

**IN THE HIGH COURT OF FIJI**  
**IN THE WESTERN DIVISION**  
**AT LAUTOKA**

**CIVIL JURISDICTION**

**Civil Action No. HBC 109 of 2018**

**BETWEEN:**            **RELCORP LIMITED**, a limited liability company duly incorporated under the laws of Fiji and having its registered office at Level 8, BSP Life, Scott Street, Suva, Fiji.

**1<sup>st</sup> PLAINTIFF**

**AND:**                    **NAISOSO PROPERTY SALES (FIJI) PTE LIMITED**, a limited liability company duly incorporated under the laws of Fiji and having its registered office at Level 8, BSP Life, 3 Scott Street, Suva in Fiji.

**2<sup>nd</sup> PLAINTIFF**

**AND:**                    **NAISOSO RESIDENTIAL MANAGEMENT LIMITED** a limited liability company duly incorporated under the laws of Fiji and having its registered office at Aliz Pacific, Level 8, Dominion House, Thomson Street, Suva in Fiji.

**DEFENDANT**

**Appearances :**        **(Ms) Nancy Choo for the plaintiffs**  
                              **(Ms) Mary Muir for the defendant**

**Hearing :**              **Monday, 21<sup>st</sup> September 2020 at 9.00 am**

**Decision :**             **Friday, 13<sup>th</sup> November 2020 at 9.00 am**

**DECISION**

**(A) INTRODUCTION**

- (01) The matter before me stems from the plaintiffs' summons for further and better particulars of the defendant's statement of defence and the counter-claim filed on 03.08.2018 to amended writ of summons.
- (02) The application is made pursuant to Order 18, rule 11 of the High Court Rules, 1988 and under the inherent jurisdiction of the court.

- (03) The application is opposed. The defendant filed an affidavit in opposition opposing the summons, sworn by (Ms) Nyssa Berryman, the director of the defendant sworn on 10.06.2020.
- (04) The plaintiffs filed an affidavit in response sworn by Mr. Robert Edward Lowres, the managing director of the first and the second plaintiff, sworn on 02.07.2020.
- (05) The plaintiffs and the defendant were heard on the summons. They made oral submissions to court. In addition to oral submissions, Counsel for the plaintiffs and the defendant filed a careful and comprehensive written submissions for which I am most grateful.

**(B) THE LAW**

- (1) It is necessary to turn to the applicable law and judicial thinking in relation to the principles governing the exercise of the discretion to make the order the plaintiffs now seek.
- (2) Rather than refer in detail to the various authorities, I propose to set out with only important citations, which I take to be the principles of the play.
- (3) The Plaintiffs' application is made pursuant to Order 18, Rule 11 (3) of the High Court Rules, 1988. I should quote Order 18, Rule 11 (3) which provides;

*"The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading or in any affidavit of his ordered to stand as a pleading or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just."*

In **Supreme Court Practice, 1999** at page 328 (18/12/2) it is clearly outlined that:

*"The purpose of pleadings is not play a game at the expense of the litigants but to enable the opposing party to know the case against him. There is a tendency to forget this basic purpose and the seek particulars which are not necessary when in truth each party knows the others case" (Trust Securities Holdings v Sir Robert McAlpine & Sons Ltd (1994) The Times, December 21, CA).*

In **Supreme Court Practice, 1999** at page 337 (18/12/56) under the heading "**Particulars Ordered by Court**" it is stated that:

*"The question on whether and what particulars should be ordered is one of discretion. The Court may refuse to order particulars of pleading to which a party would otherwise be entitled, where there has been inexcusable delay in making the application or the application is made at a late stage e.g. when there might be a substantial risk that a fixed date of trial would have to be vacated (Astrovlanis Compania Naviera SA v Linard [1972] 2 QB 611; [1972] 2 All ER 647, CA).*

- (4) The principles on grant of further and better particulars are set out in the judgment of Byrne J in In re Estate of Harry Janson Ho<sup>1</sup>: His Lordship held;

