Court of Appeal
(Inferior Jurisdiction)

Judge Anthony Ellul

Civil Appeal number:- 74/2011

Christine Kay Treglown (respondent)

vs

Nicholas Calleja (appellant)

18th April 2017

The Court:

Having seen **the application of Christine Kay Treglown dated 9th March 2011** by virtue of which she requested the Court of Magistrates (Malta) to condemn defendant to pay her the sum of nine thousand and eighty four Euro and fifty six cents (€9,084.56) representing the refund of a deposit paid by her to the said defendant pursuant to the promise of sale agreement they signed on the 5th June 2006 relative to the transfer of flat 4 in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, which promise of sale agreement expired thus making said deposit refundable to her, with legal interest.

Having seen **the reply of Nicholas Calleja dated 4th April 2011**[1] by virtue of which he raised the following pleas: (i) the request by the Plaintiff for the refund of the sum indicated in the application should be rejected, with costs against her, since it is unfounded in fact and at law in view of the fact that the plaintiff herself is his debtor for an amount which exceeds the amount being claimed by her; (ii) plaintiff had authorized the release of the deposit in his favour after the promise of sale agreement dated 5 th June 2006 had expired and this on the understanding that he would not sell the immovable being flat 4, in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, but would sell said immovable to her when she would be in a financial position to purchase the said immovable; (iii) even though he stood by his obligation, after a period of two years from the date of the release of the deposit in his favour, plaintiff informed him that she was no longer interested in purchasing the immovable property in issue; (iv) in order to honour the agreement reached with plaintiff he incurred a number of expenses and suffered

[1] Fol 7

loss of sales and a depreciation in the value of the property, for which expenses and losses plaintiff is solely responsible; (v) the claim against plaintiff is being duly put forth by virtue of a counter-claim filed concurrently with the Reply;

Having seen **the counter-claim filed by Nicholas Calleja dated 4th April 2011**[2], by virtue of which he asked the Court to declare plaintiff as being solely responsible for the breach of the agreement reached between them pertinent to the sale of flat 4 in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, and consequently condemn her to pay him the sum of eleven thousand six hundred and forty six Euro and eighty seven cents (€11,646.87) or such other sum which may be liquidated by the Court, representing damages suffered by him, which damages consist of (i) the depreciation in the value of the property in question as a result of the fact that, in accordance with an agreement reached between the parties, he had refrained from negotiating the sale of the property with third parties despite the fact that the promise of sale agreement with plaintiff had expired; and (ii) expenses and interests incurred by him in favour of third parties as a consequence of the fact that plaintiff breached their agreement. With costs and legal interest against plaintiff.

Having seen **plaintiff's reply to defendant's counter-claim dated 2nd May 2011**[3] by virtue of which she raised the following pleas: (i) she had signed a promise of sale agreement on the 5th June 2006 for the purchase of flat 4 in a block of apartments which was yet to be constructed in Triq ix-Xatt, Kalkara, and which was to be constructed within a period of twenty four months; (ii) when the promise of sale agreement was signed she paid the sum of Lm3,900, equivalent to €9,084.56. Before the two years had expired she was informed that no development permits were granted for the development of the second floor and thus the flat to be purchased by her could not be built legally. At the time she was in the United Kingdom but when she came over to Malta she went to MEPA offices together with defendant to determine if and how the issue could be determined and defendant was informed that he had to make some amendments to the plans submitted to the said Authority. Eventually she was informed that the permits had been issued by MEPA; (iii) the property was nowhere near ready in June 2008 and she was prepared to wait and kept coming over to Malta from time to time and noticed that no particular progress was being made on the development. In July 2009 the existing building had just been demolished and the site excavated and preparatory works for the foundations had started. There was just a hole on the site; (iv) she kept asking defendant to know when the property would be finalized and he kept on delaying thus causing her great frustration because each time she was coming over to Malta and defendant kept delaying her plans. Eventually defendant informed her

