

**BETWEEN: POLAR HOLDINGS LTD**  
**Claimant**

**AND: GILBERT DINH**  
**Defendant**

Coram: Justice C.N. Tuohy

Counsel: Mr. Rosewarne for Claimant  
Mr. Sugden for Defendant

Date of Hearing: 19, 20 March 2007

Date of Decision: 5 June 2007

**RESERVED JUDGMENT OF**  
**JUDGE C N TUOHY**

**Introduction**

1. This is a claim by the purchaser Polar Holdings Limited ("PHL") for specific performance of an agreement dated 29 September 2003 for sale and purchase of Leasehold Title No. 11/OD24/031, covering an area on the Port Vila harbour front commonly known as the BP Wharf.
2. In early November 2004, there were discussions between the parties which culminated in the return of the deposit by the vendor ("Mr. Dinh"). His defence characterises that as an acceptance by him of PHL's prior repudiation of the contract. However the particulars of his defence and the evidence he relies upon support a claim that the contract was discharged by mutual agreement.



3. PHL's case is that the parties made an oral agreement for the cancellation of the existing agreement and the return of the deposit which was conditional on a new agreement being entered into on the same terms except for the payment of a deposit. PHL asserts that the original agreement remains in force because no new agreement was entered into.

#### **Factual Background**

4. The purchase price in the agreement was AUD \$1,000,000. A deposit of AUD\$100,000 was payable to be held by a stakeholder, Island Property Consultants Limited ("Island Property") until the contract settled, or was avoided or cancelled in accordance with the provisions of the agreement. The deposit was paid by early October 2003. Settlement date was to be within 15 days of the purchaser being informed in writing that the consent of the lessor had been obtained and of the contract becoming unconditional but in any event not earlier than 120 days from the date of the agreement.
5. There were a number of special conditions. One related to the removal from the property of one Hendon Kalsakau who was occupying it illegally and this caused considerable delay. As at the beginning of November 2004, that condition had still not been fulfilled despite considerable efforts by Mr. Dinh to remove Hendon Kalsakau.
6. Because of the length of the delay, Mr. Sean Maxwell, the General Manager of PHL, met Mr. Dinh in late October or early November 2004 to seek the return of the deposit. The precise content of their discussion on that day and the nature of what, if anything, they agreed is a matter of hot dispute.
7. In his first sworn statement dated 2 December 2004, Mr. Maxwell said that words to the following effect were exchanged:

*I said: "Completion of this Contract is taking far too long. It is not fair that Polar Holdings has had to wait for some 12*

months because you have not been able to provide us with vacant possession. You continue to hold our deposit of AUD\$100,000.00. Polar Holdings wants to proceed with this purchase, however, we would ask that a new contract be issued to replace the existing contract which does not require our deposit to be withheld. I'd like to see a new contract issued and the existing deposit released to Polar Holdings upon the execution of the new contract".

**Dinh said:** "O.K. I'm happy to replace the existing contract with a new contract and refund your deposit to you".

**I said:** "Fine".

**Dinh said:** "Can you prepare a fresh contract and get it to me? I would ask Felix [referring to Mr. Felix Kabini, Dinh's Solicitor] but he is incompetent and there would be too much to delay".

**I said:** "O.K, I will get someone to prepare a fresh contract and get it to you as soon as possible".

8. In his second sworn statement dated 8 June 2005, he expanded on that stating that he could also recollect Mr. Dinh saying words to the effect:

*"My only concern with replacing the contract is that Westpac may get upset if they find that the contract has been cancelled, even for a short time"*

To which he replied:-

*"The existing contract will not be cancelled until the new one is signed and replaces it. As far as the Bank is concerned there will be a contract between us the whole time. We are just replacing one that requires a deposit with one that does not".*



He denied that Mr Dinh told him that if the deposit was repaid, the contract would be cancelled.