*"The general principle governing the delivery of further particulars of any pleading is that these will be ordered by the Court if it considered desirable to elucidate the issues to be tried and prevent "surprise" at the trial. No hard-and-fast line can be laid down as to the degree of particularity which is required of a pleader and which an opponent may demand of him when formulating either a claim or defence.*

*It is however, essential that each party should give his opponent a fair outline of the case which will be raised against him at the hearing, and for this purpose he must set out in the body of his pleading all particulars which are necessary to enable his opponent properly to prepare his case for trial.*

*Particulars need be given only of facts and not of evidence but as much certainty or particularity will be directed in a particular case as is reasonable having regard to the circumstances and the nature of the acts alleged – see **Ratcliffe v. Evans** (1892) 2 Q.B. 524, at 532. In **Bullen and Leake and Jacob's Precedents of Pleadings 12th Edition** the authors remark at p.113 that the tendency of modern practice is to give full particulars as may be necessary of the matters pleaded, and to respond to a request for further and better particulars of pleading more fully than previously. However, the law has always held against a party to litigation attempting to obtain information by way of particulars which can only be obtained by interrogatories – see **Lister & Company Limited v Thompson** (1891) 7 T.L.R. p.107. The practical reason for this rule of practice is that whereas when interrogatories are delivered, the answers must be an oath and various objections to provide the answers such a privilege, oppressiveness and fishing and may be taken by the other party; the same is not true of further particulars. In addition, because answers to interrogatories must be sworn if, when the matter comes to trial the person interrogated when giving evidence appears to resile from or vary his answers to interrogatories, an attack may be made on his credibility.*

*This is not true of further and better particulars so that a party may obtain an advantage over his opponent if further and better particulars are supplied when they would not necessarily have been if interrogatories had been delivered."*

- (5) In Pacific Green Industries (Fiji) Ltd v Sun Insurance Company Ltd<sup>2</sup>, HB C 070.2005 (9 August 2006) it was held;

*"[6] The nature of the distinction between fact and evidence is often difficult to apply. The example discussed by the learned author of **Australian Civil Procedure 4th edition** at page 182 provides a simple illustration by example of the distinction between fact and evidence, and I quote:*

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<sup>1</sup> [1993] FJHC 43

<sup>2</sup> [2006] FJHC 60

*"To take an obvious example, in an action for negligence, the plaintiff must prove a duty of care and a breach of that duty by the defendant. The plaintiff alleges the duty of care and the defendant's breach of it. The facts that constitute the breach are evidence. If, for example, the defendant owes the plaintiff a duty to provide a safe system of work, facts that the defendant maintained machinery by a particular ineffective method are evidence. The ultimate fact in support of the breach of duty is, inter alia, that the defendant failed to properly maintain the machinery. What constitutes the actual impropriety is evidence".*

*[7] A fact which is relevant only to establishing an ultimate fact is evidence. Those facts must not be pleaded. I must decide what facts constitute the defence and what facts go to prove the existence of those facts. Only the former facts are required to be alleged in the pleadings, since the latter class of facts is evidence.*

*[8] Denman CJ explained the nature of the distinction between fact and evidence in **Williams v Wilcox**, [1838] EngR 305; 112 E.R. 857 at 863 referred to in the above text on the same page as follows:*

*"It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation ...It is true that this mode of pleading does not disclose to the defendants the case on which the plaintiff relies: but to object to it on this ground, is to misconceive one object of pleading, and to forget another: the certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to informing the court, the jury, and the opponent of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point".*

- (6) The nature of the distinction between **fact** and **evidence** is often difficult to apply. The example discussed by the learned author of **Australian Civil Procedure, 4th edition**, at **page 182** provides a simple illustration by example of the distinction between fact and evidence, and I quote:

*"To take an obvious example, in an action for negligence, the plaintiff must prove a duty of care and a breach of that duty by the defendant. The plaintiff alleges the duty of care and the defendant's breach of it. The facts that constitute the breach are evidence. If, for example, the defendant owes the plaintiff a duty to provide a safe system of work, facts that the defendant maintained machinery by a particular ineffective method are evidence. The ultimate fact in support of the breach of duty is, inter alia, that the defendant failed to properly maintain the machinery. What constitutes the actual impropriety is evidence".*

