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

Civil Case No. 56 of 2009

**BETWEEN: JOHN CORRICK and SHARON CORRICK**
First Claimants

**AND: SOUTH PACIFIC STEEL LIMITED**
Second Claimant

**AND: JOSHUA HIROSHI KALSAKAU**
Defendant

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

***Counsels:*** *Mr. N. Morrison for the Claimants*
*Mr. E. Nalyal for the Defendant*

***Date of Judgment:*** *1 June 2012*

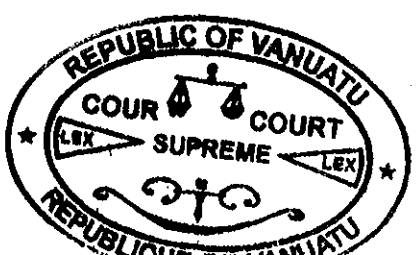
# JUDGMENT

1. This case concerns a claim filed on **13 May 2009** for the reimbursement of the purchase price of a land deal between the parties that had fallen through, together with damages, interest and costs.

2. The land deal which was finalized in **August 2006** concerned the purchase for the sum of **VT10 million** of 2 blocks of land comprised in Lease Title Nos. **12/0633/071** and **12/0633/072** situated in the Black Sands Area with access onto Mele road. The claimants had planned to establish on the site, a business manufacturing surf boards for the Australian and New Zealand markets as well as a storage business.

3. The deal fell through when the claimants lodged the necessary transfer documents with the Director of Lands and discovered that they could not be registered because the defendant's title was being challenged in court proceedings and cautions had been placed on the titles preventing the registration of any dealings with the lease titles. The claimants immediately sought the refund of the purchase price but were unsuccessful.

4. On or about **September 2008** the defendant without refunding the purchase price to the claimants, on-sold the lease titles to a third party thereby divesting himself of the land and rendering himself incapable of completing the earlier sale of the land to the claimants.



5. In his defence of **18 June 2009**, the defendant pleaded inter alia that "*... he has informed the claimants through his lawyer that the VT10 million can be reimbursed at any time and has offered reimbursement to the claimants but they have refused to accept VT10 million the defendant is willing to pay back to the claimants.*"

6. After an unsuccessful attempt at mediation in February 2010, the Court ordered the defendant in accordance with the above offer:

*"to pay VT10 million to the claimants' counsel's trust account on or before 3pm on Friday 9 April 2010 .... in partial settlement of the claimants' claim and the parties are encouraged to seriously pursue without prejudice negotiations to settle finally all outstanding issues between them relating to costs, interest and damages for lost opportunity as applicable".*

The defendant paid the sum as ordered and offered a further VT2 million to settle the outstanding matters but the claimants sought VT18 million by way of a formal offer under **Rule 9.7** of the **Civil Procedure Rules**.

7. The above-mentioned settlement figure of VT18 million which includes the VT10 million purchase price that had been refunded to the claimants, was advanced "*on the basis of further provable debts owed by* (the defendant) *including:*

*"(i) Stamping and Registration. Costs ...lost on the failed purchase;*
*(ii) Travel costs ... wasted for aborted mediation;*
*(iii) Interest on monies paid until their repayment or recovery date;*
*(iv) Storage costs ... incurred for products ... (the claimants) had purchased;*"

The covering letter dated **27 October 2010** also asserted: *"... your client has subsequently sold the relevant portions of land at considerable profit. We believe this is a clear measure of the losses our client has suffered and your client is liable to account to our clients for those profits".*

8. On **13 May 2011** the claim was amended to include an additional claim for *"VT6 million being the premium amount received by the defendant on sale (of the 2 blocks) to third parties".*

9. By his amended defence of **17 June 2011** the defendant denied the claim for "*unjust enrichment*" on the basis that the defendant *".... as owner, was entitled to sell the leases as the joint venture with the claimants had not eventuated, and he had reimbursed the claimants the purchase price for the leases*".

10. Despite the Court's best efforts the parties were unable to agree on a figure for the outstanding claims and the matter went to trial on the following heads of relief which are conveniently summarized in a Memorandum of claim dated **20 June 2011** (excluding the refunded VT10 million purchase price):

| | **VT** |
|---|---|
| • Stamping and Registration of Leases | **700,000** |

| | |
|---|---|
| • Interest on the (Refunded purchase price) from 1 August 2006 to 7 April 2010 at 5% per annum | **1,841,000** |
| • Unjust enrichment claim | **6,000,000** |
| • Habulot storage claim (AU$6,209.60) | **629,000** |
| • Corrick storage claim (AU$793.16) | **79,300** |
| | **VT9,249,300** |

11. At the trial the claimants called:

- **John Robertson Corrick** who produced a sworn statement date 16 May 2011; and

- **Paul Henry Harbulot** a principal of the second claimant company who produced a sworn statement also dated 16 May 2011.