9. In his first sworn statement dated 31 March 2005, Mr. Dinh stated:

9. *I confirmed that sometimes at end of October 2004, Sean Maxwell came to my office and told me that he wanted to take his deposit of AUD\$100,000.00 back as he want to invest that money back in Australia where he could earn higher interest on. I told him that he would talk with my agent Douglas Patterson of Island Property Consultant who held that deposit as stakeholder.*

10. *I further told him at that time, that if he takes his deposit, the contract would be cancelled which he confirmed to me that to be the situation.*

11. *He then, proposed if we could enter into another contract that no deposit is required. I told him that I need to (talk to) my lawyer about his proposal.*

10. In his second sworn statement dated 25 January 2006, Mr Dinh stated that from his recollection of his meeting with Mr Maxwell, the following words were used:

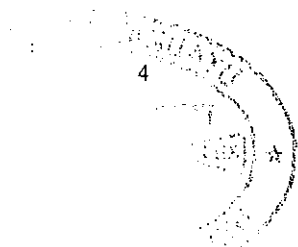
***Sean Maxwell:***

*"Than, the settlement of the BP Wharf property has taken so long. I want my AUD\$100,000.00 back. I will earn higher interest on my money if I invest it back in Australia.*

***Gilbert Dinh:***

*I cannot do much as the matter is pending before the Court of Appeal and is beyond my control. Your money is with Douglas Patterson of Island Property Consultant. I do not have it with me.*

***Sean Maxwell:***



Can you ask Douglas Patterson to pay my deposit back?

**Gilbert Dinh:**

*If you take your deposit, our contract would come to an end.*

**Sean Maxwell:**

*That would be the case. But can we enter into a new contract whereby no deposit is payable? If you agree, I will prepare a new contract for us to sign.*

**Gilbert Dinh:**

*I have to see my lawyer and my agent about your proposal for the new contract. I cannot confirm to you anything now. I do not want to sign any new contract because the case for eviction of Hendon Kalsakau has taken so long and cost me too much money.*

**Sean Maxwell:**

*Can you ask Mr. Douglas Patterson to return my AUD\$100,000.00 deposit?*

**Gilbert Dinh:**

OK

**Sean Maxwell:**

*Well, can I prepare draft letter for you to give to Douglas Patterson?*

**Gilbert Dinh:**

*Refunding your money is not a problem as the money is with Douglas Patterson.*

11. Both men maintained their respective versions in cross examination at trial.



12. Following this discussion, Mr. Maxwell's business advisor, Iain Jones of PKF, drafted a letter addressed to Island Property for Mr. Dinh to sign in the following terms:

***"BP Wharf sale to Polar Holdings Ltd***

*Given the complications with the above contract, I confirm that the original contract for the above sale is now at an end, and has been replaced with a fresh contract.*

*Under the fresh contract, there is no deposit required to be paid, so can you please immediately return the original AUD100,000.00 deposit plus all interest thereon to the account nominated by Mr. Sean Maxwell" by Mr. Sean Maxwell.*

*(12)*

13. He also prepared a new agreement for sale and purchase which was on similar terms to the agreement of 29 September 2003. The differences were:

- a) No deposit was payable
- b) The 120 day minimum period before settlement was removed

14. On or very shortly after 3 November, Mr Maxwell returned to Mr. Dinh's office and gave the letter to Mr. Dinh together with the new form of agreement. It had not been executed by PHL, the signature page being blank. Mr. Maxwell said that when they met, Mr. Dinh said:

*"I will get Felix (his lawyer) to look over the replacement contract, have it signed and return a signed copy to PKF"*

Mr. Dinh stated merely that he gave the draft contract to his lawyer to advise him whether he should accept the offer and sign the contract.

15. Mr. Maxwell returned again to Mr. Dinh's office to enquire about progress. Mr. Dinh called his solicitor, Mr. Felix Laumae of Trans Melanesian Lawyers, to come to the office and there was a further



\* conversation between him and Mr. Maxwell. Once again there is a dispute about what was said.