- (7) "Denman" CJ explained the nature of the distinction between **fact** and **evidence** in Williams v Wilcox<sup>3</sup>, at 863 as follows:

*"It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation ...It is true that this mode of pleading does not disclose to the defendants the case on which the plaintiff relies: but to object to it on this ground, is to misconceive one object of pleading, and to forget another: the certainty or particularity of pleading is directed, not to the disclosure of the case of a party, but to informing the court, the jury, and the opponent of the specific proposition for which he contends, and a scarcely less important object is the bringing the parties to issue on a single and certain point, avoiding that prolixity and uncertainty which would very probably arise from stating all the steps which lead up to that point".*

- (8) In the case of Radravu v Tuimavana<sup>4</sup>, the Honourable Court held;

*"9... Particulars need be given only of facts and not of evidence but as much certainty or particularity will be directed in a particular case as is reasonable having regard to the circumstances of the case as held in Ratcliffe v. Evans (1892) 2 Q.B. 524, at 532. The circumstances of this case is that the cause of the fire is not an external factor and the bus was ignited when it was driven by 1st Defendant and in such circumstances whether there was a defect of the bus at the time of the inspection is a matter of evidence that the 2nd Defendant has to prove at the trial..."*

- (9) The Supreme Court Practice [1999] describes succinctly the purpose for the requirement to give particulars. The Supreme Court Practice says under Order 18 Rule 12(2);

*"General – The requirement to give particulars reflects the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly, without surprises and, as possible so as to minimize costs (a view approved by Edmund-Davies L.J. in Astroviani Compania Naviera SA v. Linard [1972] 2 Q.B. 611; [1972] 2 All ER 647). The function of particulars is accordingly;*

*(1) To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved (per Lindley L.J. in Duke v Wisden 918970 77 L.T. 67 at 68, per Buckley L.J. in Young & Co. [1924] 1 K.B. 675 at 679;*

*(2) To prevent the other side from being taken by surprise at the trial (per Cotton L.J. in Speding v Fitzpatrick (1888) 38 Ch. D 410 AT 413; Thomson v Birkley (1882) 31 W.R. 230;*

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<sup>3</sup> [1838] EngR 305; 112 E.R. 857

<sup>4</sup> [2012] FJHC 1196

(3) To enable the other side to know with what evidence they ought to be prepared and to prepare for trial (per Cotton L.J. *ibid*; per Jessel M.R. in **Thorp Holdsworth** 918760 3 Ch. D 637 AT 639; **Elkington v. London Association for the Protection of Trade** (1911) 27 T.L.R. 329 at 330);

(4) To limit the generality of the pleadings (per Thesiger L.J. **Saunders v Jones** (1877) 7 Ch. D 435) or of the claim or evidence (**Milbank v Milbank** [1900] 1 Ch. 376 at p.385);

(5) To limit and define issues to be tried, and as to which discovery is required (**Yorkshire Provident Life Assurance Co v Gilbert** [1895] 2 Q.B. 148, per Vaughan Williams L.J. in **Milbank v Milbank** [1900] 1 Ch. 376 at 385);

(6) To tie the hands of the property so that he cannot without leave go into any matters not included (per Brett L.J. in **Phillips v Phillips** (1878) 4 Q.B.D. 127 at 133; **Wooley v Broad** [1892] 2 O.B. 317)

*The purpose of pleadings is not to play a game at the expense of the litigant but to enable the opposing party to know the case against him. There is a tendency to forget this basic purpose and to seek particulars which are not necessary when in truth each party knows the other's case. Whenever either party is imputing fraud, negligence, or misconduct to his opponent, the facts must be stated with special particularity and care. Thus, in an action of wrongful dismissal, a plea justifying the dismissal on the ground that the servant was incompetent or dishonest must state the charge specifically and in detail; so must a plea justifying the publication of defamatory words on the grounds that they are true; so must all charges of bad workmanship, want of skills, negligence, and contributory negligence. The Court will require of him who makes a charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place" (per Lord Penzance in **Mariner v Bishop of Bath and Wells** [1893] p.145 and see the remarks of Thesiger L.J. in **Saunders v Jones** (1877) 7 Ch. D. 435 at 452)"*

