REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2006-04036

BETWEEN

JOHN JESSAMY
PAMELLA MOTTLEY-LAWRENCE
DENISE PARIS

Claimants

AND

CLASSIC DEVELOPERS LIMITED

Defendant

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:
Ms. Andrea Goddard for the Claimants
Mr. Om Lalla and Mr. Kelvin Ramkissoon for the Defendant

1. **Introduction**

1.1 The three Claimants in this action, John Jessamy, Pamella Mottley-Lawrence and Denise Paris are disappointed purchasers. In May and July 2004 they all entered into sale agreements to purchase condominium units located at Almond Court, Western Main Road, Point Cumana, Carenage from the Defendant, Classic Developers Limited.

1.2 At the time the Claimants entered into the sale agreement the units were in its pre-construction stage. Subsequent to completion of the said sale, the Claimants allege that the units were not constructed in a proper and workmanlike manner and that the Defendant failed to maintain the value of the property in breach of their agreement. The Claimants deposits were however forfeited by the Defendant when the Claimants failed to complete the sale after being called upon to do so by the Defendant.

1.3 At the trial of this action, the first Claimant's claim was dismissed after hearing a preliminary issue on the effect of his failure to file a witness statement in this action. The second and third Claimants were unable to prove their case on a balance of probabilities after assessing their testimony against the backdrop of the agreed documentation. As a consequence the Court dismissed those Claimants' claims. The reasons for so doing are now set out herein.

2. **Backdrop**

2.1 John Jessamy agreed to purchase Unit No 7, Terrace Level pursuant to the agreement for sale dated 10th May 2004. Pamella Mottley-Lawrence agreed to purchase Unit 10, Penthouse Level and Unit No 5, Terrace Level pursuant to agreement for sale also dated 10th May 2004. Denise Paris agreed to purchase Unit 12, Penthouse Level pursuant to agreement for sale dated 1st July 2004. The size of the units varied between 921 square feet[1] and 962 square feet[2].

2.2 The Defendant advertised their proposed condominium scheme as "*Classy, comfortable and affordable living on the West Coast.*" The amenities of the condominium units included a sea view, swimming pool, modern architectural designed two bedroom "condos" and penthouses, electronic gate and security guard booth. The Claimants eagerly entered into their own arrangements with the Defendant to purchase these units. For the second and third Claimants the Defendant's project was attractive as it met the Claimants' objectives of making an investment in real estate.

2.3 The deposits paid by these Claimants pursuant to the agreements for sale were as follows: The first Claimant paid $79,500.00. The second Claimant paid a cumulative sum of $169,000.00 as a deposit for both of her units. The third Claimant paid $99,500.00.

2.4 Completion Certificates in relation to these units were issued on 1st July 2005. The certificates were sent to the Claimants under cover of a letter from the

[1] In the case of the second Claimant.
[2] In the case of the first and third Claimants.

Defendant's attorney-at-law dated 21st July 2005 calling upon the Claimants to complete the sale.

2.5 However it was from about August 2005 that the relationship between the parties became strained due to rivaling reasons. The Claimants alleged that they became dissatisfied with the quality of the work executed by the Defendant and their failure to construct a swimming pool. The second and third Claimants contended in their evidence in chief that the swimming pool was a *"main reason for entering into the contract"*. In contrast, the Defendant contended that the Claimants simply could not make good on their plans to enter into this investment and needed more time to complete the purchase.

2.6 In October 2005, the Defendant issued to the Claimants formal notices to complete the sale by 3rd November 2005 making time of the essence.

2.7 It is agreed that the Claimants did not complete the sale when they were called upon to do so by the Defendant. The Claimants sought to obtain alternative buyers to complete the sale and in the process make either a profit for themselves or at least recover their deposits. It is unfortunate that this exercise had not borne fruit, had it done so this Claim may not have been instituted.

2.8 Eventually the Defendant, after the Claimants missed the deadlines to complete the sale, forfeited the deposits and resold the units on the open market.

