IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 166 of 2009

BETWEEN: CLAUDINE MAISON
Claimant

AND: HORIZON DEVELOPMENTS LIMITED
Defendant

Coram: ***Justice D. V. Fatiaki***

Counsel: *Mark Hurley for the Claimant*
John Malcolm for the Defendant

Date of Judgment: *13 June 2014*

JUDGMENT

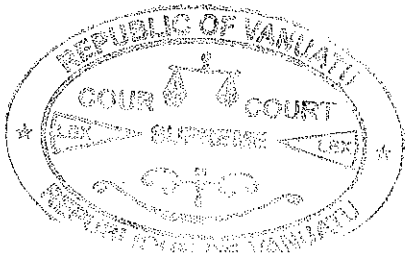
1. The claimant brings this action to recover **VT22,850,650** which she expended on her intended purchase of a leasehold title to an allotment in the **Manuro Shores Estate** development ("*Manuro*") on Efate, and on the construction of a Balinese style house and other improvements carried out on the land.

2. The defendant **Horizon Developments Ltd** (HDL) was the developer of Manuro. It is the vendor named in a contract the claimant signed to purchase the leasehold title, and the builder contracted to supply and erect the house and improvements. The claimant alleges she has validly rescinded the contracts she had with HDL and is therefore entitle to recover her money.

3. The claimant is a French woman who was residing in New Caledonia when she entered into the contract to purchase the allotment. She has very limited English which clearly hampered her understanding of written documents she signed in various transactions with HDL.

4. HDL is a Vanuatu company. When these proceedings were commenced, **Joseph Franconeri** was named as second defendant. He is the managing director and shareholder of HDL. However when the second amended statement of claim was filed (and also in the third amended statement of claim) Mr Franconeri disappeared both from the heading on the pleadings, and from the pleadings. HDL became the sole defendant.

5. At trial the evidence concentrated on 3 separate contracts. The first is an agreement for the Sale and Purchase of a residential and agricultural property ("*the first agreement*") between HDL as vendor and the claimant as purchaser.



6. This agreement by its terms was for lease title number **12/0742/103**, lot 76 (*"title 103"*). The agreed purchase price was to be VT9.9 million. The first agreement bears a handwritten date of *"30/11/2007"* but it seems clear that the agreement was actually signed in March 2008 and backdated. I do not think anything turns on the actual date on which the agreement was signed. It seems that the proposed lease was one of many in similar form prepared in 2007 for each allotment in a large subdivision which was to be a part of the Manuro development.

7. Unbeknown to the claimant *"title 103"* was not registered at the time she signed the first agreement, and has never been registered.

8. At a time that is not clear in the evidence, but probably in late 2008, HDL decided to abandon the proposed subdivision and to undertake a strata title development over the same area of land. The area was resurveyed, and steps were taken by HDL to obtain a new head lease under the **Strata Titles Act** [CAP. 266]. A draft **Strata Plan Number 0057** was lodged for approval and registration. Mr Franconeri has given evidence that the Lands Department gave approval for the strata plan to be registered in February 2009.

9. Shortly before **11th August 2009** the claimant was requested by HDL to attend its office to sign a new agreement. She did attend, and during a short meeting lasting a little more than 5 to 10 minutes but *"less than 15 minutes"*, she signed the concluding pages of a 34 page closely printed document in the English language which is entitled Sale and Purchase between HDL and the claimant for **lot 33**, Manuro Shores Estate, Vanuatu, Strata Plan 0057 (*"the second agreement"*).

10. It was implicitly accepted at trial that **lot 33** comprised the same land as in lot 76 in the then abandoned subdivision, but there was no evidence led to establish this. The second agreement at the time was treated by the parties as a substitute for the first agreement. The claimant had made two payments under the first agreement. She paid a 10% deposit in January 2008 and a further **VT5,940,000** on 7th March 2008. These monies were treated as payments under the second agreement.

11. After the claimant signed the first agreement she was keen to have a house erected on her allotment. Following discussions with Mr Franconeri and an architect who worked in HDL, she settled on a design for a kit-form house to be constructed in Bali, and then transported by container to Vanuatu. HDL quoted a price for the supply and erection of the house at **VT9.6 million**. The claimant accepted HDL's quotation on or about 19 June 2008 (*"the building agreement"*) and made a substantial down payment.

