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

CIVIL CASE No.125 OF 2009

BETWEEN: FRANCESCA GRILLO
Claimant

AND: JORG MICHAEL SCHWARTZE
Defendant

Coram: *Justice N. R. DAWSON*

Date of Hearing: *30th and 31st August,, 2010*

Date of Decision: *17th December, 2010*

Counsel: *Mr. J. Malcolm for the Claimant*
Mr. G. Blake for the Defendant

JUDGMENT

1. This claim concerns the division of property after the conclusion of a de facto relationship between the parties.

2. The parties met in February, 2005 and commenced co-habiting in April, 2005. The evidence of both parties indicated it was a relationship they were both committed to and it lasted for approximately four years. No agreement for the division of property should the relationship fail was entered into by the parties.

3. The Claimant originally came from Italy where she was a lawyer. She moved to Australia in 1997 with her then partner, an Australian citizen and property developer. From the end of that relationship in the year 2000, her only formal employment was waitressing. She also assisted other property developers and was rewarded on an ad hoc basis. She also became

qualified as a real estate agent. At the time she met the Defendant she was working in unpaid employment in a legal office while studying to qualify as a lawyer in Australia. At the time of the commencement of her relationship with the Defendant, she was living off her savings and financial support from her family in Italy. Her assets at that time according to her evidence were worth AUD$37,744 plus a further 60,771 Euro.

4. The Defendant is a semi-retired property developer and investor with considerable business experience. He originally come from Germany and moved to Australia in 1997. At the time the relationship commenced, the Defendant estimated that his assets were worth in the order of AUD$2.7 million.

5. There is not any agreement by the parties as to the exact value of the assets of each but it is accepted that there was a significant difference in value of the assets each of them owned when the relationship commenced and that the Defendant was very substantially more asset rich than the Claimant.

6. At the commencement of the hearing, counsel for the Claimant clarified that this claim was only for a share in the assets of J.F.S. Investments Ltd *("J.F.S.")* and a share in the catamaran *"Tropicana".*

7. The Claimant asserts that at the commencement of the relationship, there was an oral agreement between them that they would undertake investments and developments to build an asset base for their retirement together. She says the agreement was that the Defendant would invest money and she would also invest money of her own. As her share would be substantially less than his contribution, her fulltime commitment of her time and her knowledge would bring her contribution up to the point of being an equal contribution. She also asserts that she put a lot of time and expertise assisting other business dealings of the Defendant, against which she makes no claim but which she says is indicative of their intention to share and work together. She says that she gave up any other prospective

career to work solely for their joint enterprises and the Defendants sole business interests.

8. The Defendant's view of their business relationship is radically different. He says that he put in most of the money, that he was the business brain behind JFS, that he made all the important decisions, and the role of the Claimant in their business affairs was essentially a secretarial role. He says that the Claimants relationship with him meant that she went from a position of not earning any income and living off savings, to much better standard of living where she was living with him rent free in very good accommodation, frequently eating out at restaurants and enjoying many oversees holiday trips during their time together.

9. There is no statute based law in Vanuatu and little by way of case law relating to de facto property settlements. In Mariango v. Nalau [2007] VUCA 15 the Court of Appeal said in paragraph 19.

> *"As the Judge in the Supreme Court observed the New Zealand Court of Appeal, in Gillies, undertook an invaluable review of the law of this area. We consider the principles and approach of the Court in Gillies should govern the approach to de-facto marriage property disputes in Vanuatu."*

The principles extracted from Gillies v. Keegh [1989] 2 NZLR 327 favourably referred to by the Court of Appeal in paragraph 9 of Mariango are:

- *"although the Court has used different legal concepts to address de-facto property cases (constructive trust, unjust enrichment, common intention, estoppel) ultimately the same factors must be taken into account.*
- *the essential issue is the reasonable expectations of persons in the shoes of the parties taking into account contemporary social attitudes. In assessing that, several factors have to be taken into account.*
- *the first factor is the degree of sacrifice by the complainant, the extent to which he or she has given up other opportunities.*
- *the second factor is the value of contribution made to an asset by comparison to the benefits he or she had received. These contributions may be direct or indirect.*
- *even if sacrifices and contributions have been made the Claimant cannot succeed if a reasonable person I his or her*

shoes would have understood that the other party had beforehand positively declined to agree to any sharing of the property or payment of compensation.