2.9 The Claimants eventually instituted these proceedings against the Defendant by Claim Form and Statement of Case dated and filed 13th December 2006 seeking in essence the return of their deposits on the basis that the Defendant as vendor breached the terms of the agreements for sale.

3. **The Claim**

3.1 In the Claimants' claim they sought an order for the payment of their deposits being a sum owed by the Defendant to the Claimants for rescission of contract. In their pleadings the Claimants contended that the Defendant breached the contract by:

- Failing to exercise all due professional skill and care in the performance of its services. The particulars of this general plea are set out in paragraphs 6 and 7 of the Statement of Case. The Claimants alleged that the Defendant failed to complete the property in a "*proper and workmanlike manner in accordance with the plans and specifications."*
- Failing to maintain the value of the said property or to substantially maintain its accommodation. The Claimants contend in its Statement of Case that the failure to provide a swimming pool as part of the amenities resulted in a reduction in the value of the said property.

3.2 At paragraph 11 of the Statement of Case the Claimant pleads as follows:

"By reason of the Defendant's breach of contract and/or misrepresentation the Claimant has suffered loss and damage as well as stress and inconvenience.

Particulars:

a. The construction work was not completed on the date stipulated in the agreement that being 15th March 2005

b. The construction work was not completed in accordance with the term of the agreement, namely clause 9

c. The advertised swimming pool as an amenity was never constructed.

d. *The properties all experienced flooding."*

3.3 The Claimants relied upon this plea to support an action in misrepresentation. The Court rejected that contention. The Court is not satisfied that this plea represented a proper plea of misrepresentation and is considered in detail later in this judgment.

3.4 By its Defence filed 6th March 2007 the Defendant contended that, inter alia:

- The units were completed in a good and workmanlike manner and in accordance with relevant building plans and all statutory requirements and that it had not reduced the value of the property nor altered its accommodation.

- The first and second Claimants duly inspected the works and made neither protest nor objection over the works being performed.
- The Defendant retained the services of a reputable firm of engineers throughout the project.
- The swimming pool was replaced by a hot water therapeutic spa which was comparable in value to that which was proposed and that the Claimants were informed of the alteration.

4. **The First Claimant's claim**

4.1 At the commencement of the trial, Counsel for the Defendant submitted that the Claim of the first Claimant should be dismissed on the ground that he had failed to file a witness statement in this action as directed by the Court. As a consequence there is no direct evidence from him in support of his claim.

4.2 Indeed there were only two witness statements that were filed by attorney for the Claimants: the witness statement of Denise Paris dated and filed 2nd June 2008 and the witness statement of Pamela Mottley-Lawrence dated and filed 2nd June 2008. It is the latter witness statement that caused concern.

4.3 Ms. Mottley-Lawrence states in her witness statement that she makes her statement "*in support of my claim and that of the First Claimant with the authority of the First Claimant for damages against the Defendant in this action*." There is no document which demonstrates that Ms. Mottley-Lawrence has indeed been duly authorized by the first Claimant to make her statement of his behalf. There is nothing in the witness statement which suggests in the least any relationship at all between the two witnesses that could remotely lay the foundation for the witness to assert any such authorization. It would be unfair to introduce statements at the trial purportedly made by the first Claimant who has not submitted himself to cross examination.

4.4 Accepting the witness statement of Ms. Mottley-Lawrence as that of the first Claimant without more and without having him attend to be cross-examined would lead the Court down a dangerous path in the context of this case. Counsel for both parties agreed that the claim is in fact three separate claims being made

for the return of deposits by three purchasers with respect to different units, which are the subject of separate agreements for sale. Each of these Claimants is therefore required to prove their own case on a balance of probabilities. This is important in the context of the dispute that emerged between the parties in relation to the Claimants' expectations with regard to their respective unit's amenities and the respective allegations of poor workmanship in relation to each unit. She made no specific observation of any alleged defect of the first Claimant's unit.