12. HDL got local government approval to erect the house by inserting the details of the head lease it apparently held for the proposed subdivision. It is not clear when the construction commenced but the main structure of the house was erected by August 2009, and the claimant was then anxious to move in as she had by that time moved to Vanuatu and was renting accommodation in Port Vila.

13. Initially the claimant and her partner were on friendly terms with Mr Franconeri, but as difficulties arose over aspects of the construction and with the supply of electricity to the house from the public grid, their relationship soured.

14. By September 2009 the parties were in open dispute over many items in the construction, and the house was not completed to the point where the claimant was prepared to move into it. Finally she became frustrated by the lack of progress in resolving her complaints and by a claim from HDL for variations and extras which she considered was unjustified. The claimant abandoned the property, refused to pay anything more, and claimed back everything she had paid.

15. The claimant instructed a lawyer. Her allegations then assumed a legal form. She alleged that she had been induced to enter into the first agreement by misrepresentations by HDL that Manuro is a unique and luxury residential life style with golf course, hotel resort, a marina, a village center with shops, offices, and with countless sporting facilities.

16. The final form of the claimant's pleadings have slowly emerged through amendments and refinements. It is now alleged that the misrepresentations were not only not true but were fraudulently made, and reliance is placed on the **Misrepresentation Act 1967** (UK).

17. The particulars of the untrue misrepresentations alleged are as follows:-

> *"a) there is no golf and hotel resort community;*
> *b) there is no "world class 18 hotel gold course" or any golf course at all;*
> *c) there is no marina;*
> *d) there is no village centre with shops and offices;*
> *e) there are not countless sporting facilities or any sporting facilities at all; and*
> *f) there is no arts centre."*

18. In addition it is pleaded that HDL was never in a position to convey title as it never owned "*title 103*" to lot 76 which was confirmed later by the Department of Lands which informed the claimant's lawyer that "*title 103*" had never existed. That, plus alleged failures to meet warranties as to the supply of water, telephone and electricity services, are added grounds pleaded to justify *rescission* of "*the first agreement*".

19. As to "*the second agreement*", the claimant pleads that she was induced to enter into it by the same misrepresentations as induced her to enter into the first agreement. Her case has been run on the footing that the second agreement was also rescinded by her.

20. As to "*the building agreement*", it is pleaded that it was an implied term that HDL would honor the terms and conditions of the first agreement, and if she had not been induced by HDL to enter the first agreement she would not have entered the building

agreement. (It is also pleaded that she was induced to enter into the building agreement by entering the second agreement, but the building agreement was made more than a year before she entered the second agreement).

21. It is further alleged that HDL repudiated the "*building agreement*" by failing to complete it. Details of the failure to complete are set out in a report dated 23rd September 2009 from **Gomon Mesa** of the firm **Bitil Repair Services**. The report summarizes a site inspection by Mr. Mesa, and reads:-

> *"**Site Inspection Report***
>
> ***Work yet to be completed***
>
> 1. *Roof extension for front entrance area, remove pine timber on roof button and replace with timber supplied from Bali (see plan, photo a/b)*
> 2. *Install flashing and gutter system to building (see photo c/d/e)*
> 3. *Change door swing direction as in plan, hinges on wrong side (see photo f)*
> 4. *Install cupboard for storage in bathroom (see photo f)*
> 5. *Complete wardrobe in bed room (see photo i)*
> 6. *Cut off screw ends extended from mount plates*
> 7. *Cover hole bore in timber for screw, some filled others missing (see photos j/k/l)*
> 8. *Complete painting or varnish, rough finish and clean out writing on glass door from supplier (see photo m)*
> 9. *Fan to be lowered (50 to 100cm) and attach light (see photo n)*
> 10. *Repair bathroom top shelve cut out (see photo o/g)*
> 11. *Remove sand pile clear front of house (see photo p)*
> 12. *Apply sealant to pool surface area (see photo q/r)*
> 13. *Fix problem of pool pump pumping in sand from sea into the swimming pool*
> 14. *Complete all electrical wiring and fit on lights and power outlets as per plan (see photo s/t/u/v/d/e).*
> 15. *Supply electricity to property as required.*
>
> ***Changes to building plan by Builder***
>
> 1. *Shower cubical in place for Bali tiles in bath (not supplied by builder)*
> 2. *Install 2 weather power outlets instead of 2 spot lights*
> 3. *Install wooden framed windows on kitchen window instead of roller shutters*
> 4. *Install verandah in front of kitchen instead of front entrance side*
>
> *Estimated cost to complete work not completed is VT1,297,000"*

