019. The two-page letter then sets out the amount claimed by the plaintiff for return of the deposit, wages, interest on investment, travel, legal fees and accounting fees. The basis for the claim

for lost wages as pleaded, is in fact not referred to in the letter of Ms Jones. She does however set out a spreadsheet of calculations for the wages and other heads of loss claimed. The documents also include certain wages details for the plaintiff's husband for his employment at Thermo Applicators Inc. and for the plaintiff former position with Accountemps, also in Manitoba.

- 23.6 The plaintiff explained her claim for wages on the basis that when she received the order for specific performance in June 2016, she and her husband decided that she should stay in Vava'u to enforce her rights. Her husband stayed in Canada to continue working to help support the plaintiff's living expenses while here in Tonga. They continued to believe that the order would result in them receiving the business and live the life they wanted. Had the sale successfully concluded, the plaintiff said she would have taken over the Coconut Café business, and her husband would then have moved over and they would have operated the business. The wages claim therefore is calculated according to the wages they collectively could have earned had they remained in Canada during the period of the claim.
- 23.7 The flight on 24 December 2015 for the plaintiff, her husband and their pet dog back to Canada cost \$7,153.33. A further claim is made for airfares for the plaintiff's husband in October 2016 at \$4,986.75. The total airfares claimed therefore is \$12,140.09.
- 23.8 The plaintiff's documents included a receipt for bed-and-breakfast accommodation dated 23 June 2016 in the total sum of \$1,260.
- 23.9 The Plaintiff said she has spent a total of approximately \$22,000 on lawyers in this proceeding. Of that sum, approximately \$16,000 of fees have not yet been taxed:
- 23.9.1 Receipts for legal fees paid to Mr Sione Fonua include \$380 on 25 November 2015, \$5,000 on 2 December 2015 and \$2,500 on 20 June 2016. The fees charged by Mr Fonua are the only ones which have been assessed as part of the June 2016 orders. The second

last document in the bundle is a photocopy of a document from the Registry. Unfortunately, the copy was enlarged with parts of the edges and text cut off in printing. It is entitled a Schedule with a total amount "to be levied " (which suggests it was a schedule to an application for a writ of distress). From what can be seen, the amount was \$4,500 which appears to have been the taxed amount for Mr Fonua's fees. A further sum is stated of Canadian \$2,925.12, apparently for the plaintiff's flight, which at the then exchange rate, was the equivalent of TOP\$4,903.58. Costs of the writ were also stated at \$800. The total was therefore TOP\$10,203.58.

- 23.9.2 An email from Mr Pouono dated 16 February 2017 stated that he received fees from the Plaintiff for legal services of \$300 on 27 July 2016, \$700 on 29 August 2016 and \$800 in January 2017. The email also noted that he was going to contact Mrs Fitilagi Fa'anunu to hand the file to her that day.
- 23.9.3 A bill of costs from Mrs Fa'anunu shows that for work performed between 25 January 2017 and 24 March 2017, she charged a total of \$3,666. The plaintiff paid \$2,000 against that leaving a balance owing of \$1,666. From 28 March 2017 to 22 May 2017, she charged a further \$2,860. That, plus the outstanding balance of \$1,666, brought forward a total of \$4,526. For further work performed between 29 May 2017 and 16 June 2017, she charged a further \$1,041. That total of fees outstanding of \$5,567 plus disbursements \$209 made a total of \$5,776. \$800 was paid on 15 June 2017, leaving a final balance owing of \$4,976. The Plaintiff gave evidence that she still owes that amount.
- 23.9.4 The fourth lawyer engaged by the plaintiff was Mrs Loupua Pahulu-Kuli (as she was before being appointed to the Magistracy). She issued two bills of costs for work performed for the plaintiff. In a bill dated 3 May 2017, for work done between 21 March 2018 and 20 April 2018, she charged \$1,813. In a bill of costs dated 28 January 2019, for work performed between 21 January 2019 and the

conclusion of a two-day trial on 19 March 2019, she charged \$4,896.70. The Plaintiff said that those fees have been paid in full.

23.10 The final document in the bundle is an invoice from Jones Business Services for professional services rendered totalling \$722.20.