- (10) In the case of **Singh v Australia and New Zealand Banking Group Limited**<sup>5</sup>, the learned Master Tuilevuka (as he was then) upheld the deliberations of the New Zealand High Court in the case of **Fitzpatrick Property Syndicate v White Fox & Jones**<sup>6</sup> where he stated;

[11]. In **Fitzpatrick Property Syndicate v White Fox & Jones** [2009] NZHC, Associate Judge Osborne said at para [4]:

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<sup>5</sup> [2013] FJHC 31

<sup>6</sup> [2009] NZHC

*[4] I adopt these as principles applicable to the consideration of any application for further and better particulars:*

*(a) The primary purpose of pleadings is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.*

*(b) The statement of claim should state the claim in each case so that the Court has sufficient clarity and detail to understand the issues it has to rule on, and the defendant knows the case which is to be met and is able to prepare for trial.*

*(c) Specifically required by r 5.26(b) are such particulars '... of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances as may suffice to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action'.*

*(d) The pleadings must set out the facts or circumstances relied upon as giving rise to each cause of action alleged and the relief claimed as a consequence.*

*(e) The nature and level of particulars will depend on the facts of the particular case.*

*(f) The distinction between particulars and interrogatories is important, particulars are matters of pleadings designed to make plain to the opposite party the case to be raised whereas interrogatories are sworn statement of facts, procured by the opposite party to assist that party in proving his or her case.*

*(g) A request for further particulars can be resisted if the request goes beyond the scope of particulars and probes for evidence.*

*(h) Questions which a Court can usefully ask itself are:*

*(i) Has sufficient information been provided to inform the other party of the case they have to meet and to enable them to take steps to respond?*

*(ii) Is there a real risk that the other party may face a trial by ambush if further particulars are not provided?*

*(iii) Is the request oppressive or an unreasonable burden upon the party concerned?*

- (11) Further, in the case of **Hillview Limited v Construction (Fiji) Limited**<sup>7</sup>, the Honourable Court under paragraph 21 reiterate the White Book at page 339 Order 18, Rule 12 (63) where it stated;

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<sup>7</sup> [2012] FJHC 869

*"(7) Facts within applicant's own knowledge – It is sometimes urged as an objection to an application for particulars that the applicant must know the true facts of the case better than his opponent (**Harbord v Monk** (1878) 38 L.T. 411; **Keogh v Incorporated Dental Hospital of Ireland** (1910) 2 Ir. R. 166 CA). But this objection is misconceived: each party is entitled to know the outline of the case that this adversary is going to make against him, to bind him down to a definite story."*

- (12) In the case of **Khan v Westpac Banking Corporation**<sup>8</sup>; the Honourable Justice Tuilevuka stated circumstances upon which further particulars are sort. His Lordship held;

*"[4]. Further and better particulars are often sought when the statement of claim – although disclosing a reasonable cause of action:*

*(i) Lacks the necessary particulars of allegations of the type set out in Order 18 Rule 11 (1)1 (1) to (7) or,*

*(ii) To borrow the phraseology of Pathik J in **Prasad v University of the South Pacific** [1998] FJHC 254; (1998) 44 FLR 272 (9 November 1998), when the cause of action "appears to be hidden in a wealth of prolixity and therefore difficult to understand and get at the issues".*

It is these principles that I apply.