22. Based on the failure by HDL to complete the building, the claimant rescinded the building contract.

23. Finally, it is pleaded (in the alternative) that the claimant was induced to enter the second agreement by the "*undue influence*" and "*unconscionable conduct*" of HDL and its servant and agent, namely by Mr Franconeri fraudulently representing to the claimant that the second agreement contained "*similar terms*" to those in the first

agreement, and without negligence on her part, she was unaware that the second agreement contained substantially different terms. At trial this was treated more as a plea of "*non est factum*".

24. In its defence, HDL effectively denied all the allegations of wrong-doing pleaded against it. HDL pleaded that the claimant was aware that the nature of the development had changed from sub-division to strata titling, and that the first agreement was "*mutually abandoned*" in favour of the second agreement which superseded it in its entirety. The defence alleges that the claimant wrongly rescinded "*the second agreement*" and "*the building agreement*" which amounted to repudiation by her of both agreements. HDL counterclaimed for **VT4,577,003** being the balance of monies it alleged was due under the building agreement. Other monetary claims were also made in the pleadings but were abandoned at the end of the trial.

25. The trial extended over 3 days, mostly occupied by the cross examination first of the claimant who was the only witness in her case, and then of Mr Franconeri who was the only witness for HDL. Their evidence in chief was contained in pre-trial sworn statements to which were exhibited documents comprising the three afore mentioned agreements and many other documents and photos.

26. Much of the evidence at trial involved complaints over the items of work listed by Mr Mesa in his report, and descended to one witnesses' word against the other as to the quality of workmanship; the extent to which work was required to complete the house; and whether aspects of the work which the claimant complained about had been done at her direction. The evidence on many of these disputed items provides an unsatisfactory basis on which to resolve them, as is frequently the case in this type of building dispute.

27. Putting aside the allegations about HDL's want of title, I consider the claimant's case faces considerable difficulties.

28. Undoubtedly the claimant saw promotional material describing many enticing features about the Manuro development, but she personally visited the site before she decided to acquire an allotment. She was well aware that the whole site was still natural bush save for a few very basic tracks here and there. Her discussions with HDL's agents informed her that the development plans were expected to take five (5) years to come to fruition. The promotional material was no more than promises of things expected to come in the future. Promises of that kind are not actionable representations, unless the parties seeking to claim under them can establish that the maker of the promises had no reasonable basis for believing that the promises could be fulfilled.

29. **Mr. Franconeri** has given evidence that he believed in 2007 that the development would come to fruition, but acknowledged that in the meantime HDL's finances had deteriorated as early parts of the development had eaten into his company's finances further than expected. By the time of trial there seemed no prospect at all that the recreational and commercial facilities associated with the development would occur within the 5 year time frame or at any time in the foreseeable future, but this does not prove that HDL had no reasonable basis, in 2007, to make the promises which it did.

The evidence fails to address at all whether, in 2007, HDL had prepared detailed financial estimates from income from anticipated subdivision sales and outgoings for the construction of the development's facilities. Absent evidence of this type, the Court is in no position to find there was no reasonable basis for HDL's promises.

