

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

**CIVIL JURISDICTION**

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

**BETWEEN**

**RELCORP (FIJI) 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.

**1<sup>ST</sup> PLAINTIFF**

**AND**

**NAISOSQ 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 RESIDENTILA MANAGEMENT RIGHTS 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**

<b>Counsel</b>	Mr. Sharma D. with Ms. Fathima G. for the Plaintiffs. Ms. Muir M. for the Defendant
<b>Date(s) of Hearing</b>	28 <sup>th</sup> & 29 <sup>th</sup> August 2023
<b>Date of Judgment</b>	31 <sup>st</sup> October 2023

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**JUDGMENT**

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[1] The plaintiffs filed this action against the defendant seeking damages for breach of contract. The 1<sup>st</sup> plaintiff is a real estate and development entity which has undertaken the development of Naisoso Island. The 2<sup>nd</sup> plaintiff is the real estate

sales and marketing agency that market and sells 1<sup>st</sup> plaintiff's real estate in the Naisoso Development. The defendant is the Residential Development Operator and provides letting services as well as non-exclusive agency for sales of property on Naisoso Island.

[2] The 1<sup>st</sup> plaintiff and the defendant entered into an agreement, 08<sup>th</sup> September 2010 to purchase management rights from the defendant. The plaintiff avers in the amended statement of claim that pursuant to the contract the defendant was required to maintain a standard of professionalism required of a real estate agent to non-compete provision with the plaintiffs. It is also averred in the amended statement of claim that since the defendant failed to maintain a standard of professionalism required of a real estate agent, the plaintiffs terminated the non-compete provision of the contract but the defendant refused to accept the termination.

[3] Particulars of loss and damage as pleaded in the amended statement of claim are;

- (i) Loss of commissions;
- (ii) Loss business and revenue; and
- (iii) Allegations of breach of contract causing injury to business reputation.

[4] The plaintiffs seek the following reliefs:

- (a) A declaration that the non-compete provisions of the Management Rights Contract, are terminated;
- (b) A declaration that by selling property on Naisoso Island the plaintiffs are not in breach of Article 31.3 of the Articles of Association;
- (c) General Damages;

- (d) Post judgment interest;
- (e) Costs on an indemnity basis; and
- (f) Further or other reliefs as this court thinks fit.

[5] At the pre-trial conference the parties admitted the following facts:

1. The 1<sup>st</sup> plaintiff is a registered company that has undertaken the development of Naisoso Island (the “**Naisoso Development**”) in Nadi Fiji.
2. The defendant is a registered company.
3. The 1<sup>st</sup> plaintiff and the defendant entered into a Management Rights Contract for Naisoso Island Residential Precinct Dated 8<sup>th</sup> September 2010 (the “Contract”) for the defendant to purchase the residential management rights to the development at Naisoso Island from the plaintiff.
4. The initial payment by the defendant under the contract was the sum of AUD230,000 excluding VAT.
5. The defendant entered into a Residential Resort Operator Agreement with Naisoso Island Body Corporate Limited, as contemplated by the Contract.
6. The contract provided in paragraph 5.5 of the Special conditions that the 1<sup>st</sup> plaintiff agreed not to compete with the defendant’s real estate agent business with respect to lot resales whilst the defendant “*maintain the standard of professionalism required of a real estate agent we achieved*”.
7. By solicitors’ letter dated 14 February 2018, the 1<sup>st</sup> plaintiff alleged that the defendant had failed to maintain the professionalism required

of a real estate agent and stated that the 1<sup>st</sup> plaintiff would no longer honour the non-compete provisions of the contract.