(C) **The chronology of events**

<b>Date</b>	<b>Document</b>	<b>Party Filing</b>
25.05.18	Writ of Summons and Statement of Claim	Plaintiffs
04.07.18	Statement of Defence and Counter Claim	Defendant
19.07.18	Amended Writ of Summons and Statement of Claim	Plaintiffs
03.08.18	Statement of Defence and Counter Claim to Amended Writ of Summons	Defendant
24.10.18	Reply to Defence & Counterclaim	Plaintiffs
12.11.18	Reply to Plaintiffs' Reply to Counter Claim	Defendant
24.01.19	Notice of Change of Solicitors	Plaintiffs
21.02.19	Amended Notice of Change of Solicitors	Plaintiffs
25.03.19	Summons for Directions	Plaintiffs
10.07.19	Letter enclosing Defendant's Bundle of Documents	Defendant

<sup>8</sup> [2011] FJHC 83



17.09.19	Pre-Trial Conference Minutes	Plaintiffs
30.09.19	Summons to Set Down Action for Trial	Plaintiffs
04.10.19	Trial dates starting 25 May 2020 given on Summons to Set Down Action for Trial	Plaintiffs
17.03.20	Letter requesting further and better particulars	Plaintiffs
02.04.20	Letter providing further and better particulars	Defendant
27.04.20	Letter enclosing copies of 26 registered Transfers of Naisoso lot re-sales and proposed agreed bundle of documents	Defendant
13.05.20	Notice to Produce	Defendant
15.05.20	Letter proposing mediation and adjournment of litigation	Plaintiffs
20.05.20	Inter-Partes Summons	Plaintiffs

**(D) Consideration and the determination**

- (01) Let me pause here for a moment to consider the nature of the proceedings before me. The proceedings commenced by the plaintiffs are founded on breach of contract. The plaintiffs claim that by contract dated 8<sup>th</sup> September 2010 the first plaintiff and the defendant (formerly known as Naisoso Residential Management Rights Limited) entered into a Management Rights Contract (the “**contract**”) for the total sum of AUD\$230,000.00 (Two Hundred and Thirty Thousand Dollars) exclusive of Value Added Tax (the “**Contract Price**”) to purchase the management rights of the Naisoso Development from the defendant. It is further claimed that pursuant to the Contract, the defendant was required to maintain a standard of professionalism required of a real estate agent to ensure a non-compete provision with the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff. The Plaintiffs allege that in breach of the Contract the defendant’s Company failed to maintain a standard of professionalism required of a real estate agent. It is claimed that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff terminated the non-compete provisions of the Contract and the defendant has failed to accept the termination and claims that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff do not have the right to terminate the non-compete provisions. The plaintiffs allege that as a result of the defendant’s breach of Contract, the plaintiffs’ termination of the non-compete provisions and the defendant’s subsequent challenge, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff are restrained by the defendant from undertaking property re-sales. The plaintiffs say that they have suffered loss and damages as a result of the breaches alleged.
- (02) Save that they admit that the defendant and the first plaintiff entered in to the Management Rights Contract for the total sum of AUD\$230,000.00, the defendant denies virtually every major premise in the plaintiffs’ case. The defendant denies:
- ❖ it has any duties or obligations, contractual or otherwise to the 2<sup>nd</sup> plaintiff, as the 2<sup>nd</sup> plaintiff is not a party to the contract and/or the covenant not to compete.

- ❖ that it failed to maintain a standard of professionalism required of a real estate agent, that it says that these allegations by the 1<sup>st</sup> plaintiff are blatantly false and fabricated, and were made by the 1<sup>st</sup> plaintiff in bad faith as a pretext to terminate its covenant not to compete,
- ❖ any breach of contract on its part, but admits that the 1<sup>st</sup> plaintiff purported to terminate the non-compete provisions of the contract on blatantly false and fabricated grounds.
- ❖ that 2<sup>nd</sup> plaintiff terminated the non-compete provisions of the contract, in as much as the 2<sup>nd</sup> plaintiff is not a party to the contract and has no locus- standi thereunder.
- ❖ any breach by the defendant and denies that the plaintiffs have suffered any loss or damages or loss of reputation or are entitled to any damages, interests or costs.