30. The complainant's major complaint under the "*first agreement*" that electricity had not been connected faces a formidable difficulty under **Special Condition 12** of the first agreement which provides:-

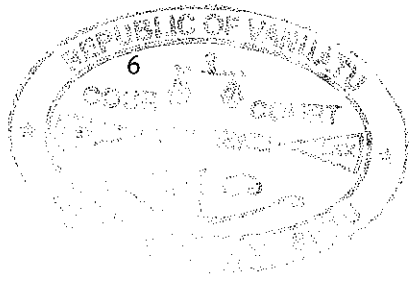
> *"12 – In the event that utilities such as water, electricity, telephone and all road is not completed to the boundary of the land stated herein to a satisfactory standard by the vendor within 2 years from the date of signing this document, then the purchaser, after informing the vendor and giving him sufficient time to execute or to complete the said work mentioned above, may process with the execution or the completion of the work, at the expenses of the vendor, providing that such work is carried out by a refute person or body.(SIC)"*

31. Given **Special Condition 12** (above), I do not consider that the failure of HDL to have electricity connected by September 2009 gave the claimant any right to rescind the contract. It may have given the claimant a right to damages but not the right to assert that HDL had so failed to perform its obligation that it thereby repudiated the agreement. Indeed the evidence is that electricity was provided with a temporary portable generator.

32. The claim that the "*building contract*" was validly rescinded because the house was not completed also faces a similar difficulty.

33. By September 2009, the house was, in a lay sense, practically completed. The items that remained unfinished were not major and were capable of rectification. The items where the dispute related to who instructed what to be done are also relatively minor. The dispute existing between HDL and the claimant in September 2009 is typical of the sorts of defects that have to be sorted out under most building contracts before final certificates are issued at the time of practical completion and at the end of a maintenance period. I do not think the complainant's complaints are sufficiently serious to justify rescission. Damages for breach of contract would have been a sufficient remedy. HDL had taken many steps to rectify the issues raised by the claimant. Sympathies are raised in favour of one side by some of the complaints, and in favour of the other by other complaints.

34. The mutual accusations between the two witnesses the – *"he did, she did"* banter provides no convincing way to resolve many of the concerns identified and, if it were necessary to do so, justice would likely be done by simply off-setting the complaints of one side under the building agreement against the counter complaints of the other, and letting their alleged losses lie where they fall.



35. I do not think it is necessary to undertake a close analysis of these construction issues as I consider the consequences which flow from HDL's inability to convey title under the first agreement must lead to judgment for the claimant under all three agreements.

36. Documents tendered in HDL's case on their face show that on 30th October 2007, the **Eton Land Committee** purporting to act as lessor signed a form of lease for 75 years to HDL for the area to comprise lot 76 of the Manuro subdivision, operative from 31st July 2007. The form of lease bears the lease title 103 reference. HDL also held an undated consent signed by the **Eton Land Committee** for the transfer of lease title 103 to the claimant. In addition HDL produced a completed transfer of lease for title 103 signed by both HDL and the claimant.

37. *When?* the consent and the transfer of lease was signed is not established by direct evidence. The bottom of the second page of the transfer however has a printed provision to date it in "*2007*" and the third page, which contains the parties' signatures, has a provision for the certifying witness to the transferee's signature (and there is no certifying witness) to sign the consent on a date in "*2008*". I think it is probable that these documents were prepared early in 2008.

38. The claimant had personally inspected the land on a visit to Vanuatu between 21 and 25 December 2007. She then orally agreed to purchase allotment 76. She paid a 10% deposit on about 8 January 2008. By email she discussed the meaning of terms in a *proforma* contract of Sale and purchase that had been supplied to her by HDL before she returned to Vanuatu from 5 to 12 March 2008. I find that she signed the first agreement and the transfer of lease title 103 at that time. This then led onto discussions about the construction of a house, the contractual details of which were finally settled when the complainant accepted HDL's quotation on 19 June 2008 when she was next in Vanuatu.

39. At the time of the complainant's second visit to Vanuatu in March, the Minister responsible for land had not consented to the grant of leasehold title 103 to HDL. That consent was given subsequently on 25 March 2008. The evidence, such as it is, shows that at the time that the first agreement was entered into HDL had good reason to anticipate that it would be able to convey title in due course.

40. However **Special Conditions 10** and **11** in the first agreement relevantly provide:-

> *"10. This contract entirely is subject to and conditional upon the vendor at its costs obtaining issue stamping and registration of the new leasehold title No. .... for an area of ..... sqm, such leasehold title to contain rules and covenants of the subdivision relating to all titles shown on the plan, the terms and conditions of which have been provided to and agreed by the purchaser herein and the format as attached to this contract.*
>
> *11. Notwithstanding anything herein before contained and subject to Clause 12 all conditions in the contract must be satisfied within 180 days of signing failing which this contract shall be at an end, and all*

monies paid over shall be refunded in full including interest but provided the parties may by way of written agreement, agree to extend such period for satisfaction of all conditions of this contract for a mutually agreed period of time."