[2] Fol 8
[3] Fol 12 et seq

that the apartment and underlying garage which she was going to purchase would be ready and built in shell form by January 2010; (v) in January/February 2010 defendant informed her that the property was ready in shell form and so she came over to Malta and informed him accordingly. Defendant had already set a date with the Notary, Dr. Pierre Cassar, for the singing of the relative deed of sale but upon inspecting the property she noted that there was no roof on the apartment and none of the common parts were finished and there was no ramp to the garage. The stonework wasn't pointed and the property was nowhere near ready, not even in shell form. She immediately contacted the Notary for advice and he told her that in the circumstances it was not in her interest to acquire the property in that condition. She informed defendant accordingly; (vi) she met defendant and after a brief discussion between them he promised that the property would be ready by March and that she could return to Malta then in order to finalize the deed. However after consulting her accountant in the United Kingdom and taking stock of the situation, by letter dated 2nd March 2010 addressed to Notary Pierre Cassar, which letter was e-mailed to defendant and duly received by him, she informed the Notary that for the reasons explained in the letter she was no longer interested in purchasing the property; (vii) if anyone has suffered any damage as a consequence of this whole issue it is her since she repeatedly came to Malta on defendant's suggestion only to find that what he stated to her was not the case. The last time she visited the property was in September 2010 and even then the common parts were still not finished and the property could not be said to be finished in shell form; (viii) the Defendant's assertion that he held off the sale of the property because of her is totally unfounded. This claim was never put forth by defendant except when she requested the refund of the deposit transferred to him; (ix) there wasn't any binding agreement between them which compelled defendant from not selling the property in question to any third party. She never agreed with defendant that he would keep the property off the market. Defendant merely wanted to sell the property to her and she was willing to purchase it within the timeframe agreed upon. When she authorized the Notary to forward the deposit to the defendant this was done as a gesture of good will on her part with the hope that eventually defendant, whom she thought was short of funds, would complete the property as soon as possible. Based on the above, the counter-claim should accordingly be rejected.

Having seen **the judgement of the Court of Magistrates of the 4th February 2016** which decided as follows:

"For these reasons the Court:

1. Rejects the Defendant's pleas to the Plaintiff's claim;

2. Uphold the Plaintiff's pleas to the Defendant's Counter-Claim;

3. Rejects the Defendant's Counter-Claim;

4. Upholds the Plaintiff's claim; and

5. Condemns the Defendant to pay the Plaintiff the sum of €9,084.56, with legal interest due from the 21st March 2011, the date of service of the claim on the Defendant, till date of actual payment.

Costs are to be borne entirely by the Defendant."

Defendant appealed from the said judgement and respondent replied[4]. During the sitting of the 7th February 2017[5] oral submissions were made and the appeal was adjourned for judgement.

The Court took cognisance of all the acts from which it results that:

i. Respondent is a British National;

ii. Following an advert placed by appellant on an on-line site advertising the sale of property on plan, he received an email from respondent whereby she declared her interest in buying one of the projected apartments[6];

iii. On the 5th June 2006 appellant and respondent signed a promise of sale by virtue of which he bound himself to sell and transfer unto respondent, who bound herself to purchase and acquire, (a) the airspace measuring approximately 95 square metres which shall be occupied by the apartment which when constructed shall be internally marked number 4 in a block of apartments externally unnumbered and unnamed, in Marina Street (Triq ix-Xatt), Kalkara, including a share in ownership of the common parts including the lift and the right of use over the roof which right of use means that the purchaser has the right to install and keep a television aerial/satellite dish and a water tank with the consequential right of access in case of maintenance and repairs. … (b) the garage externally unnumbered and unnamed in a private drive way in Marina Street, Kalkara, at basement level[7];

iv. The price was €90,845.56 (the equivalent of Lm39,000 at the time), out of which the sum of €9,084.56 (equivalent to Lm3,900 at the time) was paid "*on account of the sale price and the balance paid on the final deed of sale*"[8]. In the promise of sale it was stated that this deposit on account was to be paid within three weeks from the date of the promise of sale and was to be held by Notary Pierre Cassar until such time when the searches in the liabilities and transfers of the Vendor, that is the appellant, would be completed and the building permits by MEPA issued. The said payment of account was forfeitable in favour of appellant in the eventuality that