- *a simple monetary award, rather than the recognition of any interest in property may be the appropriate way of giving effect to reasonable expectations.*
- *a careful analysis of the facts is always important."*

10. The principles adopted in Mariango in paragraph 9 above when applied to the facts of this case result in this Court reaching the conclusion that it was never a reasonable expectation of the Claimant to expect that she would immediately be entitled to a full half share resulting from the investments and developments entered into by her and the Defendant through JFS and the purchase of *"Tropicana"*. It would be a reasonable expectation for the Claimant to have that her share in each would increase and grow nearer to a half share the longer she was together with the Respondent. Her contribution for the four years of their relationship was considerable and she was not able to pursue other career paths open to her throughout that time.

11. The Defendant's view that he put in most of the money, that he was the business brain behind JFS, and he made all the important business decisions is mainly correct. However it is not correct that the Claimant's role was essentially a secretarial one. The evidence indicates that they discussed their business interests and the Claimant did have an input into those decisions even if the Defendant was the final decision maker. The Claimant clearly acted on her own initiative and made decisions on her own in the course of implementing the major business decisions made by them. In a sense, she acted like a chief executive officer making the management decisions to implement the strategic decisions of a board of directors.

12. The company, JFS, was incorporated in Vanuatu in December, 2006. It is accepted by both parties that the initials JFS stood for *"Jorg and Francesca Schwartze"*. The Claimant and the Defendant owned 6 shares each in JFS on its incorporation. In June, 2008 the shares in JFS were transferred to Carpe Diem Inc, which is held by 1 share each for the

Claimant and Defendant. The Claimant is not claiming a half share of the assets Carpe Diem Inc. She is claiming for a half share of the assets of JFS through her ownership of half the shareholding in Carpe Diem Inc. Carpe Diem Inc has assets other than the shares in JFS, of which the Claimant makes no claim.

13. In July, 2007, JFS acquired its first asset, leasehold land title 12/0521/013 at Havannah Harbour. A *"JFS Investments Limited Agreement"* dated 26th November 2007, signed by both party's records:

a) The purchase price and associated expenses totaling $272,000 were paid by the Respondent.

b) That upon the signing of the Agreement the Claimant would pay $52,700 to the Defendant, and consequently the Claimant would own approximately 20% of the land and the Defendant would own approximately 80% of the land.

c) The Claimant would pay to the Defendant a further $83,300 within 3 months which would give her a 50% share in the land.

d) In the recitals in the Agreement, it is noted that the Claimant and the Defendant *"are the only shareholders in equal shares of JMS (sic. JFS) INVESTMENTS LIMITED".*

14. Other assets, including land, vehicles and shares in other companies were bought and sold by JFS up until the date of separation. No other agreements were entered into between the parties about these later acquired assets. No formal valuations of those assets have been undertaken by the parties. The Respondent in his submissions to the Court accepts that the value of the assets of JFS is in the order of A$1.66 million. The Claimant estimates the net value of JFS at A$2,043,000.

15. The major disparity in the values estimated by the parties is that the Claimant has included an asset of A$460,000 which were funds paid into JFS by the Respondent and then paid on to Tropicana Limited, another company owned by the Defendant. The Claimant says that this is a debt owed to JFS by Tropicana Limited. The Defendant says that JFS was often used by him as a useful conduit to pay the money from himself to

Tropicana Limited and other entities and it was never intended that the money was to become an asset of JFS. The Defendant's submission is accepted by the Court as the correct position. There was evidence before the Court to indicate that the Defendant often used JFS as a convenient conduit of funds for his own personal reasons. It was unwise of him to do so, but the evidence indicated that when he did so there was never an intention that the funds become an asset of JFS and no loan or other agreements exist to indicate that it was an asset of JFS.

16. The Claimant's estimated value for JFS is therefore reduced to A$1,583,000, which is less than the Defendant's estimate of A$1,660,000. For the purposes of this case, the Claimant's estimated value of JFS of A$1,583,000 is accepted as the preferable estimate. Even if the Respondent's figure was accepted, there could still be notional expenses to release assets in order to meet the Claimant's claim. Also, it is the Claimant's claim, and if less is being claimed than the Defendant allows, then the Claimant's lesser figure should be accepted.