24 In November 2016, the plaintiff and her husband started a delicatessen business in order to try and mitigate their losses. The plaintiff said they 'officially opened' that business in November 2017.

25 In August 2018, the Plaintiff 'unofficially' opened the Hideaway Café. After liquor licence arrangements were put in place, she officially opened that café in May 2019.

26 Following the hearing, I directed the plaintiff to provide financial statements for her delicatessen and café businesses. Those statements reveal that:

26.1 From 1 January 2016 to 30 June 2017, the delicatessen made a loss of \$11,738.47. The expenses did not include any wages or salaries for the plaintiff or her husband. For the period from 1 July 2017 to 30 June 2018, the delicatessen made a small profit of \$1,552.24. Again, no allowance was made for wages or salaries for the plaintiff or her husband.

26.2 For the deli and the Hideaway Café combined:

26.2.1 for the period from 1 July 2018 to 30 June 2019, the businesses made a net loss of \$11,323.45;

26.2.2 for the period from 1 July 2019 to 31 December 2019, they generated a profit of \$18,695.28;

26.2.3 in that period, wages and salaries were paid in the sum of \$3,508.50. It is not clear whether they were paid to the plaintiff and/or her husband or to other staff.

Consideration

- 27 The normal function of damages for breach of contract is the same as that in tort, namely, to compensate the true loss suffered by the innocent party and place her/him in the same position, so far as money can do it, as if the contract had been performed.³ The plaintiff must prove that the loss suffered resulted from the breach and that, when the contract was made, such loss was reasonably foreseeable as likely to result from such a breach.⁴ That means that the loss must be such as may fairly and reasonably be considered either as arising naturally from such a breach, that is, in the usual course of things, or such as may reasonably be supposed to have been in the contemplation of both parties, when they made the contract, as the probable result of its breach.⁵
- 28 It is a general, but not invariable, rule that damages for breach of contract are assessed as at the date of breach.⁶
- 29 In cases of non-delivery, the usual measure of loss will be the difference between the contract price and the market value of a comparable (here) café business.⁷ In this case, there was no evidence of an available market for cafes in Vava'u similar to the Coconet Café. That reality was perhaps best demonstrated by the Plaintiff having to establish her own 'Hideaway Café' some three years after she had contracted for the Coconet Café from the defendants.
- 30 A further general rule is that a plaintiff may only recover damages for a loss which he/she has himself suffered. A loss suffered by a third party will not suffice.⁸
- 31 An assessment of damages is also subject to exclusions for remoteness and the plaintiff's obligation to mitigate her/his loss.

³ *BBMB Finance (Hong Kong) Ltd v Eda Holdings* [1991] 2 All ER 129 at 131, PC; *Ruxley Electronics & Construction Ltd v Forsyth* [1995] 3 All ER 268 at 277, HL; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch 529; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 286 [13].

⁴ *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd* (1968) 120 CLR 516, 523.

⁵ *Hadley v Baxendale* [1854] EngR 296; (1854) 9 Ex 341, 354; 156 ER 145, 151; *Amann Aviation* (1991) 174 CLR 64, 91–2 (Mason CJ and Deane J), 98–9 (Brennan J); *Baltic Shipping* (1993) 176 CLR 344, 368 (Brennan J).

⁶ *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co (a firm)* [1987] 1 All ER 289 at 297, *Chitty on Contracts* (29th ed, 2004) vol 1, pp 1456–1457 (para 26-057).

⁷ *Koch Marine Inc v D'Amica Societa di Navigazione ARL, The Elena d'Amico* [1980] 1 Lloyd's Rep 75.

⁸ *Alfred McAlpine Ltd v Panatown Ltd* [2000] 4 All ER 97 at 100, HL, per Lord Clyde.