4.5 The motivations, inducements and expectations of the first Claimant, which as it turned out was the backbone of the Claimants' case could not be properly adduced though Ms. Mottley-Lawrence without the first Claimants attendance as a witness to be cross-examined. The statements of the first Claimant's belief and observations remain hearsay.

4.6 Reliance by the first Claimant on the witness statement of Ms. Mottley-Lawrence is not helpful to his case. The witness statement of Ms. Mottley-Lawrence is already bereft of the details necessary to establish the allegation of poor workmanship with her own unit. The difficulty of the first Claimant is compounded by the fact that Ms. Mottley-Lawrence makes no specific observation of deficiencies in the first Claimant's unit.

4.7 Counsel for the first Claimant did not volunteer any reason for the absence of the first Claimant and indeed offered to withdraw the first Claimant's case in light of the failure to file his witness statement

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5. **Witness statements**

5.1 The witness statement is now a central feature of trials in the new landscape of the Civil Proceedings Rules ("CPR"). Its utility is obvious. It abbreviates the time spent at a trial. It condenses the evidence of the witnesses and is focused on the issues for determination. It is exchanged and shared with the opposing party prior to the commencement of a trial which results in a better understanding of the case by the respective parties or ultimately a resolution of the matter without a trial.

For this reason good case management will suggest that the exchange of witness statements take place prior to a pre-trial review so that the Court at the pre-trial review stage may consider the proposed evidence, consider applications by the parties such as to strike out portions of the evidence requests for information, and determine the effect of the proposed evidence on the pleaded case.

5.2 Part 29.4 CPR states that the witness statement is the "*statement of the evidence of any witness upon which the party serving the statement intends to rely in relation to any issues of fact to be decided at the trial."* These statements should as far as reasonably practicable, be in the intended witnesses own words and not include any matters of information or belief which are not admissible and, where admissible, must state the source of such information or belief or any matters of information or belief.

5.3 The Court has the power to order any inadmissible, scandalous, irrelevant or otherwise oppressive matters be struck out of any witness statement.

5.4 Having provided a witness statement, it is the obligation of that party to call that witness to give evidence unless the court orders otherwise. See Part 29.9 CPR. If a party does not wish to call that witness he may give a notice to that effect to the other party of not less than 21 days before the trial. See Part 29.9 (2) CPR. It is obvious that in cases where there is a dispute of fact the maker of the witness statement must attend to be cross-examined on his statement unless there is some compelling reason not to do so. Indeed a Claimant runs a considerable risk in not filing his witness statement, as it can ultimately lead to a Court concluding that there is simply no evidence to be adduced from him in support of his claim.

5.5 This may not however always be the case as is demonstrated by Gobin J in H.C.A. 39/2005 ***John Rahael vT&T News Centre Limited.*** In that case the agreed statement of facts was sufficient for the Court to adjudicate upon the issues to be determined in that case notwithstanding the absence of witness statements for either party. The impact of witness statements and the absence of testimony by a party to proceedings will therefore vary from case to case. In relation to this case, although there is an agreed chronology of facts, there are hotly contested facts

which are central to the claim for the first Claimant. Without his evidence he sets in train a domino effect resulting in the eventual collapse of his case.

5.6 In some cases a witness statement may be filed on behalf of a witness but he is not called to be cross-examined. **Blackstones, Civil Practice 2008** observes:

> *"Despite the provisions of the Civil Evidence Act 1995, there are several reasons why judges tend to attach limited weight to statements relied upon as heresay without calling the maker at trial. The fact that the witness is not present, in the absence of some good reason, tends to indicate that the witness does not have confidence in the statement. It will not have been tested by cross-examination. It may not have been possible to show weaknesses or limitations in the evidence, such as the distance from the scene of the witness, whether there were any obstructions, whether the witness saw what is dealt with in the statement rather than constructing it after the event, etc. Live witnesses are also thought to have great impact with the court (for better or for worse, depending on how they perform in the witness box). The result is that, wherever possible, witnesses are called to give evidence at trials."*

