IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE No.20 OF 2008

BETWEEN: WHITESANDS RESORT LIMITED
First Appellant

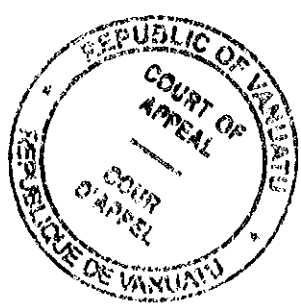
AND: DOMINIQUE DINH
Second Appellant

AND: MARILYN MEYER, BUDI &DWIPA WINARTO, STEVEN KORMAS, MARY ANNE WALKLEY & ZARIFIS ZARIFIPOLOS, LSANDROS & NIKI KARANICOLOS, MERTHI POEDIJONE
Respondents

Coram: *Chief Justice Vincent Lunabek*
Justice John von Doussa
Justice Oliver Saksak
Justice Ronald Young

Counsel: *Mr Robert Sugden for the Appellants*
Mr Juris Ozols for the Respondents

Date of hearing: *27th November 2008*
Date of Judgment: *4th December 2008*



JUDGMENT

There are two appeals brought by leave against separate interlocutory Orders made by Justice Tuohy. The first order refused to strike out the claim of the claimants (the respondents to this appeal). The second Order refused to give leave to the appellants to join Michael Theophilos as a Third Party to the proceedings.

In the principal proceedings the claimants each sought to recover monies paid by them to the first appellant (Whitesands) as deposits or otherwise on account of the anticipated purchase price of one or more sub-leases of allotments of land in a

seaside development being promoted by Whitesands. The second respondent is the Chairman of Whitesands.

Monies were paid by the claimants as provided for in documents entitled "Agreement to Sublease" (the Agreement) proffered to them in Australia by the sales representative of Whitesands, Michael Theophilos.

In the case of the first respondent, Marilyn Meyer, there is a dispute between the parties over whether the Agreement documents she signed in respect of three allotments were ever accepted by Whitesands. If they were not, it is common ground that no contractual obligations have arisen, and she is entitled to recover the considerable monies (some AU$286,000.00) which she has paid to Whitesands. Alternatively, if the Agreements were accepted, Whitesands asserts that these Agreements are still on foot, and seeks to hold Ms Meyer to them. Ms Meyer, in an alternative claim, says for her part that the Agreements have been brought to an end by her acceptance of the repudiation of the Agreements by Whitesands. A consideration of these disputed issues does not arise in this appeal. Her claim raises issues which differ from the claims of the other claimants, and Whitesands acknowledges that its strike out application was not intended to apply to her claim. The issues in this appeal, apart from those concerning the joinder of Michael Theophilos, relate only to the other claimants.

In the case of the other claimants an Agreement was entered into by Whitesands with each of them in late 2003. In each Agreement the party contracting with Whitesands is described as the "Member".

The Agreements contain a number of conditions precedent "to the Lessor and the Member's obligation to complete this Agreement", covering such matters as the approval of sub-leases by the Minister of Lands, completion of the Lessor's title and the procurement of electricity, water and road access to each allotment.

Whilst the Agreements variously anticipated that the conditions precedent would be fully completed by late 2004, the conditions precedent had not been satisfied by the end of 2005.

The Agreements, in clause 5 , provided that as soon as practicable after satisfaction of all the conditions precedent, the Lessor would submit to the Member copies of the sublease for the relevant allotment for execution, and would take other steps to complete the Agreement. The Agreements made provision for the giving of a Notice to Complete as follows:

"3.4 ***Notice To Complete***

3.4.1 If Completion does not take place within the period specified in clause 5, a party can serve a notice to complete making time of the essence of this Agreement if that party is otherwise entitled to do so.

3.4.2 The Member and the Lessor acknowledge that a period of 14 days following the date of the service of a notice to complete will be deemed to be a reasonable time for Completion under that notice."