The defendant also testified and produced a sworn statement dated 17 June 2011

12. The defendant's case was that he had entered into a joint venture business with the claimants for which he was to receive a 40% share. His contribution to the joint venture was the equivalent of VT8 million being the discount he gave on the purchase price for the 2 blocks of land which were valued at VT9 million each.

13. As for the inability of the claimants to register the leases, the defendant deposed that he had not foreseen "*... that there would be any problem with giving good title*" and, it was only after the agreement (to sell), that "*... (he) discovered that some other persons were disputing* (his) *custom ownership of the land that he had agreed to sell* (to the claimants)."

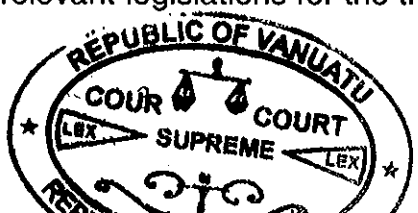
14. The claimants on the other hand vehemently deny ever agreeing to a joint venture with the defendant. The reduction in the purchase price was agreed by the defendant on the basis that the claimants bought 2 lots and settled in cash which they did within 2 days of receiving the signed transfers of the leases.

15. Although the defendant has refunded the purchase price, having seen and heard the parties in cross-examination, I prefer and accept the evidence of the claimants. In so far as it may be necessary to do so, I find that there was no joint venture agreement between the parties and I disbelieve the defendant's denials as to his knowledge about the earlier court case involving the subject lands or the cautions registered on them.

16. I turn next to deal with the claimants' outstanding heads of claim:

**(1) Stamping and Registration Fees**

I am satisfied that the claimants paid **VT700,000** for stamp duty and registration fees as required under the relevant legislations for the transfer to them of the two



leasehold titles and which are now wasted payments as a direct result of the defendant's breach of contract.

**(2) Interest from 1 August 2006 to 7 April 2010**

I am also satisfied in all the circumstances of this case that the claimants are entitled to be compensated for the time that the defendant wrongfully withheld the refund of the purchase price of **VT10 million**.

17. In this regard the Court of Appeal said in **Barrett and Sinclair v. McCormack** [1995] VUCA 11:

> *"Courts exercising jurisdiction in equity have regularly awarded simple interest as ancillary relief to equitable remedies, recognizing that without an award of interest a party that has been kept out of his money for a time will not be adequately compensated unless interest is awarded ...*
>
> *Whether the interest awarded should be simple or compound interest depends on whether the wrongdoer obtained and retained money thereby gaining a benefit from it ...."*

And then in words that could apply equally to the claimants in this case, the Court said:

> *"Even if (the respondent) were foolish to act on the representations (of the appellant) that is no ground for denying him interest, ... without simple interest the compensation effected by the judgment is manifestly incomplete".*

18. Although claimant's counsel submits that the appropriate period should commence from the date of payment of the purchase price on or about 1 August 2006, I prefer **5 September 2008** which is the date when the defendant sold the leases to a third party thereby disabling himself from completing the sale to the claimants.

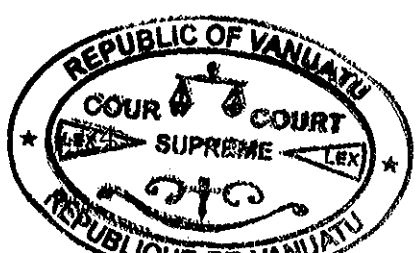
19. As for the rate of interest I consider that it should be more closely aligned to the commercial rate of borrowing which I fix at **10% per annum**.

20. Under this head therefore, I award the claimants the sum of:
VT(10 million x 10% x 19/12) = **VT1,583,333**.

**(3) Unjust Enrichment**

21. The claimants' submission in this regard is as follows:

> *"The elements of required restitution for unjust enrichment have been approved in Bohu v. Vanuatu Maritime Authority [2003] VUSC 137. They are made out by the facts herein. Namely:*



(a) *The defendant received an element of benefit by deceiving the claimants and in failing to make good the transfer he benefited on their resale by VT6 million;*

(b) *There is an element which provides the claimants with the opportunity to make the claim. The benefit was at the claimants' expense.*

(c) *There is an element of injustice. It is submitted that for the defendant to retain the benefit he has received consequent upon his own deceit and dishonesty would be unfair, unconscionable or inequitable."*

(my underlining)

22. Defence counsel did not provide the Court with a written closing submission and presumably, is content to rely on his amended defence that: "*as owner, he was entitled to sell the leases as the joint venture with the claimants had not eventuated, and he had reimbursed the purchase price for the leases*".