5.7 In this case no reason was advanced for the first Claimant's failure to file his witness statement nor to attend Court to be cross-examined. It is true that Ms. Mottley-Lawrence did attend to be cross-examined on her witness statement. However her statements concerning the decisions made by the first Claimant to purchase the unit, the motivating factors of the first Claimant to enter into the agreements for sale, his observations with regard to his property are not matters which can fairly be the subject of cross examination of Ms. Mottley-Lawrence. The Court certainly can put very little weight on any of these statements in the absence of his cross-examination. If then the evidence in support of the first Claimant's case is of little probative value, why should it be entertained at all?

5.8 In this regard the Court agrees with the observations of Pemberton J in CV 2006-214 ***Jorsling Guide and Enez Guide v Richard Guide Diane Bird and Guide Funeral Services and Crematorium Limited*** when she stated:

"*The significance of cross examination can never be over emphasized. This is the crucial stage of the trial process where evidence is tested. During cross-examination the Court has an opportunity to assess the value of the evidence based on the demeanor of the witness and the coherence and consistency in his responses….The need for cross examination is particularly heightened when the Court is called upon to resolve issues of fact, as opposed to law.*"

5.9 It is vital in this case for the Claimants that they demonstrate their motivation, the inducements to enter into the agreements, their observations as to the state of the workmanship in their own units. In short the Court is called upon to make findings of fact on their intentions and actions throughout the course of their dealings with the Defendant. These are not matters which the second Claimant can speak of in relation to the first Claimant. One cannot assume that Ms. Mottley-Lawrence has some extrasensory perception to convey to the Court true impressions, observations and opinions of the first Claimant. The evidence on these matters must come from the first Claimant.

5.10 Out of an abundance of caution, the Court enquired whether there was any relationship or nexus between the two persons, but there was none save for the statement that the first Claimant was "her friend". The evidence can have no probative value to the first Claimant's case. Furthermore the evidence in relation to the first Claimant at best is hearsay and portions of the witness statement at paragraphs 7 and 9 were struck out on the ground that it contained hearsay evidence.

5.11 As a last resort, the Court examined the agreed bundle of documents to determine whether this could have been used to support the case for the first Claimant as stated in his pleadings. Unfortunately it does not. Even if the witness statement is permitted to corroborate the agreed facts which emerge from the agreed bundle of documents, it takes the first Claimant nowhere.

5.12 Accordingly there is no evidence that can be used in support of the first Claimant's claim. As a consequence the claim was struck out with costs. Those costs were dealt with at the end of the trial.

6. The second and third Claimant's claim

6.1 The second and third Claimant's claim is a simple one and the issues to be resolved are as follows:

(a) Whether these Claimants[3] are entitled to rescind the contracts for sale and obtain a return of their deposits.

(b) Whether there was a breach of the terms of the agreements for sale by the Defendant by (i) failing to exercise professional skill and care in the construction of the units and/or (ii) failing to maintain the value of the property or substantially maintain its accommodation.

(c) Whether the Defendant can properly advance a claim for misrepresentation against the Defendant.

(d) If so whether the Defendant reported to the Claimant the existence of a swimming pool as an amenity of the unit and the effect of that representation on the contract.

(e) If there was a breach of these contractual obligations did it go to the root of the contract to entitle the Defendant to avoid the contract altogether.

6.2 These Claimants bear the legal burden to substantiate its claims on a balance of probabilities. Unfortunately the case for the Claimants when characterized by the lack of independent corroborating testimony, little or no evidence with regard to the construction, design and fittings of the completed units and no expert evidence on the value of the property or to the quality of the workmanship. The Claimants' evidence lacked the detail required to mount its claim of defective or substandard workmanship. Bereft of any expert evidence as to the effect the absence of the swimming pool had on the value of the property and the quality of the workmanship performed, it is difficult for the Court to chisel away at the Defendant's statements as to its own quality of work performed on the units. See ***Lewis v Fothergill*** (1869-70) L.R. 5 Ch App 1203 per Lord Hatherly LC.