16. Mr. Maxwell's account of this meeting is in his second statement:

*Sometime following 3 November 2004, I again attended at Dinh's offices, met with Dinh and can recollect a conversation ensuing in words to the following general effect:-*

**I said:** *What is happening with the replacement contract.*

**Dinh said:** *I don't know. I will contact Felix and get him down here to meet you.*

**I said:** *OK*

*I then waited in Dinh's reception area for Felix Laumae ("Felix") to arrive. When Felix arrived, he and I went into a separate office and after exchanging the usual cordialities, a conversation ensued in words to the following general effect:-*

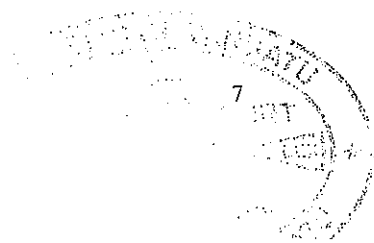
**I said:** *What is taking so long with the replacement contract.*

**Felix said:** *I just have to find time to read it through.*

**I said:** *I don't understand why it is taking so long. It is exactly the same contract with the only difference being that the deposit is released. Dinh has already agreed to that.*

**Felix said:** *I will do it soon and get back to you.*

*The conversation concluded shortly thereafter with nothing more of import being said.*



I deny that Felix, at any time during this conversation, said anything to lead me to believe that Dinh purported to treat the existing contract as no longer in effect.

17. Mr. Dinh's account is in his first statement at para 13;

*Sometimes after 3 November 2004, Sean Maxwell again attended at my office to enquire whether I agreed to sign his draft contract. I called my lawyer to my office and we met with Sean Maxwell about his new offer and draft contract. In that meeting, my lawyer told Sean Maxwell that he needs to discuss further with me the Claimant's offer and draft contract he provided as he do not want to me to accept and enter into an open ended contract with not set date for settlement and deposit paid.*

Mr. Laumae did not provide any evidence to the Court.

18. On 8 November Mr. Maxwell returned once more. Mr. Laumae was in Mr. Dinh's office when he arrived. He gave Mr. Maxwell a letter addressed to Mr. Douglas Patterson of Island Property in the following terms:

*"RE: RELEASE OF AUD\$100,000 DEPOSIT FOR BP WHARF TO POLAR HOLDINGS LIMITED*

*We are instructed by Dinh Van Than to write to you with respect to the above matter.*

*As you aware, the contract under which the above sum was paid to you as deposit was cancelled by Mr. Dinh and Polar Holdings Limited due to the delay in Appeal Case concerning the eviction of Hendon Kalsakau.*

*We are instructed to request you to release the funds back to Sean Maxwell of Polar Holdings Limited.*



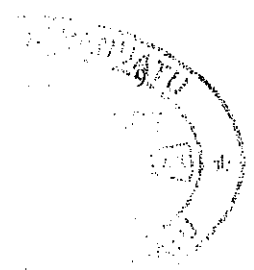
The letter was copied to Mr. Maxwell and Mr. Dinh.

19. Mr. Maxwell said that he delivered that letter to Island Property but it was in a sealed envelope and that he did not read it then. He said that he recollected having a discussion there with Mr. Laumae to the following effect:

**I said:** *Is there any problem with the contract?  
Why is this taking so long to sort out?*

**Felix said:** *There is no problem. We will shortly have a signed replacement contract ready for you to collect.  
Here is a letter for you to take to Douglas Patterson which authorises the release of your deposit.*

20. In his first sworn statement, Mr. Maxwell said that he received his copy of the letter on 8 November. In his second sworn statement he was vague about when he received it. He said that he was not provided with a copy until "some time after" 8 November. In his cross examination at trial, he was almost as vague, saying that he received it some time between 8 and 18 November.
21. When he did receive a copy of the letter, he said that he noted the reference to the cancellation of the existing contract but said he did not think anything of it at the time as he believed Mr. Laumae was "getting ahead of himself".
22. There is no reason to think that there was any delay in Mr. Maxwell receiving the letter. Mr. Laumae was certainly not trying to keep it from him since he actually gave him the original to deliver. His first sworn statement closest to the event is most likely to be correct. I am satisfied that he probably saw of the letter on its date, 8 November, and certainly by 10 November when he made reference to it when speaking to Mr. Patterson about repayment of the deposit.