23. In this regard I have already found: "*that there was no joint venture agreement between the parties*" (**para 14 above**) and further, "*on or about September 2008 the defendant without refunding the purchase price to the claimants, on-sold the lease titles to a third party ...*" (**para 4 above**). Plainly there is no merit in the defendant's pleaded defence to the claim for "*unjust enrichment*".

24. Nevertheless the claimant still bears the burden of establishing the 3 elements of the claim. As the Samoan Court of Appeal said in **Stanley v. Vito** [2010] WSCA 2:

> "*Unjust enrichment does not turn on wrong doing on the recipient's part. The three ingredients of the cause of action for unjust enrichment are (i) a benefit enjoyed by the recipient; (ii) a corresponding deprivation on the part of the claimant and (iii) absence of any juristic reason for the recipient to retain the benefit*".

**(i) A Benefit enjoyed by the Recipient**

25. In this case the "*benefit*" that the claimants say the defendant received was the monetary "*profit*" of VT6 million that the defendant made in "*on-selling*" the land to a third party.

**(ii) A Corresponding Deprivation on the part of the claimants**

26. This ingredient raises the more difficult question of whether the benefit gained by the defendant was "*at the expense of the claimants*". I say "*more difficult*" because the claimants pleaded in their original claim to recover the VT10 million purchase price (**at para 12**):

> "*As soon as practical after they discovered the* (defendant's) *representations were untrue the claimants demanded reimbursement of their money paid together with reasonable expenses which was refused by the defendant*".

I note in passing that there is no claim for specific performance or an averment that the defendant was ever given any notice making time of the essence or requiring him to complete the transfer of the land by a given date. Furthermore, there is no suggestion that the claimants had a speculative intention or purpose for the land other than to acquire it for the operation of a planned surfboard manufacturing business and a storage business.

27. No particular dates are recorded in the above paragraph of the claim but **Mr. Harbulot** deposed in his sworn statement to demanding a refund of the purchase price as early as October 2006 and, again, in April 2007 when he located the defendant on **Ifira island**. Added to those demands are the lodgment of an official police complaint against the defendant in August 2006 and the rejection of the defendant's offer of a replacement block in October 2006.

28. In **Vitol v. Norelf Ltd.** [1996] AC800 **Lord Steyn** discussed the requirements of an effective acceptance of a repudiatory breach in the following terms:

> *"The act of acceptance of a repudiation required no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end ..."*

What then is the effect of the claimants' actions and demands for reimbursement of the VT10 million purchase price?

29. In my view such actions and demands evinces a clear intention on the claimants' part to cancel and/or terminate the sale and purchase agreement entered with the defendant. I am driven to the conclusion that the claimants on discovering the several impediments to the registration of their transfers, formed the firm view there had been a total failure of consideration even fraud on the defendant's part in selling the land to them and the claimants unequivocally determined to end the contract, there and then, and to demand the immediate refund of the purchase price.

30. The correct legal position is no better explained than by **Lord Wilberforce** in **Johnson v. Agnew** [1980] AC367 when his lordship stated the following "*uncontroversial propositions of law*" at (**p. 392**):

> *"First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance (similar remedies are of course available to purchasers against vendors). This is simply the ordinary law of contract applied to contracts capable of specific performance.*

.....

*Thirdly, if the ... (purchaser) treats the ... (vendor) as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact, that the ... (vendor) having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance*".

(my underlining)

31. I am mindful that the claimants could have obtained the grant of an injunction to restrain the defendant from selling or transferring the leases if they truly intended to continue with the sale and purchase agreement and desired to preserve the leases until such time that the signed transfers could be registered. The fact that they did not pursue such a course speaks loudly of their singular determination to end the contract and recover the purchase price.

32. I am also conscious that the claimants primarily seek the refund of the purchase price paid to the defendant and not just damages for breach of contract. Such a claim for restitutory relief is only available where there has been a total failure of consideration on the defendant's part. This was obviously the view held by the claimants when they first demanded the refund of the purchase price and continued until the issuance of the proceedings.