[3] "Claimants" in sections 6 to 12 inclusive of this judgment refer to the second and third Claimants, the claim of the first Claimant having been dismissed.

7. **The agreements for sale**

7.1 The Claimants rely upon the implied terms of the agreement for sale. The agreement sets out the main obligations which are in contest in this case, that is the quality of the work to be executed and the date of completion.

Quality of work:

7.2 The main plank of the Claimants' case rests on clause 9 of the agreement for sale. This clause sets out the obligation of the Defendant in the construction of the units. Paragraphs 5, 6 and 7 of the Statement of Case set out the breaches of contract in particular reference to clause 9 of the agreement.

7.3 The "pre action protocol letter" issued by the second Claimant makes specific reference to the breach of clause 9. It is important in the context of this dispute to note the manner in which the claim was so framed by the third Claimant in its pre action protocol letter.

> "*Clause 9 of the subject agreement requires that the units be completed in a proper and workmanlike manner in accordance with the plans and specifications. Further clause 9 required the seller not to reduce the value of the condominium or substantially alter the accommodation.*
>
> *My client instructs me as to the following points:-*
>
> *(1) Part of the condominium fills with water whenever it rains. There is inadequate drainage resulting in damp.*
>
> *(2) Poor workmanship has been effected on to the furnishings and floorings.*
>
> *(3) The sale brochure of the subject premises exhibited a pool as being part of the amenities provided by the builders. No pool has been built.*
>
> *The property was purchased in the expectation that clause 9 would be adhered to and the property would be in confirmatory with its advertised value based on the sale brochure."*

7.4 It is significant to note that the main complaints of the third Claimant as articulated in this letter and indeed crystallized in her pleadings was of the

alleged poor workmanship by reference to plans and specifications and the reduction in value of the property or the failure to complete the property in conformity with its advertised value. This is also the case in relation to the second Claimant. Unfortunately there is absolutely no evidence in this case of the value of the property save for the purchase price in the agreements for sale. Furthermore there is no evidence of the plans or specifications to which the Defendant was to conform in its construction. Although the agreed bundle contained an exhibit of a floor plan of the units, this in no way assisted the Court in either establishing the value of the property or determining what were the items of finishes and/or design to be achieved in construction. Both Counsel for the Claimant and the Defendant conceded this.

7.5 In the context of clause 9, the evidence of the plans and specifications should have formed part of the agreed bundle. Without this critical evidence the Claimants' case is a non starter.

7.6 Clause 9 of the sale agreement also provides that the Defendant had the right to substitute materials of comparable quality and value in lieu of those contained or referred to in the said plans "*if in its absolute discretion it deems it expedient so to do and to make reasonable modifications to the said plans in such a manner as may be necessary as a result of the use of such substituted materials as aforesaid*".

Date of completion:

7.7 Counsel for the Claimants observed that the agreement for sale made express provision for the completion of the construction and completion of the sale. Certainly the construction must precede the sale and this is captured in clauses 4 and 9 of the agreement for sale.

7.8 Clause 4 of the agreement for sale provides for the completion of the purchase and payment of the balance of the purchase price to take place on or before the expiration of 30 days "*from the date of production by the Development Company to the purchaser of a completion certificate issued by the Regional Corporation in respect of the condominium*" clause 5 sets out the obligation of the Defendant to procure a lease to effect the sale and purchase of the condominium.

7.9 At clause 8 the Defendant is entitled to forfeit the deposit if the purchaser fails to complete the sale "*on the date fixed for completion"* through no default of the Defendant.

7.10 Clause 9 sets another deadline date. It is for the completion of the construction of the unit no later than 15th March 2005. Paragraph 10 of the agreement stipulates that if the Company shall fail to complete the condominium on or before 15th March 2005 it shall be completed on an agreed date as soon as possible after the said 15th June 2005.