17. The Claimant submits that she is entitled to 50% of the assets and profits of JFS. The Defendant submits that she is entitled to only 50% of the profits of JFS after the deduction of the Claimant's and the Defendant's contributions to JFS by way of money. There is no dispute that the Defendant paid by far the larger contribution of money into JFS. There is a dispute as to what were the parties intentions as to the ownership of JFS's assets.

18. The Defendant says that the Agreement dated 26th November 2007 shows that equal monetary contributions were required by both parties before an equal split of assets would be contemplated and the further payment of $83,300 was not paid by the Claimant. The Defendant in his submissions says that from Jacob's Law on Trusts (4th edition), the following principles can be extracted:-

- *"A resulting trust will be presumed where, on purchase, the legal title to real or property is vested in someone other than the person*

who is proved (by parole or other evidence) to have provided the purchase money – see paragraph 1210 of Jacobs'.

- *Where two or more persons purchase lands with moneys provided in different and unequal proportions and the property is transferred to them as joint tenants, then (in the absence of a presumption of advancement or rebuttal of the resulting trust) legal title is held on trust for themselves in proportion to the sums advances by each of them – see paragraph 1212 of Jacobs', fn 47.*
- *The presumption of a resulting trust may be rebutted – see paragraph 1218 of Jacobs'. Evidence needs to be called to prove that no trust was intended.*
- *The law endeavours always to give effect to the intentions of the parties, but in the absence of any evidence of such intentions, it presumes, until the contrary is proved, in favour of the person providing the purchase money – see Jacobs' paragraph 1218."*

19. The Defendant submits that there has been no rebuttal of the presumption in favour of a resulting trust and there has been a significant disparity in financial contributions. The Defendant points to a previous business dealing when a commercial property in Maroochydere was sold by him in May, 2006. He says that the Claimant's assistance with the administration and sale of that property was rewarded by him giving her a 1/3 share of the profit from the sale. He submits that a just outcome would be an entitlement of 25% of profits JFS to the Claimant and a repayment of her financial contributions.

20. The Claimant submits that there was never a trust in favour of the Defendant intended, thought of or able to be inferred. The Claimant submits that JFS and *"Tropicana"* were always intended to be theirs jointly, with JFS being a vehicle to build assets for their life together and future retirement. The Claimant points to other very significant assets including properties vehicles, and shareholdings in other companies worth very significant amounts of money, over which she makes no claim, as she says they were always intended to be the sole property of the Defendant. No claim is made against them notwithstanding the time and

effort she put in helping the Defendant administer those assets because there was not an intention that those assets would be shared.

21. The Claimant submits that there is no evidence that any funds paid into JFS by her or the Defendant were loans, and she denies that was the case. She also points out that the Defendants was usually meticulous in recording business arrangements in writing and usually by documents signed by the parties concerned. She submits also that in October, 2008 when their relationship was going through a *"rocky patch"* that the Defendant then began to demand that arrangements should be documented in writing. Also, at the same time as JFS was set up, the Defendant set up another company, Tropicana Limited as a solely owned investment company for himself, which indicates that JFS was different and was a shared investment company.

22. On the basis of the evidence heard during the trial and the very voluminous amount of documentary evidence produced, this Court is persuaded that there no trust was contemplated, intended or able to be inferred with respect to the shares in JFS or the sums advanced to JFS. The Defendant knows what a trust is as he created one previously and it was documented. All the evidence indicates, and the parties agree, that at the commencement of the relationship it was extremely romantic and passionate. The evidence was that they planned to live the rest of their lives together and actively planned to use their joint knowledge and experience to build and create new assets through JFS so they could continue to live a lifestyle which most would regard as luxurious and privileged and have a comfortable retirement together. That the heights of passion in their relationship have now been replaced by the depths of toxicity between them does not change that originally intention.

23. It is acknowledged by both parties that the catamaran *"Tropicana"* was purchased entirely from funds provided by the Defendant. There are two Bills of Sale for this catamaran both recording a purchase price of A$520,000 and both recording EC Marine Pty Ltd as the vendor. The first Bill of Sale is dated 8th February 2007 and shows the Claimant and the

Defendant as joint purchasers. The second dated 8th February 2008 shows only the Defendant as the purchaser. Neither party provided any satisfactory explanation as to why there were two bills of sale a year apart or why the names of the purchaser changed to the Defendant alone. From the evidence it would appear that the Claimant arranged both Bills of Sale. In her correspondence arranging the second Bill of Sale, she signed letters *"Francesco Grillo (for Jorge Schwartze)".* Both parties lived on the *"Tropicana"* in Vanuatu and maintained it for a period of about one year once it arrived in Vanuatu, while they built a home and continued their business activities.