41. The blanks in **Special Condition 10** (above), for the title number and allotment area are of no consequence as the proposed new leasehold title number is evident on the face of the agreement, and the allotment size is identified in a survey plan attached to the form of lease signed by the claimant which I find occurred at the same time as she signed the first agreement.

42. Nevertheless by 8 August 2009 the first agreement by effluxion of time and in terms of **Special Condition 11** (above), was "*at an end*", and HDL was under an obligation to refund "*all monies paid over*" by the claimant.

43. The problem for HDL was that it was, by then, well advanced under the building contract. The claimant was kept in ignorance about this problem. Not only could HDL not rely on the first agreement should any conflict arise with the complainant under the building contract (or otherwise), but during the latter part of 2008, HDL had also abandoned the sub-division proposal and had neither intention nor capacity to convey the title to allotment 76 to the claimant.

44. Moreover during 2008, HDL to its knowledge had become the defendant in a **Supreme Court Civil Action No. 61 of 2008** brought by the Chief and Trustees of the Wallis and Futuna Communities in Vanuatu as registered lessees under leasehold title number **12/0742/002** covering the Manuro development site. The claim sought orders to set aside the transfer of their title as lessees to HDL on the basis that the transfer was forged and otherwise fraudulently obtained. The fact that HDL's title was under challenge of this kind was not revealed to the claimant when she was asked to enter into the second agreement by signing the bundle of papers in HDL's office. The evidence of Mr. Franconeri is to the effect that HDL was pressing on with its strata title plans in disregard of the Supreme Court challenge to its title.

45. There is a dispute in the evidence between the claimant and Mr. Franconeri whether the claimant understood the rights and obligations that would attach to the holder of a strata title interest. The claimant said she did not understand it, and was simply told by Mr. Franconeri that she should sign a new contract which was to the same effect as the first agreement "*to enable her to get her title sooner*". Mr. Franconeri said that there had been discussion about a proposed change to a strata title development sometime earlier, but although there may have been earlier mention of the need to sign a new contract, I am satisfied that the claimant was not given any meaningful information in advance of 11th August 2009 about the rights and obligations attaching to a strata plan development.

46. The meeting the claimant had with Mr. Franconeri on 11th August 2009 was by all accounts very short. Mr. Franconeri agrees that the pages that had to be signed on the agreement for Sale and Purchase of the strata title were already open when the

meeting started, so that the claimant could sign where indicated by prominent arrows. There was discussion whether HDL had a copy of the agreement in French. The claimant was told that the strata title law was "*English law*" and the documents were in English. She said: "*that's fine*" and signed. Mr. Franconeri says that he told the claimant about the benefits of the strata title scheme, but in the time available, at best, the discussion on that topic must have been very minimal.

47. I am satisfied that the claimant was not given any meaningful information about the legal significance of a strata title, and was justified on the basis of the discussion that occurred, in her belief that there was no significant difference between the first agreement and the second agreement, and that the purpose of signing the second agreement was to enable her to get her title sooner. By this time she was hopeful of moving into the house in the next few weeks and was plainly anxious to get her title.

48. I find that at the time when the claimant signed the second agreement critical facts had not been made known to her. HDL had not revealed to her **(1)** that the first agreement had come to an end by force of its own terms and that HDL was obliged by the "*special condition*" to refund her money; **(2)** that this obligation could be overcome by getting the claimant to enter into a new agreement; **(3)** HDL had no prospect or intention of conveying her title under allotment 76 in any event; and **(4)** that its own title to the site was under challenge in the Supreme Court.

49. Indeed HDL had strong motivation to obtain the claimant's signature to the second agreement, and strong motivation not to reveal the critically damaging facts in its knowledge as that may have caused the claimant to seek more information about the second agreement, and to reconsider her position.