23. After he delivered the letter, Mr. Maxwell contacted Mr. Patterson. Mr. Patterson's account of their conversation is as follows:

10. *On the same day, 8<sup>th</sup> November, Sean Maxwell contacted me requesting the deposit funds. He asked if I had received the letter from Trans-Melanesian Lawyers (which was copied to him) and I said that I had.*

11. *He then asked me when he could get the funds. I replied that I would need to speak to Mr. Dinh first since he was our client, not Trans-Melanesian Lawyers.*

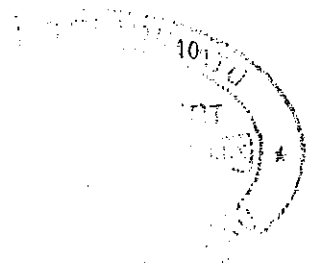
21. *I made it clear to Mr. Maxwell that because of the significance of returning a deposit and cancelling a contract, I wanted Mr. Dinh's personal authority to do this.*

24. On 10 November, Mr. Maxwell telephoned Mr. Patterson to press him for immediate return of the deposit. Mr. Patterson stated that their conversation was to the following effect:

14. *Mr. Maxwell telephoned me on 10<sup>th</sup> November insisting he receive the funds "immediately". Mr. Maxwell said words to the effect of, "I need this money urgently. You have the letter from Felix. I must have that money today".*

15. *I told Mr. Maxwell I would talk to Mr. Dinh that day. I also said to Mr. Maxwell words to the effect of, "You do understand that if I return this deposit to you the contract will be cancelled". Mr. Maxwell replied with words to the effect of, "That is my problem, not yours. Just pay back the deposit".*

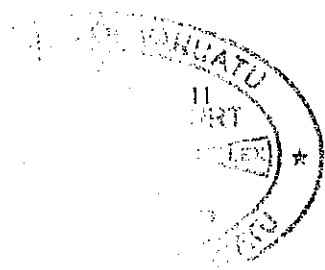
25. Mr. Maxwell denied that Mr. Patterson said anything on or about 8 November about cancellation of the contract. He said that on a date that might have been either 8 or 10 November, he recalls a conversation with Mr Patterson to the following general effect:



**Mr. Patterson said:** *The refund of the deposit will put your existing contract at risk.*

**I said:** *You know Dinh and I have agreed to replace the existing contract with a new one. You know what's going on. The new contract does not require that any deposit be withheld.*

26. He also said that, in an earlier conversation, he told Mr. Patterson that PHL had entered into a fresh contract with Mr. Dinh which did not require a deposit. Mr. Patterson in his evidence at trial said that he did not know at the time that Mr. Maxwell was presenting another contract to Mr. Dinh.
27. After that conversation Mr. Patterson obtained Mr. Dinh's authority to refund the deposit and he effected that by crediting the account that the deposit had been paid from, International Finance Trust Co Ltd, c/- PKF. No interest was paid. The precise date when the funds appeared in the account is not disclosed in the evidence but I am satisfied that it must have been not later than 11 November and that Mr. Maxwell was aware by that date that it had been done. He acknowledged that in his oral evidence and it can also be inferred because he made no further demand to Island Property after 10 November even though he was by then quite frustrated by what he saw as continuing delay and had been chasing the matter up on an almost daily basis.
28. Mr. Patterson immediately began to look for another purchaser. Within a week he had found one. On 17 November, he presented an offer to Mr. Dinh from a new purchaser at AUD\$1,750,000. Mr. Dinh instructed his lawyer to enquire whether PHL was prepared to match it. On 18 November, Mr. Maxwell called at Mr. Laumae's office and learnt of the new offer. He declined to match it. He immediately sought legal advice. Solicitor's letters were exchanged in which the



parties essentially took the positions which they have maintained at trial.

29. On 8 December, Mr. Dinh entered into an agreement to sell the property to the new purchaser at the price of AUD\$1,750,000. PHL then filed this proceeding and obtained an undertaking preventing the completion of the sale to the new purchaser.