(03) The defendant alleges that the first plaintiff has breached the contract between them as follows;

- ❖ Failure to perform clause 10.2 (a) of the contract by acting to compete with the defendant in respect of sales of lots not owned by the 1<sup>st</sup> plaintiff both prior to and after the purported termination of the covenant not to compete;
- ❖ Failure to perform clause 10.2 (b) of the contract by not encouraging lot owners to appoint the defendant as their letting agent;
- ❖ Failure to properly implement the contract in respect of the exclusive real estate agency for lot re-sales in the structure of the residential precinct and the Body Corporate;
- ❖ Failure to provide a suitable location for a storage shed and failure to do so in a timely manner as required by special condition 4 of Schedule 1 of the contract, causing the defendant to incur substantial expenses for storage;
- ❖ Failure to comply with the covenant not to compete contained in special conditions 5.5 of Schedule 1 of the contract;
- ❖ Encouraging and or conspiring with others to challenge the validity of Article 31.3 of the Articles of Association of the Body Corporate despite having accepted consideration from the defendant for the exclusive resale rights set out therein;
- ❖ Encouraging others to ignore instead of complying with Article 31.3 of the Articles of Association;
- ❖ Falsely claiming breach of contract against the defendant on spurious grounds;

- (04) The defendant says it has incurred loss and damages from the 1<sup>st</sup> plaintiff's breach of contract, including the failure of the consideration paid by the defendant in respect of the letting and resale rights due to the 1<sup>st</sup> plaintiff's conduct and bad faith, the particulars of which are as follows:

#### **PARTICULARS OF LOSS AND DAMAGES**

- (a) Contractual consideration paid for lettings and re-sales – AUD\$230,000.00 and FJD \$178,123.37.
  - (b) Consideration paid for template resale contracts – FJD \$7,601.00.
  - (c) Lost or reduced commissions on re-sales and lettings – FJD \$818,052.87.
  - (d) Lost or reduced commissions relating to breach of the covenant not to compete – FJD \$767,822.87.
  - (e) Solicitors costs relating to disputes with or caused by the 1<sup>st</sup> Plaintiff – FJD \$79,712.51.
  - (f) Storage costs incurred in absence of the storage shed – FJD \$140,866.66.
- (05) The pleadings in this case were closed in November, 2018. On 04.10.2019, the court fixed the dates of trial as 25<sup>th</sup> to 03<sup>rd</sup> June 2020. On 17.03.2020, about 68 days before the case was due to be heard, the solicitors for the plaintiffs wrote a letter for particulars of statement of defence and counter-claim filed on 03.07.2018. The plaintiffs' solicitors received a written response to their request for particulars from the defendant's solicitors on 02.04.2020. The plaintiffs' solicitors waited for six weeks, until 20.05.2020, only five days before the case was due to be heard, to file their inter-partes summons for particulars of the statement of defence and counter-claim filed on 03.07.2018. The court vacated the trial to November 2020 owing to a pending hearing on application for skype evidence made by the defendant.
- (06) **In my judgment, this application comes far too late.** Without going into the rights or wrongs of the matter, this application should have been made as soon as the statement of defence and the counter-claim was filed.
- (07) The first and the second plaintiffs were represented by Lal Patel Bale Lawyers. On 24.01.2019, R. Patel Lawyers filed its notice of change in lieu of Lal Patel Bale represented the first and the second plaintiffs.
- (08) Three points appear quite clear; (1) The plaintiffs have been fully aware of the contents of the defendant's statement of defence and counter-claim since July 2018. (2) The plaintiffs' current solicitors had the conduct of this action since January 2019, shortly after the close of the pleadings; (3) The plaintiffs' current solicitors progressed the action through

discovery and disclosure and pre-trial conference and applied to court to have the action set down for trial and never requested for particulars until 17.03.2020.