7.11 Certificates of completion were issued on 21st July 2005. However, there was no evidence that this was an agreed date for the completion of the construction of the unit. Notwithstanding the Claimants' claim against the Defendant was not about the delay in construction but whether it constructed the condominiums in a "proper and workmanlike manner in accordance with the building plans specifications." In any event the construction was superceded by the main deadline for the completion of the sale, which was set at three months from the date of production by the Defendant to the purchasers of a completion certificate issued by the regional corporation. The Court agrees with the submission for the Defendant that it is the issue of the certificate which will set off "the alarm bell" for the purchaser signifying their obligation to complete the sale and to pay the balance of the purchase price. The certificates having been issued on 21st July 2005, the deadline for completion of the sale by the Claimants was 20th October 2005. Indeed by notice dated 5th October 2005 the Defendant called upon the second and third Claimants to complete the sale within 28 days of the date of the notice setting a deadline date of 2nd November 2005. The Defendant by the said notice made time of the essence.

<u>The deposit</u>**:**

7.12 It is accepted that the vendor is entitled to forfeit a deposit upon the failure of the purchaser to complete a sale. This indeed is the express term at clause 10 of the agreement for sale. There is no issue in this case that the deposit of 10% paid by the Claimants was unconscionable or exorbitant nor was it forfeited by way of penalty. Those were the main considerations in ***Workers Trust and Merchant***

Bank Limited [1993] 2 AER 370 (PC). In that case however Lord Browne Wilkinson usefully observed:

> "*Ancient law has established that the forfeiture of such a deposit (customarily 10% of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract.*
>
> *Ever since the decision in Howe v Smith the nature of such a deposit has been settled in English Law. Even in the absence of express contractual provision it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeited, equity having no power to relieve against such forfeiture."*

7.13 There is no dispute that the Claimants failed to complete when called upon to do so by the Defendant. This triggered the Defendant's right to forfeit their deposits. The issue for determination is whether the Claimants were justified in failing to complete and to avoid the contract altogether.

8. **Construction in a proper and workmanlike manner:**

8.1 The obligation of the Defendant pursuant to the express terms of the contract was to complete the said units "*in a proper and workmanlike manner in accordance with building plans specifications*."

8.2 The obligation to complete units in a "proper and workmanlike manner" simply refers to the manner in which the work is to be performed as distinct from the materials to be used. See ***Hancock and Others v Brazzier*** [1966] 1 WLR 1317 per Lord Diplcok LJ. In that case there were agreements in writing in substantially identical terms. The defendant company, which carried on business as building contractors and house vendors, agreed to sell to the respective plaintiffs plots of land with a partially erected house on each. By clause 9 the builders agreed to

erect and complete the houses "in a proper and workmanlike manner" in accordance with the plan and specification annexed to the agreement. The plan and specification required four-inch "hardcore" to be put under the concrete floors.

8.3 **Lord Diplock LJ** stated:

> *"Therefore, following the advice of Parker L.J. in Lynch v. Thorne I approach clause 9 to see to what extent there is room for the implied condition to operate in the area not covered by the express condition. The express condition I have already read. There is first a reference to the completion of the house in a proper and workmanlike manner. My inclination would be to regard that express clause as relating to the way in which the work was carried out rather than to the materials, and that clause requires that the work shall be carried out with due skill, care and judgment. Then it goes on: the house is to be erected, built and completed in accordance with the plan and specification supplied to the purchaser. It is in the plan and specification that one finds the reference to materials and, as I have said, the only reference to the hardcore as a material is to be found in the specification, and the only express term about it is the description of it, the single word "hardcore."*
>
> See also ***Brewer Rhymneytron Co.*** [1910] 1 Ch. 766

8.4 The enquiry as to whether work was performed in a "proper and workmanlike manner" is fact specific. The Court is not satisfied that the evidence demonstrates any lack of care or skill on the part of the Defendant. Further, without the plans and specifications it is difficult for this Court to make any assessment as to whether the Defendant is in breach of the obligation to complete the units in a proper and workmanlike manner in accordance with plans specification. There is no evidence that the work that was performed did not comply with the plans and specifications which the Claimant's inspected prior to entering the agreements for sale.