The claimants, other than Ms Meyer (who at the time was represented by different solicitors) on various dates between 4th October 2005 and 19th December 2005 gave Notices to Complete to Whitesands which recited Clauses 3.4.1 and 3.4.2. Completion did not follow the service of the notices, and many of the conditions precedent remained unsatisfied. However by letter dated 6 January 2006 Whitesands, after receiving the notices, wrote to the claimants' solicitors in the following terms:

"Whitesands
Vanuatu

P & B Commercial Lawyers
Attention: Lindsay Kotzman

6th January 2006

Dear Lindsay,

Re: WHITESANDS RESORT DEVELOPMENT

We refer to our recent discussion regarding land sales at the Whitesands Resort Development and would like to present the following to your clients:

(1) Full funding for the Whitesands Resort Development is now expected be finalised by the end of February 2006 and therefore this will enable the Golf facilities together with all infrastructure pertaining to their residential lots to be completed by December 2006.

(2) Your clients to consider their option at this time as there seems to be some confusion on representations made to them in the past by the then Whitesands Sales Representative as we would like to see them maximise their investment potential by remaining in the program.

(3) At the time of the Golf facilities being completed, at which time we expect to have significantly more sales, should your existing clients for who you have contacted us about then wish to withdraw their participation, WSR management will re-purchase their lots plus 20% premium on the deposit funds they had paid.

(4) That all future queries and representations on behalf of WSR to come from direct contact with our sales office or formal representatives.

The Chairman would like to express his apologies for any confusion that may have occurred between various parties and would like to personally honour this offer to your clients as he sees them as true & loyal supporters of such a magnificent project being undertaken in Vanuatu.

Please do not hesitate to contact me or the WSR sales personal with any further queries.

Yours sincerely,

D. Dinh
Chairman"

The solicitors acting for the claimants (other than Ms Meyer) then wrote to Whitesands advising that the claimants for whom they acted accepted Whitesands repudiation of their respective Agreements, and demanded repayment of the monies which the claimants had paid.

Relevantly, Clause 13 of the Agreements provided:

"13. ***RESCISSION OF CONTRACT***

13.1 ***Meaning of Rescission***

If this Agreement is rescinded (as opposed to terminated) the rescission will be deemed to be rescission from the beginning, and unless the parties otherwise agree:

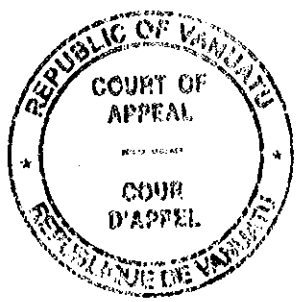
13.1.1 the deposit and all other money paid by the Member under this Agreement will be refunded immediately to the Member; and

13.1.2 neither party will be liable to pay the other any sum for damages, costs or expenses."

Communications then followed between the claimants' solicitor and officers of Whitesands. In a letter dated 17 January 2006 to Whitesands, the solicitors wrote:

"17 January 2006

Dominique Dinh
Whitesands Resort Ltd



Dear Sir,

Lot 15, Whitesands Resort Ltd to Winarto and Winarto
Lot 16, Whitesands Resort Ltd to Kormas
Lots 20 & 35, Whitesands Resort Ltd to Zarifopoulos and Walkley
Lot 27, Whitesands Resort Ltd to Karanicolos and Karanicolos
Lot 49, Whitesands Resort Ltd to Poedijono

We refer to our conversation with Nick Atherinos, who telephoned us on behalf of Whitesands Resort Ltd ("Whitesands") on 12 January 2006.

We understand from this conversation that Ridgway Blake no longer act for Whitesands, and that a Vanuatu firm (possibly called Hudson &Conway) have been instructed to contact us early this week.

We also confirm from this conversation that you have confirmed to Atherinos that both Whitesands and Dominique Dinh undertake to pay all of our clients' deposit monies plus a further amount of 20% on top of the deposit monies, to be received at our office on or before the last day of February 2006. Please confirm the details of this offer to us by return so that we may seek our clients' instructions on it.