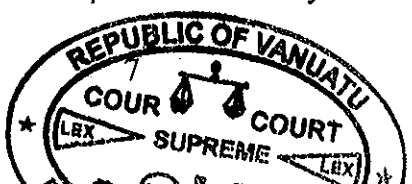
33. The learned author's of **Goff and Jones**: **The Law of Restitution** (7th edn) in recognizing this legal principle observed (**at para 20 – 007**):

> "*The breach of contract may be so fundamental that it deprives (the innocent party) ... of substantially the whole benefit which it was the intention of the parties ... that he should obtain ... (from the contract). The innocent party has then an election. He may affirm the contract, or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for recovery of the money provided that the consideration for the payment has wholly failed: if the consideration has partially failed, his only action is for damages.*"
>
> (my underlining)

Can it therefore be said that the on-selling of the lease titles in September 2008 (many months after the demands were made) was done "*at the expense of the claimants*" who had irrevocably elected to end the agreement?

34. The clear answer that I have arrived at on the basis of the evidence which is all "*one-way*", is: No the claimants' sale of the lease titles was not done or achieved "*at the expense of the claimants*".

35. I am satisfied that what the claimants lost as a result of the defendant's breach was the opportunity to acquire registered transfers of the leases and not the VT6 million "*profit*" that the defendant allegedly earned from on-selling the lease titles to a third party. I use the word "*profit*" in a very loose sense and solely as a



means of highlighting the difference in the purchase prices of the claimants and the third party. Needless to say the defendant could have retained the leases instead of selling them and there is some evidence that the two lease titles were originally valued for more than the purchase price obtained by the defendant on-selling them to a third party.

36. The claimants having failed to establish this second ingredient there is no need for the Court to consider the final ingredient. The amended cause of action for unjust enrichment is accordingly dismissed.

**(4) The Storage charges**

37. I am satisfied on a consideration of the evidence that the storage charges that the claimants incurred in storing plant and equipment that they had acquired for the purpose of establishing their planned businesses on the land in Port Vila and which included the hire and storage of a 40 foot container and the "*purchase of a factory in Australia to send to Vanuatu*", were incurred and was within the knowledge and reasonable contemplation of the parties at the time of entering into the land deal and which has been wasted as a result of the defendant's breach.

38. That such wasted expenditure is recoverable is clear from the following passage in **Chitty on Contracts** (Vol 1) 29th edn (**at para 26 – 065**):

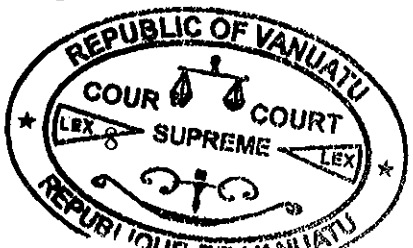
> "*Before the breach the claimant may incur expenditure in reliance on the expected performance of the contract by the defendant ...; this is expenditure from which he expected to benefit, as part of the activity in which he was engaged, after he had received the benefit of the defendant's performance, but which the breach now renders futile ... the claimant is entitled to damages to reimburse him for this expenditure, provided it was within the reasonable contemplation of the parties that it was not unlikely that the claimant would incur it in reliance on the contract, and that it would be wasted if the defendant committed the breach in question.*"

39. Under this head I award:
(1) **John and Sharon Corrick – VT79,300**;
(2) **South Pacific Steel Ltd. – VT692,000**.
as claimed.

**(5) Interest on Judgment**

40. The claimants seek interest on any judgment sum awarded to them at the rate of **5% per annum** from the date of filing the claim (13 May 2009) to the date of payment.

41. In **Air Vanuatu (Operations) Limited v. Molloy** [2004] VUCA 17 the Court of Appeal in allowing interest although there was no evidence called or submissions made on the point said:



*"In our judgment in the absence of evidence, the court should only award what would be the amount that a person could receive from a normal bank investment during the relevant period.* ***Richard Lo trading as LCM v. Sagan*** *[2003] VUCA 16 ... We are satisfied ... the appropriate basic interest rate of 5% is all that can be justified. Interest should be compensatory, not punitive".*

42. I can see no valid reason not to allow simple interest under this head of claim but to avoid any possible compounding or punitive effect, I exclude the sum of VT1,583,333 ordered earlier in respect of the refunded purchase price.

## CONCLUSION

43. The claim succeeds and I award the claimants the following sums:

| | VT |
|---|---|
| • Stamping and Registration Fees | **700,000** |
| • Storage charges – John Corrick | **79,300** |
| South Pacific Steel | **692,000** |
| | **VT1,471,300** |

44. The above sums are to carry interest at the rate of **5% per annum** from the filing of the claim on **13 May 2009** until paid in full.

45. Finally I confirm the award of **VT1,583,333** and order costs in favour of the claimants to be taxed if not agreed.

**DATED at Port Vila, this 1st day of June, 2012.**

**BY THE COURT**

**D. V. FATIAKI**
**Judge.**