- 32 The test of remoteness has been expounded as presenting the question whether, on the information available to the defendant when the contract was made, the defendant should, or a reasonable person in the defendant's position would, have realised that such loss was sufficiently likely to result from the breach of the contract to make it proper to hold that the loss flowed naturally from the breach, or that loss of that kind should have been within the defendant's contemplation.⁹
- 33 Generally speaking, a Plaintiff may not recover damages against a repudiator for loss which (s)he could reasonably have avoided by taking reasonable steps to mitigate his/her loss.¹⁰ A plaintiff must act not only in his/her own interests but also in the interests of the defendant and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter.¹¹ Where, however, a defendant alleges that the plaintiff should have mitigated his loss, the burden of proving such matters rests upon the defendant.¹²

Loss of wages

- 34 The plaintiff's claim for loss of wages is misconceived in a number of respects.
- 35 Firstly, the claims in respect of her husband are not recoverable. The plaintiff alone was a party to the contract with the defendants. I do not accept that the claims for the husband are supportable by any notion of the 'sanctity of marriage'. This was a commercial transaction. It was open to the plaintiff and her husband to name themselves jointly or as a partnership as purchasers if they so wished. They did not do so. It is therefore only the plaintiff who is entitled to claim damages from the defendants' repudiation.
- 36 Secondly, the substantive components of the plaintiff's claim are not put on the usual basis of damages assessed as if the breach had not occurred, i.e., that the sale had been completed and the plaintiff taken possession of the café. In that event, the plaintiff would have been required to pay the balance of the purchase

⁹ *C Czarnikow v Koufos* [1969] 1 AC 350, 385 (Lord Reid); *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, 667 (Wilson, Deane and Dawson JJ); *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413, 435 [46] (McHugh J).

¹⁰ *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] 3 All ER 1 at [10].

¹¹ *Folau v Ledger* [2004] Tonga LR 131.

¹² *Maile v Tonga Cooperative Federation Company* [2004] Tonga LR 123.

price but also be entitled to claim loss of profits expected from the business. It appears that formulation of her claim has not been advanced because, somewhat astonishingly, she did not obtain any financial information from the defendants as to the profitability (or otherwise) of the café business before she entered into the contract.

- 37 That deficiency has forced the plaintiff to formulate her claim on the basis as if she had never entered into the contract or a "no contract" basis. That may be available on the misrepresentation claims. However, the usual components of a no contract claim would be for any wasted expenditure plus, for example, any lost opportunities otherwise available had the plaintiff not entered into the impugned contract.
- 38 Here, however, the plaintiff claims the value of wages she and her husband (who I have already excluded from the assessment for the reasons stated above) would have earned had they remained in Canada. The difficulty with that approach is that the natural consequence of a repudiation case such as this would have been for the plaintiff to either seek to purchase an alternative café if one was available within a reasonable period or otherwise return to her employment in Canada. Both would have been reasonable courses by which to mitigate her loss. Even though I accept that the defendants' breaches contributed to, but were not the sole cause of, the plaintiff's impecuniosity, I do not accept that the Plaintiff was 'locked into a situation from which she could not escape'.¹³
- 39 Instead, after the plaintiff returned to Vava'u to attend the June 2016 court hearing, which was perfectly reasonable, and probably necessary, she determined to remain in Vava'u in the expectation that the defendants would observe the order for specific performance and without delay. In the absence of any evidence that they did in fact intend to abide the order, I do not consider that it was reasonable or necessary for the plaintiff to remain in Vava'u for the purpose of enforcing the order when she had engaged lawyers to act on her behalf to do so.

¹³ As referred to in by the High Court in *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653, cited recently in *Archibald v Powlett* [2017] VSCA 259 at [75].

- 40 Certainly, once the time period provided by the order had passed, and there was no sign that the defendants were going to comply, the plaintiff's decision to remain in Tonga thereafter was, in my view, motivated by her (and her husband's) desire to forge a new life in Vava'u, no matter what. With that decision, they consciously elected not to return or remain in Canada where they had employment but instead decided to 'take their chances' in seeking to either find another business in Vava'u or to establish their own, as they eventually did. In any event, they chose to remain in Tonga where they had no immediate income instead of returning to Canada where they did. It would appear that was only possible through the financial support provided by the plaintiff's father.
- 41 Thirdly, the total amount of the wages claim is out of all proportion to the value of the contract and, if the plaintiff's financial statements for the delicatessen and Hideaway Café (referred to further below) are any indication, the level of profit such small businesses are capable of generating in Vava'u.
- 42 For those reasons I consider this aspect of the claim to be too remote. The claim is also at odds with the Plaintiff's duty to mitigate her loss.
- 43 However, rather than disallow the claim entirely without any form of compensation, I consider it reasonable and appropriate to allow the plaintiff to recover her deposit for the business she did not acquire and to assess compensation for loss of profits which may have been expected from the business had the transaction been concluded.
- 44 Courts acknowledge that exactitude in assessment of loss may be an unattainable goal, but the mere difficulty of quantifying loss does not relieve the court of the task.¹⁴ Even though the plaintiff did not obtain financial information from the defendants in respect of the profitability or otherwise of the café in question, it is possible in my view to calculate a broad brush estimate of the likely profit, or order thereof, the café could have been reasonably expected to have earned the plaintiff by reference to the financial information she has provided in respect of her subsequently established Hideaway Café business.