8.5 Further the Claimants' Counsel conceded that there is no evidence before this Court that the Defendant -

- Failed to install properly or at all drawers in the kitchen area;
- Failed to complete the driveway properly or at all;
- Failed to install the doors and windows properly or at all;
- Failed to provide fittings of same or similar quality pursuant to the plans and specifications.

8.6 Indeed with regard to the units purchased by the second Claimant her observations of the units in her evidence in chief took place prior to completion. Even so her description falls woefully short of the type of evidence needed to demonstrate a breach of clause 9 of the agreement. "*The master bedroom was so tiny.*" "*The tiles were different from room to room*". "*The kitchen was simply under par.*" The Court does not accept this as credible evidence to demonstrate a breach of the obligation to complete the property in a "proper and workmanlike manner."

8.7 Similarly, the third Claimants' observations made after the units were constructed does not paint a picture of a unit that was incapable of being delivered to the Defendant. She observed "*cheap ceramic tiles,*" light fixtures of a "*cheap quality*" pipe fixtures and broken tiles in the bathroom were exposed. The view of the sea was partially blocked by a firewall. These allegations, even if untested in cross examination, cannot cross the hurdle of providing a breach of the Defendant's obligation in clause 9. The pictures that were admitted into evidence do not corroborate the allegation of broken tiles nor exposed fixtures. Further this Court simply cannot be called upon to give judgment for a Claimant who complains about "*cheap quality*" without ascribing a value or indicating her basis for making this claim or stating what precisely is the breach in the obligation under clause 9 in providing those fittings and fixtures. If indeed the Defendant used fittings and fixtures that were not specified in the plans and specifications that is another matter, but that simply does not arise in this case.

8.8 The Defendant's witness Ms. Pillai on the other hand was unshaken in cross-examination as to the quality of work that was executed on site. She was also

confident that the value of the units had not diminished. She explained that the problem with the excess water on the patio was corrected. She indicated that the tiles were styled to fit the décor of the different rooms and the cupboards used were the modern cupboards available to the Defendant.

9. **The swimming pool**

9.1 The case for the Claimants in relation to this item is to be treated in context of its pleaded claim that the value of the property was diminished by the replacement of the pool with a therapeutic spa. The allegation that the value of the property was diminished by the replacement of the pool with a spa was however an expression of the opinion of the third Defendant which was not supported by any evidence.

9.2 The evidence as to value, if there was any, goes however the other way. The letter written by Ms. Mottley-Lawrence in August 2005 acknowledges that the units could have been re-sold at a higher value. Further in the cross examination of both witnesses they confessed that they were in the market to resell the units to make either a profit or to recover their deposits.

9.3 Furthermore in relation to the third Claimant this Court finds as a fact that she was well aware of the replacement of the pool with a spa and failed to rescind the agreement or to demonstrate her dissatisfaction with it. With regard to the second Defendant this Court accepts that she readily accepted the alteration when she was advised by Ms. Pillai of the change.

9.4 The Claimants' case was simply a matter of personal taste, of preferences without any supporting evidence as to diminution in value. Indeed one mans' meat is another man's poison. However one's personal preferences does not on its own invalidate these agreements for sale.

10. **Misrepresentation**

10.1 The Court holds that paragraph 11 of the Statement of Case is an inadequate plea to avoid the contract on the ground of misrepresentation. ***Bullen and Leake and Jacob's Precedents of Pleadings*** 13th Ed. page 427-428.