24. The Claimant submits that the *"Tropicana"* was jointly owned, is now held by the Defendant and that the Claimant is entitled to 50% of its value. The Defendant submits that the *"Tropicana"* is owned solely by the Defendant.

25. From all the evidence this Court is satisfied that the *"Tropicana"* was an asset that the parties intended to share. This intention was formed when the relationship was a happy one. They came to Vanuatu and lived on the *"Tropicana"* as their home whilst continuing their business and investment activities to provide for their then and future lifestyle. It is appropriate therefore that the *"Tropicana"* should be considered, like JFS, in light of Gillies and Mariango.

26. The Claimant says that the *"Tropicana"* has an insured value of A$600,000, and a comparative vessel sold recently for A$495,000. On this evidence, the Claimant submits that for the purpose of this case, a value of A$550,000 should be adopted.

27. The Defendant has produced evidence of a similar catamaran for sale in Mooloolaba, Australia for A$495,000 tax paid. He submits that if sold in Australia a tax of 14% would have to be paid, reducing the value to about A$435,000.

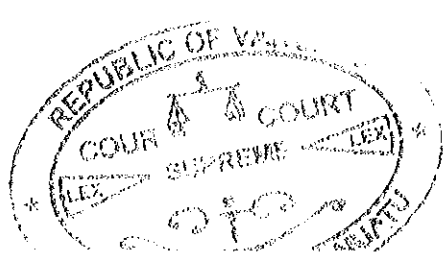
28. The *"Tropicana"* does not have to be sold, or if sold, sold in Australia and incur tax. Nor is there any evidence that the catamaran being sole in

Mooloolaba is anything other than a similar model to the *"Tropicana"*. Additional expensive accessories could easily be on the *"Tropicana"* that may not be on the catamaran in Mooloolaba or vice versa. The Claimant has an interest in inflating the value and the Defendant has an interest in depreciating it. The figure that this Court can rely upon is the purchase price of the *"Tropicana"* of A$520,000 paid either two or three years ago depending upon which Bill of Sale is accurate. After factoring in a degree of depreciation, this Court adopts a value of A$450,000 for the *"Tropicana"* for the purposes of this case.

29. It is then necessary for this Court to assess the level of entitlement in the assets of JFS and the *"Tropicana"* after taking into account the principles adopted in Mariango. There is no mathematical formula the Court can use to assess the value of the Claimant's entitlement. After considering the original intentions, respective monetary contributions, application of business acumen and the time and effort of each party, along with the Claimant's loss of opportunity to follow another career for four years, it is the view of this Court that the Claimant is entitled to a 1/3 share in the assets of JFS and the *"Tropicana"*, after a deduction of A$83,300 is made for the sum she agreed to pay to the Defendant in the JFS INVESTMENTS BUSINESS AGREEMENT referred to in paragraph 13 herein.

30. The parties have not reached any agreement as to the value of the two assets which are the subject of this claim and it is therefore necessary for this Court to assess values for the purpose of settling this claim. A process of assessment must be based upon a realistic view being taken of the evidence as it has been placed before this Court by the parties. By necessity this assessment will not be exact, but made on the evidence and in the interests of achieving a fair and just resolution of the claim. Neither party have submitted that they be put to the expense of obtaining expert evidence to assess the valuation of the two assets in question, but have submitted what they think those assets are worth.

31. The value of the two assets are therefore set at:



JFS		
		A$1,583,000
"Tropicana"		A$450,000
		A$2,033,000
Claimant's entitlement @ 1/3	=	A$677,666-67
Less payment due to Defendant		A$83,300-00
		A$594,366-67

32. To remove any doubt, the Claimant's entitlement of A$594,366-67 is inclusive of her cash contributions made to JFS. This claim is to be settled by the Defendant paying A$594,366-67 to the Claimant, at which time she is to hand over to the Defendant an executed share transfer for her sole share in Carpe Diem Inc. If the parties agree, the amount can be settled partially or entirely by a transfer of assets, but if there is no agreement, a cash payment in settlement is required.

33. In this case, it is appropriate for each party are to bear their own costs.

Dated at Port Vila, this 17th day of December, 2010

BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

N. R. DAWSON
Judge