¹⁴ *Rodocanachi, Sons & Co v Milburn Bros* (1886) 18 QBD 67 at 78, CA, per Lindley LJ.

- 45 Unfortunately, the financial statements for the combined business do not readily distinguish between the two. Nevertheless, as noted above, the combined performance for the first full year in 2018/2019 resulted in a loss of just over \$11,000. However, for the second half of the 2019 calendar year, the combined performance produced a net profit of over \$18,000. By reference to that span of profit and loss for fledgling businesses, and doing the best the court can, I consider \$10,000 profit per annum, for what was an established café business, to be a reasonable allowance.
- 46 As to the appropriate period for the assessment of this head of damages, the plaintiff should have taken possession of the café by about August 2015 and she eventually established her Hideaway Café from August 2018. That is a period of three years. In the circumstances outlined by the plaintiff, namely, a lack of suitable locations in and around Vava'u, her financial plight (which was contributed to by the defendants' breach), and the time it took to navigate through the main steps in the litigation, I consider three years to have been a reasonable period the plaintiff to set about establishing her own replacement business.
- 47 Accordingly, I allow loss of profits in the sum of \$30,000. Pre-judgement interest will also be allowed for two years at 10% per annum, which calculates to \$6,000.

Return of deposit

- 48 There can be no doubt that the claim for return of the deposit of TOP\$25,866.53 should be allowed.

Interest on deposit

- 49 As the plaintiff borrowed the deposit from her father on terms including payment of 10% interest per annum, I allow pre-judgement interest on the deposit from the date of payment, namely, 27 February 2015, to the date hereof, being a total period of five years and eight months, at 10% per annum, which calculates to \$13,524.

Airfares

- 50 As stated above, I do not consider it appropriate to allow any claims for expenses incurred for the plaintiff's husband or the transport of their dog.
- 51 Therefore, for the first component of the airfares claim, being their return to Canada in December 2015, I am satisfied that this was an expense which was only incurred as a result of the defendants' breach. However, I will only allow half of the airfares claimed for the plaintiff and her husband (\$5,442 and \$620) and half the travel insurance fee (\$408), which makes a total of \$3,235. I will also allow pre-judgement interest on that sum for a period of four years and 10 months at 10% per annum which calculates to \$1,563.
- 52 The second component of the airfares claim is for the return of the plaintiff's husband to Tonga in October 2016. For the reasons stated, that claim is disallowed.

Hotel expenses for June 2016

- 53 The claim for accommodation for the court proceedings in June 2016, which is more in the nature of a disbursement or cost of court attendance rather than damages, is nonetheless reasonable and is therefore allowed in the sum of \$1,260. I will also allow pre-judgement interest thereon at the rate of 10% per annum for a period of four years and four months which calculates to \$546.

Legal fees

- 54 Given the protracted and somewhat tortured history of this proceeding, I consider it appropriate to assess or tax the outstanding legal costs (meaning those which have not been the subject of previous orders and/or taxation of costs) claimed by the plaintiff rather than refer them to the Registrar for later taxation. In that task, I am guided by Order 47 rule 2 of the Supreme Court Rules which provides:

Allowance for costs

- (1) *There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party.*
- (2) *Unless there are exceptional circumstances there shall not be allowed —*

(a) any costs in respect of work done prematurely and not subsequently proving of use;

(b) any costs incurred or increased as a result of negligence, mistake, or over caution;

(c) any unusual expense.