8. By solicitors' letter dated 20 March 2018 the 1<sup>st</sup> plaintiff provided the following particulars of the plaintiff's allegation that the defendant had failed to maintain a standard of professionalism as a real estate agent:
  - Failure to maintain and operate the residential gates;
  - No maintenance, operation or training of the computerized sprinkler system for the residential and resort common areas although the landscape contractors at the material time (Greenscape Limited provided a manual and a program for watering areas;
  - No attendance to required repairs of the computerized sprinkler system since October 2016.
  - No servicing of the Solenoid Valves or replacement of the solenoid wires in the computerized sprinkler system;
  - No training of the current cleaning contractors where they are instructed to pull out the electrical wires for the computerized sprinkler system to stop operation during rainy weather;
  - Zero beach maintenance during the term of agreement;
  - No regular maintenance of the Utilities Building Area where there has been nor apparent maintenance or inspection program.
9. Photographs were attached to the solicitors' letter dated 20 March 2018;
10. Article 31.3 of the Articles of Association of Naisoso Island Body corporate Limited states as follows:

“Residential members must also use the Residential Resort Operator as their agent for the sale of their Lot for the purpose of

marketing their Lot within Fiji. This is to assist in potential buyers being aware of the structure of Naisoso Island and the requirements for conveyancing of a Lot in a Residential Precinct on Naisoso Island.

[6] While denying the allegation of the plaintiffs, the defendant by way of a counterclaim alleges that the 1<sup>st</sup> plaintiff has breached the contract between them and the alleged breaches are as follows:

- (a) Failure to perform clause 10.2(a) of the contract by acting to compete with the defendant in respect 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;
- (b) Failure to perform clause 10.2(b) of the contract by not encouraging lot owners to appoint the defendant as their letting agent;
- (c) Failure to properly implement the contract in respect of the exclusive real estate agency for lot resales in the structure of the residential precinct and the Body Corporate;
- (d) 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;
- (e) Failure to comply with the covenant not to compete contained in special condition 5.5 of Schedule 1 of the contract;
- (f) Encouraging and / or conspiring with the 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;

- (g) Encouraging the others to ignore instead of complying with Article 31.3 of the Articles of Association;
- (h) Falsely claiming breach of contract against the defendant on spurious grounds;
- (i) Promising lot owners, including a consortium purchasing 18 lots, that Article 31.3 would not be enforced or applied to them to require them to use the defendant's services as real estate agent for resales; and
- (j) Intentionally interfering with the defendant's business relationship with the Body Corporate despite having accepted consideration from the defendant for the management rights.

[7] Particulars of damage as averred in the statement of defence are;

- (a) Contractual consideration paid for lettings and resales – AUD 230,000 and FJD 178,123.37;
- (b) Consideration paid for template resale contracts – FJD 7,601.00;
- (c) Lost or reduced commissions on resale and letting – 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; and
- (f) Storage costs incurred in absence of the storage shed – FJD 140,866.66.

[8] The defendant seeks the following orders:

- (a) The plaintiffs' statement of claim be dismissed;
- (b) Judgment be entered for the defendant for special damages and loss and general and consequential damages as per its counter claim;

- (c) Order be made restraining the 1<sup>st</sup> plaintiff and any related companies including the 2<sup>nd</sup> plaintiff, from acting as real estate agents in respect of any resale of lots in the residential precinct of Naisoso Island as per the covenant not to compete;
- (d) Aggravated or exemplary damages against the 1<sup>st</sup> plaintiff;
- (e) Costs of this action on an indemnity basis;
- (f) Interest; and
- (g) Such other or further relief as this Honourable Court may deem just or necessary in the circumstances.

[9] When the was taken up for trial the learned counsel for plaintiffs moved to withdraw the plaintiffs' claim and accordingly, the court struck out the plaintiffs' claim and proceeded to hear the defendant's counter claim.

[10] On 08<sup>th</sup> September 2010 the 1<sup>st</sup> plaintiff and the defendant entered into an agreement called MANAGEMENT RIGHTS CONTRACT, NAISOSO ISLAND RECIDENCE TO PURCHASE (D1) management rights which means, the defendant to be the residential resort operator under the said agreement.

[11] Under the said agreement the defendant was required to pay the 1<sup>st</sup> plaintiff AUD 230,000.00 exclusive of Value Added Tax which the defendant had paid and there is no dispute as to the payment.