- (09) Suffice it to mention that in the affidavit in support sworn on 19.05.2020, Mr. Robert Edward Lowres deposed that;
- (6) *In fact the pleadings rendered and filed by our previous solicitors had also alluded to the fact that we required further and better particulars in response to these paragraphs.*
- (10) It is quite clear to the court that by the plaintiffs' own admission, they knew and were aware prior to the close of the pleadings of the need for further and better particulars. They did not apply for particulars. Instead, they attended the summons for directions and agreed to the dates for trial being fixed for 25<sup>th</sup> May to 03<sup>rd</sup> June 2020, without complaint.
- (11) There has been inexcusable and indefensible delay on the plaintiffs' part in applying for the particulars now sought. Not only are the plaintiffs' seeking particulars at the last minute, they now wish to amend their pleadings and bring strike out applications on the eve of trial with the result that the defendants would be put to indefensible inconvenience and unnecessary expense. Despite the skilful advocacy of Counsel for the plaintiffs, why the application for particulars came far too late is still not clear to me.
- (12) **So, I would dismiss the application first on the ground that there has been inexcusable and indefensible delay on the plaintiffs' part in applying for the particulars now sought, and secondly, they tendered to cause delay and expense which was unnecessary and undesirable.**
- (13) In reaching this conclusion. I also take account of the fact that the plaintiffs' application failed to disclose to this court that the plaintiffs' solicitors received a reply letter on 2 April 2020 from the defendant's solicitors, providing further particulars.
- (14) The plaintiffs omitted to annex that letter to their affidavit in support which is a material omission.
- (15) The defendant's reply letter of 2 April 2020 is annexure "NB 3" to the Affidavit of Nyssa Berryman in Opposition sworn on the 10<sup>th</sup> day of June 2020 and filed on 12 June 2020.
- (16) The plaintiffs say that a lot of questions of the plaintiffs in its letter dated 17-03-2020 were not answered by the defendant. All that may be conceded! But as I understand the contents of the letter of 02-04-2020, **paragraphs (13) to (19) and (22) to (28) of that letter provides further particulars including a description of the conduct by the first plaintiff's managing director alleged to constitute a breach of contract, a list of registered transfers alleged to be lot resale handled by the First Plaintiff as an estate agent and details of the defendant's storage costs.**

- (17) Subsequently copies of those transfers were disclosed and supplied to the plaintiffs' solicitors (Annexure "NB 4").
- (18) Yet the plaintiffs' Inter Parte Summons does not reflect the receipt of these particulars from the defendant.
- (19) Counsel for the plaintiffs did not submit that there was an innocent failure by the plaintiffs to discharge the duty of disclosure of matters relevant to the exercise of the courts discretion. Instead, counsel for the plaintiffs contends that; (1) The 02<sup>nd</sup> April letter did not estop the plaintiffs from making the application to court (2) There was no duty under Order 18, rule 11 to disclose any response to 17-03-2020 letter.

**I therefore, find that the plaintiffs' failure to disclose the letter was deliberate.**

**It is clear that paragraphs (13) to (19) and (22) to (28) of that letter provides further particulars including a description of the conduct by the First Plaintiff's managing director alleged to constitute a breach of contract, a list of registered transfers alleged to be lot re-sales handled by the First Plaintiff as an estate agent and details of the defendant's storage costs.**

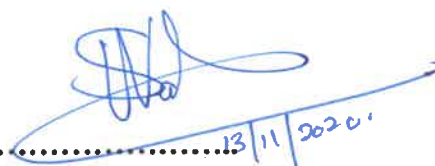
- (20) There is not a word about this in the plaintiffs' affidavit. This is a serious misconduct by the plaintiffs. Why untrustworthy? Why failure to disclose matters relevant to the exercise of the court's discretion? This is the conduct of the plaintiffs applying for particulars. The conduct of a party applying for relief is always an important element for consideration. The failure of the plaintiffs to disclose the letter and the particulars provided by the letter is reprehensible. I take a serious view of this matter !

### **ORDERS**

- (01) The plaintiffs' application for particulars is dismissed.
- (02) I award costs of the application to the defendant summarily assessed in the sum of \$1000.00.



High Court – Lautoka  
Friday, 13<sup>th</sup> November, 2020

  
.....13/11/2020  
**Jude Nanayakkara**  
[Judge]