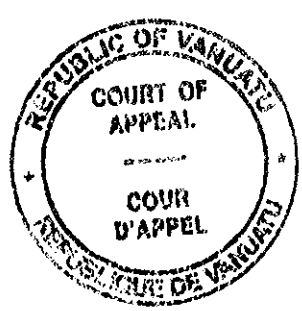
Please also provide the details of your solicitors in Vanuatu, and whether Voitin & Voitin still acts for Whitesands in Australia.

This letter is served without prejudice to our clients' rights, all of which are expressly reserved. In particular we reiterate the contents or our facsimile to you of 11 January 2006 and advice that we have instructions to issue proceedings without further notice.

Please contact the writer immediately with regard to the above.

Yours faithfully
PROPERTY & BUSINESS COMMERCIAL LAWYERS
JAMES GRAHAM"

Whitesands replied by letter dated 27 January 2006. Although the letter is said to be in response to one dated 18 January 2006 from the Solicitors, it is plainly written in response to the above letter dated 17 January 2006. Whitesands said:



"Vila, 27th January 2006

Attention: James Graham
P & B Property Lawyers

Dear Sir,

I refer to your letter dated 18th January 2006 and advise as follows:

1) Ridgway Blake have not been our lawyers for more than 2 years.

2) *Your clients deposit funds will be reimbursed by end of February plus contract interest, not 20%. This percentage was on offer if the clients re-considered their options of remaining in the project up to December 2006 when Golf Course, Infrastructure, Club House will be completed and a this time should they wish to pull out, W.S.R. will refund them deposit monies plus 20% interest.*

I await your advise.

D. DINH
C.E.O.
Whitesands Resort Limited"

No refund was made to the claimants, and on 31st March 2006 proceedings were commenced in the Supreme Court of the Republic of Vanuatu to recover the payments which the claimants had made to Whitesands.

To this point the legal issues arising from the events which had happened look straight forward. However, matters became anything but clear when a defence and counterclaim was filed by Whitesands and Mr Dinh in June 2006. The defence asserted that the Notices to Complete were not authorised by the terms of the Agreement, and that the purported rescission of the Agreement constituted a wrongful repudiation by the claimants. Whitesands by its counterclaim sought a declaration that the Agreements (other than in the case of Ms Meyer) had been terminated by the claimants' wrongful repudiation, and Whitesands was entitled to retain all monies paid to it.

Whitesands asserted that the Notices were not authorised by the terms of clause 3 as the conditions precedent had not been satisfied, and until they were satisfied Whitesands was under no obligation under Clause 5 to submit a sublease for execution.

The defence and counterclaim led the claimants to redraw what had been a straight forward statement of claim, and to replace it with a very long and complex set of pleadings. The amended pleadings raised multiple grounds said to justify the rescission in or about January 2006.

Whitesands, arguing that in substance the claimant's claim for rescission and refund of monies dependent wholly and solely on unsupportable notices to complete, brought an application to strike out the claims. The application was in effect a claim for summary dismissal of the claim and summary judgment on the counterclaim, although it was not expressed in quite such clear terms.

The learned primary Judge refused the Orders sought. Whilst His Lordship noted the correspondence from Whitesands in January 2006 and observed that at no time did Whitesands overtly challenge the claimant's stand that they were entitled to rescind the Agreements, he passed over the significance of the events of January 2006. He considered whether there were other grounds for the claimants to dispute Whitesands' assertion that the claimants had abandoned their Agreements so as to amount to a repudiation. His Lordship concluded this was an open question in law, and, further there were the factual issues that needed to be resolved at trial ahead of the legal issues.

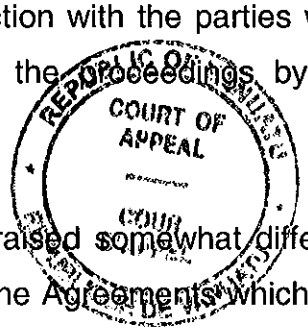
In a separate ruling His Lordship refused to join Michael Theophilos as a Third Party. The primary relief sought against him in the proposed Third Party Notice was an order to deliver up documents which Whitesands claimed were necessary evidence it required for the defence of the claim. His Lordship considered that this remedy was not in the nature of a claim for indemnity or contribution in respect of any claim made by the claimants, and moreover the application was brought late and would unduly delay the claimants' proceedings.