[12] Clause 10.2(a) on the said agreement the 1<sup>st</sup> plaintiff has agreed that;

subject to special condition 5, we will not act in competition with you as a letting agent for any lot in the development and sales of any lot in the development and sales of any lots in the development not owned by us.

[13] On 14<sup>th</sup> February 2018, the Solicitors Lal Patel Bale Lawyers on instructions of the 1<sup>st</sup> plaintiff sent a letter (D3) terminating the non-compete provision of the contract alleging that it had failed to maintain the professionalism required of a



real estate agent with the capability of representing the 1<sup>st</sup> plaintiff company and related companies as required under Schedule 1, Special Conditions 5.5.

[14] Special Condition 5 –

5.1 You acknowledge that we (or a related company of ours) intended to use your services (and those of your directors or employees) to act as real estate sales persons to sell Lots, after settlement, to the extent allowed by law.

5.2 We (or a related company of ours) intended to carry out a real estate agents business for sale and marketing of our Lots with the ultimate intention to have you carry on a business of selling our Lots once you and your employees have obtained all appropriate licenses and sufficient experience to carry out a professional real estate agency business selling Lots to international and domestic buyers to the standard that we have achieved.

5.3 You will take reasonable steps to procure all necessary licenses and accept tuition and direction from us about how to act as a real estate agent for the development so as to achieve our standard. We agree to give you reasonable assistance (provided it is at no cost to us) in obtaining experience in selling lots to us.

5.5 Once you have achieved a standard that is equivalent to ours, as a real estate agent, we agreed not to compete with your real estate agent business with respect to the sale of Lots (by persons other than us) whilst you maintain standard of professionalism required of a real estate agent we achieved. We retain the rights (together with our related company) to:

(a) carry on the business of selling our Lots;

- (b) carry on the letting and sale of commercial Lots; and
- (c) act as a real estate agent for the sale of Lots not owned by us in the Residential Precinct where the owner of the Lot is not satisfied with your service or level of professionalism. However we agree we shall not in these circumstances seek listings or appointment as agent to selling Lots we do not own in the Residential Precinct within the terms of this special condition. We will pay to you any commission we earn in selling Lots in the Residential Precinct that we do not own, less any taxes and expenses payable by us in relation to such sales. This arrangement shall continue for two years after the settlement date. The parties agree to meet and reconsider this clause 5.5 at the end of that 2 year period.

[15] Referring to the above clauses of the Management Rights Contract the defendant's witness (the witness) said that clause 10.2 of the Management Rights Contract confirmed that it could not act in competition with the defendant company as letting agent for any of the Lots in residential development and in selling the Lots not owned by the plaintiff.

[16] The management Rights Contract was entered into between the 1<sup>st</sup> plaintiff and the defendant on 08<sup>th</sup> September 2010 where they have agreed for the 1<sup>st</sup> plaintiff to pay any commission earned in selling Lots in residential precinct to the defendant for two years after the settlement date.

[17] The Management Rights Contract was terminated by the 1<sup>st</sup> plaintiff but only the non-compete provision of the said contract was terminated and the rest of the contract was in operation even at the time of the institution of these proceedings.

[18] Special damages must be pleaded and proved by the claimant. In this matter the defendant claims FJD 2,222,179.28 as special damages the details of which are averred in paragraph 35 of the statement of defence which I have reproduced in paragraph 7 above.

[19] In **Attorney General v Burnett** [2012] FJCA 15; ABU0023.2009 (21 March 2012) at paragraph 71 the Court of Appeal has cited the following observation of Diplock LJ in **Ilkiw -v- Samuels and Others** [1963] 1 WLR 991 at page 1006:

“Special damages, in the sense of a monetary loss which the Plaintiff has sustained up to the date of trial, must be pleaded and particularised. \_ \_ \_ . In my view, it is plain law – so plain that there appears to be no direct authority because everyone has accepted it as being the law for the last hundred years – that you can recover in an action only special damage which has been pleaded, and, of course, proved.”