### Discussion

30. The primary issue in this case is what was agreed between Mr. Maxwell and Mr. Dinh in their initial discussion. To decide it is not a straightforward task. The only direct witnesses are the two persons whose accounts conflict with each other, Mr Maxwell and Mr Dinh. There are also disputes about what was said in subsequent oral conversations between them and between Mr. Maxwell and Mr. Patterson where the only direct witnesses are the participants. Both Mr Maxwell and Mr Dinh have a very obvious interest in the outcome of the proceeding. Mr Patterson does not have such a direct interest but, as Mr. Dinh's agent on both sales, he is certainly not a disinterested witness.
31. I do not in this case derive any appreciable assistance from the demeanour of the witnesses in Court. It is much more helpful to consider which of the respective accounts is more logical, probable, plausible and consistent with the contemporary documentation and subsequent actions of the parties. As the English Court of Appeal said in **Mears v Safecar Security Ltd** [1982] 2 All ER 865, 867, common sense suggests that the parties' subsequent conduct is the best evidence of what they orally agreed.
32. It also necessary to keep in mind that when considering whether an agreement is proven as alleged by PHL, the subjective intentions and beliefs of the parties are not relevant. In the law of contract, the issue is what a notional reasonable bystander would objectively conclude in the light of the words and conduct of the parties.



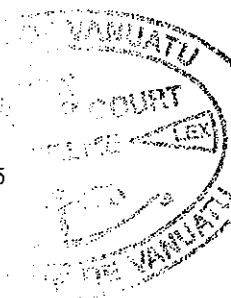
33. On that basis I turn to consider the crucial question of what was agreed in the first discussion between Mr Maxwell and Mr Dinh. Mr Maxwell initiated that discussion. His main purpose was to obtain a refund of the deposit because he thought it was unfair that Mr.Dinh should continue to hold it given the delay in completion. His subsequent actions show that this was his primary focus. He pressed hard on an almost daily basis until it was repaid, then when he knew it had been, he let matters lie for at least a week. I do not think that he appreciated that the market had moved to any degree. If he had appreciated the degree to which it had moved, I think that he would not have even tried to recover the deposit because he would have seen what a small price the loss of interest was for the capital gain. I think that it is likely that he was not as insistent and clear as he now professes to have been about linking the refund of the deposit to the signing of a new contract.
34. It is also difficult to see why Mr. Dinh would agree simply to refund the deposit and lose both the interest and the security for performance which it gave to him but continue to be bound to sell to PHL at the price agreed more than a year previously. There is no sensible commercial reason for him to return the deposit to PHL simply because Mr. Maxwell asked for it. But that is effectively what the arrangement Mr. Maxwell says was agreed amounts to. Mr Dinh is an experienced businessman and a substantial dealer in land in Vanuatu. I think it very unlikely that he was unaware of the rise in the market for this piece of land and just as unlikely that he would agree to a surrender of the deposit without some corresponding advantage to him. I am not persuaded that he was unduly concerned about the reaction of his mortgagee, Westpac, to the termination of the contract. As he indicated in his evidence, the land will always be in a premium location. I think he would have been happy to give back PHL's deposit provided that it released him from the existing contract but not otherwise.

35. The actions of the parties subsequently are also of great importance in throwing light on what was or was not agreed between them at the first meeting. Mr Maxwell presented Mr Dinh with the letter of 3 November and the new agreement. I consider it significant that the new agreement was not signed by PHL when Mr Maxwell presented it. If the arrangement was in substance that Mr Dinh would give back the deposit but otherwise the parties would have exactly the same contractual rights and obligations, there was no need for any new contract at all. All that was necessary was an exchange of solicitors' letters recording that.

36. Mr. Maxwell explained that on the basis that he is not a lawyer and he assumed that there would need to be a new contract. That is a credible explanation for producing a new agreement but it does not explain why the new agreement was presented to Mr. Dinh for his perusal unsigned. Nor does it explain why Mr. Dinh did not sign it there and then and was not asked to sign it there and then. It was quite obviously an exact copy of the earlier agreement apart from the two changes outlined in Para 12 above, one being the deletion of the deposit and the other being a small drafting amendment consequent on the passage of time. Instead it was accepted that Mr. Dinh would have to refer it to his lawyer. In my view the actions of the parties in this respect show that it was open for Mr. Dinh to come back with changes or to decline to sign at all.

\*37. Indeed PHL's own case, based on Mr. Maxwell's evidence, is that Mr. Dinh did not bind himself at the initial meeting to give back the deposit or sign the new agreement. Rather, it is PHL's case that he agreed to an unnecessarily complicated, therefore unlikely, arrangement under which he would give back the deposit but only if a new agreement was signed on the same terms but he could nevertheless choose to do neither in which case the status quo would continue. PHL's claim to specific performance is based upon the original agreement of 29 September 2003, not on any replacement or varied agreement.