10.2 The Claimant must properly plead, with full particulars, whether the misrepresentation is fraudulent, innocent or negligent. It is unfair for the Claimants to identify the nature of the misrepresentation relied upon in its closing arguments.

10.3 Even if the Court is wrong on this issue, it is satisfied that the second Claimant accepted the alteration in the construction of the spa and that it was not a material representation in any event to enter into the contract.

10.4 The Court accepts that the Defendant genuinely held the view that a pool could have been constructed but later discovered that it could not dig too far beneath the earth to install a pool with dimensions of 12 feet x 13 feet. These were matters which were only discovered during the course of construction, and the purchasers were immediately advised of the alteration to a spa of 12 feet x 12 feet. The second Claimant accepted the alternative, the third Claimant made no initial complaint.

11. **Assessment of evidence**

11.1 In assessing the witnesses in this case, the Court was able to observe the demeanor of the witnesses and make its assessment based on their cross-examination against their witness statements and documentary evidence found in the agreed bundle.

11.2 Ms. Mottley-Lawrence was not a compelling witness. She was prone to exaggeration, inconsistent and unreliable. First she denied ever having seen the "October notice" calling upon her to complete the sale as well as the letter from the attorney at law for the Defendant in July 2005. This in spite of her admission in her evidence in chief that she did receive the October notice and the agreed bundle of documents containing both the notice and letter dated 21st July, 2005. She was obviously distancing herself from the Defendant's notice to avoid the contract, cognizant of the "alarm bell" of the completion certificate signifying the time for completion. The Court was satisfied that she was too busy with her personal affairs to give this project any attention. Second the Court is satisfied

that she instinctively reacted affirmatively when the Defendant advised her of the alteration of the pool to a spa.

11.3 The third Defendant claimed that the reason she did not complete the sale was that she was not able to "get the pool." However the Court was not furnished with the details of the pool to make any assessment as to whether the therapeutic spa was a poor replacement. Her evidence was also lacking in detail as to value of the property and alleged poor workmanship. Ultimately her desire to avoid the contract was based on her personal preference rather than a breach of contract on the part of the Defendant.

11.4 In contrast Ms. Alia Pillai, the witness for the Defendant, was unshaken in cross-examination and consistent in her approach to the project. The key elements of her testimony, which was accepted by the Court, are as follows:

- She contacted all the purchasers with regard to the change in the pool.
- Her reflex response in cross examination in relation to Ms Mottley-Lawrence who said "that was nice" when she was advised of the spa is more believable.
- In her opinion the value of the spa was just as good as a pool.
- She gave a very frank account of the finishes in the units.
- The finishes in her view conformed to the plans and specifications.
- The complaint in relation to the tiles was a deliberate design by the developers to suit the décor of the apartment.
- Indeed she was astute to remark that the units in her opinion were "modern, classy and affordable."

11.5 Mr. Pillai was not vigorously tested in cross-examination. He indicated that the materials used in the workmanship of the cupboards was acceptable in the industry.

12. **Conclusion**

12.1 Upon an overall assessment of the evidence, the Court was not satisfied that the Claimants' discharged their burden of proof. The Court held that the Defendant's

version of the events was more believable. In the premises the Claimants' claims were dismissed with costs.

12.2 Counsel for the parties agreed that the costs to be awarded as prescribed costs assessed on the values of the respective claims of the Claimants. The Court was of the view however that with regard to the first Claimant the Defendant should have applied to strike out that claim between the period when the witness statement was served on 2nd June 2008 and the date of the trial. Costs were therefore assessed up to the pre-trial stage and not up to the date of this trial.

12.3 The Defendant's costs payable by the Claimants are assessed as follows:

- The first Claimant do pay the Defendant's prescribed costs in the sum of $13,860.00.
- The second Claimant do pay the Defendant's prescribed costs in the sum of $34,350.00.
- The third Claimant do pay the Defendant's prescribed costs in the sum of $19,800.00.

Dated this 15th day of May 2009

Vasheist Kokaram
Judge