[20] The same principle was followed in **Deo Construction Development Company Ltd v Denarau Corporation Ltd** [2017] FJHC 182; HBC184.2014 (10 March 2017) and further cited the following paragraph from **Halsbury’s, Laws of England**, 4th Edition, Volume 12 at paragraph 812 state as follows;

“...In the context of liability of loss (usually in contract) general damages are those which arise naturally and in the normal course or events whereas special damages are those which do not arise naturally out of the defendant’s breach and are recoverable only where they were not beyond the reasonable contemplation of the parties (for example, where the plaintiff communicated to the defendant prior to the breach the likely consequences of the breach). The distinction between the two terms is also drawn in relation to proof of loss... special damages; in this context are those losses which can be calculated in financial terms. A third

distinction between the two terms is in relation to pleading: here, special damages refer to those losses which must be proved...”

[21] The defendant claims AUD230,000.00 and it is clear from the defendant's witness that this money had been paid to enter into the Management Contract. The Management Contract was entered into in the year 2010 and this amount was claimed in 2018. The defendant's witness did not explain the basis of this claim.

[22] The defendant, as special damages claim FJD178,123.37 but the defendant's witness failed to explain the basis of this claim and how she arrived at this figure.

[23] The defendant also claims \$7,601.00 as the consideration paid for template resale contracts. However, the defendant's witness did not say in her evidence how the defendant company became entitled to this amount and as correctly submitted by the learned counsel for the plaintiffs, there is no evidence that the 1<sup>st</sup> plaintiff used this template for their sales.

[24] The defendant also claims \$818,052.87 as lost or reduced commission on resales and lettings. According to the evidence of the defendant's witness she is claiming what the defendant had paid to the 1<sup>st</sup> plaintiff as Letting Payment fees and Villa Completion fees since 2010. These payments had been paid as agreed by the parties in the contract which is still valid.

[25] Clause 3.3 of the Management Rights Contract provides:

In addition to the purchase price, you must pay us;

(a) \$4,750 AUD plus Vat for each Lot during the term (“Villa Payment”);

and

(b) \$7,250.00 AUD plus VAT for each letting appointment for each Lot during the Term ("Letting Payment") to be paid in 4 equal instalments, Quarterly in arrears.

[26] As submitted by the learned counsel for the plaintiff the defendant did not seek an order from the court that this clause was oppressive.

[27] The defendant also claims \$767,822.87 as lost or reduced commission. The defendant's witness tendered in evidence several transfers but none of them shows that the 1<sup>st</sup> plaintiff had any involvement in it. There is also no evidence giving particulars of this claim.

[28] It was a condition between the defendant and the 1<sup>st</sup> plaintiff that it was entirely up to the Residential Precinct Owner to decide whether to obtain services of the defendant and if the Residential Precinct owner did not want the services of the defendant the 1<sup>st</sup> plaintiff cannot be blamed or held responsible for that.

[29] The defendant claims \$79,712.51 as solicitor's costs. Legal costs are not special damages and further, the defendant has failed to give particulars of the claim for the court to decide the amount that the defendant is entitled to.

[30] The defendant also claims \$140,866.66 as storage cost.

[31] Clause 4.3 of the contract provides:

Subject to special condition 4.2, we agree to make our best endeavours to have the Storage Shed constructed as soon as practicable when you provide us with reasonable evidence of your need for a Storage Shed because of the requirements of the management rights business.

[32] There is no evidence that the defendant made such a request. Furthermore, when the defendant's witness was asked in cross-examination about the breakdown of the sum since it has not been pleaded in the counter claim she

replied that it was part of the rental they had paid for houses they rented and stayed in. Without particulars of the claim the court is unable to ascertain the amount the defendant is, if at all, entitled to.

[33] For the reasons set out above the court makes the following orders.

### ORDERS

1. The Plaintiff's action is dismissed upon withdrawal.
2. The defendant's counter claim is dismissed.
3. There will be no order for costs.

  
Lyone Seneviratne



**JUDGE**

31<sup>st</sup> October 2023