[4] Fol 9 et seq
[5] Fol 17
[6] Appellant's affidavit at fol 21, para 1-3
[7] Agreement at fol 26 et seq
[8] Clause 1 at fol 27

respondent fails to appear for the final deed of transfer without a valid reason at law[9];

v. The agreement was also subject to the condition that within four months from date of the promise of sale agreement a building permit for the construction of a block of apartments and basement garages had to be obtained[10];

vi. The promise of sale agreement was valid up to the 30th June 2007[11];

vii. Concurrently with the promise of sale agreement, the parties signed another agreement also dated 6th June 2006[12] by virtue of which respondent commissioned the appellant as Contractor, who accepted, to carry out the works indicated in the said agreement, that is: (a) the application and issue of the building permits; (b) the construction in shell form of the garage complex at basement level shown in the plan attached hereto; (c) the construction in shell form of the apartment and the block of apartments shown in the plan attached hereto; (d) the completion and finishing off the common parts of the garage complex having the specifications herein mentioned: electricity operated gate to the garage complex with optional remote control unit, automatic sensor lighting, lighting points, trunking systems for water and electricity services to the garage, plastering and pointing of the garage common parts and garage;

viii. This agreement further stated that the contractor shall complete and deliver (a) the apartment within 24 months from the date of the agreement, and (b) the finishing of the common parts of the garage complex also within 24 months from the date of the agreement;

ix. The price for the said works was €25,623.10 (equivalent to Lm11,000 at the time) which amount was to be paid when the architect responsible for the works issues a certificate declaring that the apartment and garage common parts have been completed as provided for in the agreement;

x. **When the promise of sale agreement expired on the 30th June 2007 it was not extended. No new promise of sale agreement was at any time signed between the parties**;

xi. Nevertheless parties remained in contact via email, expressing a reciprocal intention to proceed with the sale of the apartment once the building permit is

[9] Clause 2.0 and 2.1 at fol 27
[10] Clause 5 of the agreement at fol 27
[11] Clause 11 at fol 28
[12] Fol 29 et seq

issued and the apartment is completed and finished as previously agreed between them[13];

xii. The development permit for the demolition of the existing building and construction of 6 dwellings and 5 garages) at the site in question was issued by MEPA on the 29th January 2008[14];

xiii. On the 16th June 2008[15] respondent authorized Notary Pierre Cassar to release in favour of the Defendant the sum of Lm3,900 she had previously placed under his custody and this as soon as the contracts are 'drawn up';

xiv. In July 2008 the money was released to appellant[16];

xv. On the 30th November 2009 respondent told her Notary that from information given to her by appellant, *"the property is nearly finished in shell form"* and that the transfer of funds needed to be completed by the 8th January 2010 as indicated by appellant[17];

xvi. On the 26th January 2010 respondent transferred funds from her British Bank account to the Maltese bank account in order to proceed with the contract of sale of the apartment in question[18];

xvii. Respondent came to Malta in February 2010 to conclude the contract because she was informed that the apartment was ready[19] but photos taken on the 4th of that month showed the property still in an unfinished state[20]. Appellant confirmed that the property was in the state shown in the photos at that time[21];

xviii. On the 2nd March 2010, respondent wrote a letter to her Notary, copied also to appellant[22], informing him that she had decided not to proceed with the purchase of the property for the reasons mentioned therein, and that as a result she wished to recover the deposit of Lm3,900 and the Lm390 paid to the Inland Revenue in that respect;

xix. The day after, appellant communicated with respondent to discuss the situation in view of what he referred to as "*a lot of misunderstandings*"[23];

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[13] Fol 48 et seq
[14] Fol 117.
[15] Email at fol 48.
[16] Evidence of respondent at fol 129 and bank transfer at fol 128.
[17] Fol 50.
[18] Fol 126-127; see also evidence of respondent at fol 129 et seq.
[19] Fol 129.
[20] Fol 107-112.
[21] Fol 114.
[22] Fol 54-56.
[23] Fol 54.

xx. The matter was not solved amicably and the present court proceedings were intitiated.

First Grievance: No judicial intimation in terms of section 1357 (2) of the Civil Code.

Appellant disagrees with the conclusion of the Court of Magistrates because in his opinion it disregarded the crucial and determining fact that prior to the lapse of the term stipulated in the promise of sale agreement, respondent did not formally call upon him to sign the deed of sale according to law.