50. By this time too Mr. Franconeri also considered that his good relationship with the claimant had broken down, and the complaints about the house were mounting. HDL was exploiting its superior knowledge to the considerable disadvantage of the claimant.

51. Be that as it may the claimant took away copies of the second agreement when she left HDL's office. She later set about trying to translate it into French. It was only then that she realized that it was a very different agreement to the first agreement.

52. It is on these circumstances that counsel for the claimant contends that she was induced to enter into the second agreement by "*unconscionable conduct*" on the part of HDL. For reasons which follow I do not think it is necessary to decide that contention.

53. I consider that the "*second agreement*", though it had been signed by both parties, is a meaningless document. It is not capable of defining an enforceable contractual agreement between the two parties. HDL points to the "*Sunset Date*" in the Reference Table to the agreement and argues that the provision allows HDL to make good its title, and inferentially, all other shortcomings in the purported contract, within 12 months from the date when the second agreement was signed: ***see***: in this regard, **Clause 3.2** & **2.4** and the definition of "***Conditions***".

54. However, the "*Sunset Date*" provision cannot save the second agreement which is fundamentally meaningless as critical parts of the intended agreement are not contained in it. In particular, there is no draft Strata Plan (which could help identify the subject matter of the agreement) and there is no Approved Lease, or draft By-laws, or draft Restrictive Agreement which could tell the claimant what she was agreeing to under the strata title.

55. I do not think there is any need for the claimant to rely on "*unconscionable conduct*" or a plea of "*non est factum*". There simply was no enforceable second agreement entered into.

56. I agree with counsel for the claimant that the consideration for the payment she made under the first contract wholly failed. HDL was never in a position to convey title to her. I consider she lawfully rescinded the first agreement if it had not already come to an end by force of **Special Condition 11**. This position cannot be saved by the fact that HDL had undertaken the construction of the house on the allotment. HDL did this with full knowledge that its title to the allotment remained to be perfected, and plainly, if it was not, the claimant could not get title to the house.

57. As the first agreement is at an end, the claimant's interest in the house is lost to her. The house remains a fixture on the land and belongs to whoever now holds the title. If it is now HDL, then HDL will have the benefit of the land including the house, and any profit it may receive on the future sale of the allotment with its improvements will belong to HDL. I consider this result must follow whether or not the "*building agreement*" was otherwise validly rescinded by the claimant for the reasons she asserts. All the controversy over the alleged building defects is, in the end, beside the point.

58. The claimant is entitled to recover the monies paid by her under the "*first agreement*" and in respect of the associated "*building agreement*". She is also entitled to recover monies outlaid by her, on site works and improvements including the swimming pool and a substantial masonry fence as these go with the allotment.

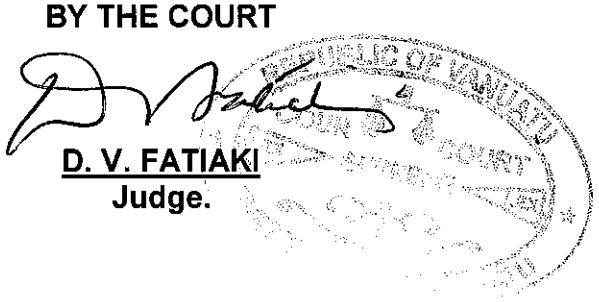
59. However, as the "*first agreement*" has come to an end, the claimant is not entitled to damages in addition for its breach. The claim for rental payments must therefore fail. However these were not pressed at the end of the trial and neither were claims for "*inconvenience*" and "*stress*".

60. For the foregoing reasons I consider the claimant is entitled to recover **VT7,280,000** paid under the "*first agreement*" and **VT15,570,605** paid under the "*building agreement*" and for land improvements, making a total of **VT22,850,650** The quantification of these amounts was not disputed at trial. The claimant is also entitled to recover interest on that sum which I fix at 5% per annum simple interest calculated from **1st October 2009** (being the approximate date on which the parties finally ended their relationship).

61. HDL must pay the claimant's costs of these proceedings to be taxed on the standard basis if not agreed.

Dated at Port Vila, this 13th day of June 2014

BY THE COURT



D. V. FATIAKI
Judge.