55 Having regard to:

55.1 the information available;

55.2 the fact that I was not involved with the management and hearing to better understand what work by lawyers would reasonably be expected for the various applications and trials within the proceeding; and

55.3 Paulsen LCJ's observations and criticisms referred to in paragraph 7 above,

I assess the other claims for legal fees as follows:

55.3.1 Mr Pouono \$1,000

55.3.2 Mrs Fa'anunu \$5,000

55.3.3 Mrs Pahulu-Kuli \$4,000

56 As the plaintiff has paid various amounts of legal costs between 2017 and 2019, I will allow pre-judgement interest on a total of \$7,000 (as a part of Mrs Fa'anunu's fees remain unpaid) at the rate of 10% per annum for a period of two years, which calculates to \$1,400.

Accounting fees

57 The claim of \$722 for advice and the letter report from Jones Business Services is reasonable and is allowed. That invoice is dated 31 July 2019. I will allow pre-judgement interest on that sum at 10% per annum for one year which calculates to \$72.

Emotional distress

58 As discussed recently in *Luna'eva Enterprises Ltd v Manu* [2020] TOSC 1, the general rule is that damages for anxiety, disappointment and distress are not recoverable in an action for breach of contract.¹⁵ The principal exceptions to that rule are where the contract is one whose object is to provide enjoyment, relaxation or freedom from molestation,¹⁶ and where the damages proceed from physical inconvenience caused by the breach,¹⁷ such as breach of a building contract giving rise to physical discomfort or inconvenience.¹⁸ The decision in *Latu v Palu*,¹⁹ is an example of a case falling within the said exceptions, in which an award was made for the plaintiff having to endure unreasonable and unacceptable noise for a significant period of time.

59 For those reasons, the claim for general damages is refused.

Result

60 For those reasons, I assess the plaintiff's claims for damages, costs and other expenses as follows:

| Description | TOP\$ |
|---|--------|
| Loss of profits | 30,000 |
| pre-judgment interest thereon | 6,000 |
| Deposit | 25,866 |
| pre-judgment interest thereon | 13,524 |
| Airfares | 3,235 |
| pre-judgement interest thereon | 1,563 |
| Accommodation for June 2016 court proceedings | 1,260 |
| pre-judgment interest thereon | 546 |
| Legal fees | 10,000 |
| pre-judgment interest thereon | 1,400 |
| Accounting fees | 722 |

¹⁵ *Archibald v Powlett* [2017] VSCA 259 at [62]-[65], referring to *Baltic Shipping* (1993) 176 CLR 344, 361-3, 365 (Mason CJ), 380-1, 383 (Deane and Dawson JJ), 387 (Gaudron J), 405 (McHugh J).

¹⁶ *Ibid.*

¹⁷ *Ibid* 365 (Mason CJ), 383 (Deane and Dawson JJ), 387 (Gaudron J), 405 (McHugh J).

¹⁸ *Perry* [1982] 1 WLR 1297, 1299, 1302-3 (Lord Denning MR); *Watts* (1991) 1 WLR 1421, 1441-1443; *Boncrisiano v Lohmann* [1998] 4 VR 82, 94-5; *Nouvelle Homes* [2008] WASC 127 [76]-[82], [86], [100]; *Willshee* [2009] WASCA 87 [78]-[79]; *Campbelltown City Council* (1989) 15 NSWLR 501, 511-12 (McHugh JA). The last case was based on tort rather than contract.

¹⁹ [2013] TOSC 43

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|-------------------------------|---------------|
| pre-judgment interest thereon | 72 |
| TOTAL | 94,188 |

- 61 Accordingly, there will be judgment for the plaintiff against the second and third defendants, jointly and severally, for damages, costs and other expenses in the total sum of TOP\$94,188.00.
- 62 Pursuant to Order 30 rule 2 of the Supreme Court Rules, the said judgement debt shall carry interest at the rate of 10% per annum until the judgement is satisfied.
- 63 As the plaintiff appeared self-represented, there will be no further order as to costs in respect of this assessment of damages hearing.
- 64 A copy of this judgment and the accompanying orders will be served on the second and third defendants by email within 14 days hereof. Copies will also be provided to Mrs Tupou KC for her to provide to the said defendants in accordance with her earlier undertaking to the court.

NUKU'ALOFA
9 November 2020



M. H. Whitten QC
LORD CHIEF JUSTICE