When the appeal came on for hearing, this Court took Counsel for Whitesands to the January 2006 communications between the claimants' solicitors and Whitesands. Counsel was invited to address the Court on why the Court should not find that the position adopted by Whitesands constituted unequivocal acceptance of the rescission of the Agreements which effectively brought the contractual relationship of the parties to an end, subject only to Whitesands' obligation to repay the monies it had received from the claimants pursuant to Clause 13 of the Agreement. Counsel was unable to offer a plausible reason – in our view because in law there is not one.

The position of the parties was made clear in the communications and correspondence in January 2006, and the claimants then put the matter in the hands of the Court by the issue of proceedings on 31st March 2006. It was then for the Court to determine the rights and obligations of the parties as at that date. That situation, whatever it was, could not be changed by the unilateral barrage of correspondence and assertions which followed from Whitesands' solicitors in the months after the claimants issued their proceedings.

In our opinion there is no merit in the allegations made by the appellants in their defence and in their counterclaim. The primary Judge identified reasons why Whitesands' arguments that the claimants had wrongfully abandoned the Agreements relying on the Notices to Complete was attended by both factual and legal doubts. However, we consider Whitesands claim and defence must fail at inception as Whitesands' arguments were precluded by its acceptance, in January 2006, of the claimants' rescission of the Agreements. It is not to the point that some months later its solicitors sought to place a different construction on the letters which effected rescission, particularly as the new construction conveniently overlooks the stance taken by Whitesands in January 2006. In our opinion the application by Whitesands to strike out the claimants' claim, and in effect to obtain judgment for the appellants on both the claim and counterclaim, was misconceived and rightly dismissed, although for reasons which differ from those of the primary judge.

The matter must be returned to a Judge of the Supreme Court. It seems likely in light of the reasons of this Court that the claimants (other than Ms Meyer) will seek summary judgment in their favour on both their claims and the counterclaim. It will be for the Supreme Court to work out in conjunction with the parties what consequential orders should now follow to conclude the proceedings by the claimants (other than Ms Meyer).



The parties are agreed that the claims of Ms. Meyer raised somewhat different issues, including whether there was an acceptance of the Agreements which she signed and apparently gave to Michael Theophilos as offers. When Whitesands asserted that her offers had been accepted, without prejudice to her position she then gave Notices to Complete and when completion did not happen, she sought

to rescind the Agreements. In Ms Meyer's case it is not apparent whether there were communications with Whitesands similar to those which occurred with the other claimants in January 2006. These are factual issues which will have to be determined at the trial if the parties cannot reach agreement over their differences.

The appeal against the refusal to grant leave to issue a Third Party Notice against Michael Theophilos can be shortly dealt with. The remedy sought by the notice would have not achieved Whitesands' aim. Any order made for the delivery up of the documents on the Third Party Notice would follow the trial, and would not produce a result that could be used in the trial itself. Other processes to obtain the documents are obviously more appropriate. When the Court suggested the possibility of proceedings in Australia seeking an urgent remedy of the kind sought, we were informed that proceedings had already been commenced by Whitesands against Michael Theophilos in Australia. The Australian proceedings should be the procedural vehicle to obtain whatever remedy Whitesands now seeks against Michael Theophilos. The proceedings by Ms Meyer should not be complicated by Third Party proceedings against him in Vanuatu.

For these reasons, the appeal must be dismissed. The appellant must pay the respondents' costs of the appeal and costs be agreed if not determined.

DATED at Port-Vila this 4th day of December 2008

BY THE COURT

.....
Vincent LUNABEK CJ

.....
John von DOUSSA J

.....
Oliver SAKSAK J

.....
Ronald YOUNG J