38. Mr. Maxwell's acceptance of the return of the deposit in tandem with the letter of 8 November from Trans Melanesian Lawyers is also inconsistent with what he said was agreed at the initial meeting. As set out above, I am satisfied that he was aware of the contents of the letter not later than when PHL actually received the deposit back but he neither returned it nor even protested to Mr. Dinh or his lawyers. I find it difficult to accept that he did not appreciate the import of the letter viz. that the existing contract was at an end independently of any replacement. Mr. Maxwell also is an experienced businessman and showed himself in evidence as alive to the nuances of language.
39. Mr Dinh's subsequent actions in relation to the new agreement and the refund of the deposit, (including those of his lawyer acting on his instructions on 8 November), are also inconsistent with any binding commitment on his part to enter into a new agreement on the same terms except for a deposit; although they are consistent with having indicated to Mr Maxwell that he would consider entering into a new agreement on substantially similar terms. His actions are consistent throughout with keeping his options open, including the option of contracting again with PHL, as opposed to committing himself to that course.
40. I do not accept Mr. Maxwell's evidence that there was a firm agreement made in the terms he alleges. While I am satisfied that Mr. Dinh did agree to refund the deposit, I am not satisfied that there was any clear agreement as to the contractual basis on which he would do so. Likewise I am not satisfied that at the initial meeting a binding agreement was made that on repayment of the deposit, the existing agreement would be discharged. To the extent that that was Mr. Dinh's evidence, I do not accept it either. I find that objectively there was no contractually binding agreement concluded at the initial meeting
41. It is therefore necessary to consider the contractual effect of the parties' subsequent words and conduct. The most significant event was that Mr. Dinh repaid the deposit and he did so accompanied by



his solicitors' letter of 8 November 2004 which was copied to both parties to the original contract. That letter recorded clearly a mutually agreed cancellation of that contract. It said nothing about a replacement contract. Mr. Maxwell received the letter and retained the deposit for a period of a week without complaint or comment.

42. He did so in the context of his conversations with Mr. Dinh's agent, Mr. Patterson, on 8 and 10 November. I accept Mr. Patterson's version of those conversations. While not a disinterested party, he is somewhat less interested than Mr. Maxwell. More importantly his account is probable and plausible. From his point of view, he thought he was losing a substantial sale and the commission on it and he implied that he was unhappy about that. It is entirely plausible that he would have clearly warned Mr. Maxwell that if the deposit was returned, the contract would be cancelled. That this was his view of the effect of return of the deposit is confirmed by the fact that he immediately started marketing the property again. That fact is also inconsistent with Mr. Maxwell's claim that he told Mr Patterson that he had entered into a fresh contract with Mr. Dinh since Mr. Patterson was hardly likely to market a property which he had been told was already sold.
43. A reasonable bystander, knowing those facts and knowing the prior history of the interactions between the parties from the time of the initial discussion, would conclude that the parties had agreed to mutually terminate their agreement without being bound to enter into another. It follows that PHL's claim based upon the agreement cannot succeed.
44. For completeness, I record that Mr. Sugden's argument that there was repudiation by PHL is, in my view, misconceived. A party repudiates a contract when he evinces an unequivocal intention not to be bound by his future obligations under it. A request or demand for the return of a deposit already paid cannot be that. It is a request to vary the contract. The other party may agree to it or not as he wishes. There could only be repudiation if the first party makes it clear that he will



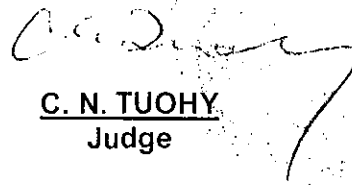
not comply with his contractual obligations which remain to be carried out, in this case payment of the balance purchase price at the stipulated time. There was no suggestion that PHL gave any such indication.

**Conclusion**

45. There will be judgment for the Defendant with costs to be agreed or fixed by the Court on application made within 30 days.

**Dated at Port Vila on 5 June 2007**

**BY THE COURT**



**C. N. TUOHY**  
Judge