Respondent rebutted that neither of the parties sent a judicial intimation in terms of the law and so the effects of the promise of sale ceased on the lapse of the time stipulated therein. At that point, there was no legal reason for the deposit not to be returned. Moreover, respondent had every right not to sign the deed of sale because by the date of the expiry of the promise of sale agreement, there was no building permit on site and the building had not been constructed.

Section 1357 of the Civil Code states that -

"1357. (1) A promise to sell a thing for a fixed price, or for a price to be fixed by one or more persons as stated in the foregoing articles, shall not be equivalent to a sale; but, if accepted, it shall create an obligation on the part of the promisor to carry out the sale, or, if the sale can no longer be carried out, to make good the damages to the promisee.

(2) The effect of such promise shall cease on the lapse of the time agreed between the parties for the purpose or, failing any such agreement, on the lapse of three months from the day on which the sale could be carried out, unless the promisee calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid."

From the above provision it is immediately clear to the Court that if the time agreed upon between the parties in the promise of sale agreement lapses, **all** its effects cease. It is also clear that the judicial intimation referred to in this provision is only **an option** which may or may not be resorted to by the promisee in order to carry out the same agreement. If such option is not exercised, each party returns to the *status quo ante* and the promisor is bound to return to the promisee the sum paid on account of the sale price.

As was stated in the case **Paul Zammit et vs Jonathan de Maria et decided on the 27th October 2016** by the First Hall, Civil Court -

"Illi skont il-gurisprudenza tal-Qrati taghna jekk il-formalitajiet rikjesti f'dan l-artikolu ma jigux osservati, l-konvenju jitlef l-effikacja tieghu u dakinhar li jiskadi, l-partijiet jergghu lura ghal posizzjoni li kienu qabel sar il-konvenju.

"F'kaz fejn konvenju jiskadi minghajr hadd mill-kontendenti ma jimplimenta dan il-konvenju fit-terminu tal-validita` tieghu, u lanqas ma jiehu mizuri gudizzjarji li trid il-ligi biex jinfurzaw id-drittijiet u obbligi reciproci stipulati fil-konvenju jfisser li l-partijiet jirritornaw ghall-istatus quo ante. Ghalhekk, il-kompratur jista' jilob lura minghand il-venditur, id-depozitu li jkun hallas fuq il-konvenju." (Ara sentenzi A. ***Ciantar vs A. Vella*** *– LXXII pII p828;* ***L.Abela vs T.Spiteri*** *– Vol LXXIII pII p403;* ***J.Cassar vs Farrugia*** *– LXXVII pII p316).*

*Illi kif intqal fis-sentenza "**Carmelo Sciberras et vs Nazzareno Muscat et**" (deciza fl-20 ta' Ottubru 1999, Cit Nru 2485/97/RCP) "dan ifisser li l-ammont li thallas millatturi lill-konvenuti bhala depozitu u 'akkont tal-prezz' ghandu jigi mhallas lura mill-konvenuti lill-atturi, u dan anke peress li la darba dan thallas bhala akkont tal-prezz, u lbejgh bejn il-partijiet ma sarx, allura huwa ovvju li ma hemm ebda prezz x'jithallas". "**Victor Cini vs Andrew Agius**" – AC 9 ta' Marzu 1998 - Vol VLXXII.II.464; **Aldo Ciantar vs Alfred Vella**" – P.A. GMB 18 ta' Novembru, 1998 – Vol VLXXII.IV.828).*

Ghalhekk, bhala principju, l-ammont depozitat jithallas lura lill-kompratur jekk il-bejgh bejn il-partjiet ma jsirx. (Appell Kummercjali ***V. Cini vs A.Agius et****, fuq citat)."*

That no judicial intimation in terms of article 1357(2) of the Civil Code was sent in the present case is not disputed between the parties.

The Court deems that all the arguments raised by appellant under this grievance are unfounded because:-

i. The promise of sale agreement stipulated the forfeiture of the payment on account in favour of appellant **only** if respondent failed to appear on the final deed of sale without a valid reason at law;

2. Respondent had no obligation at law to summon appellant to appear on the relative deed of transfer prior to the lapse of the promise of sale. This is more emphatically stated in view of the fact that at the time of lapse of such agreement, the building permit for the demolition of the existing dwelling and the construction of the apartments and garages in question had not even been issued. So even from a factual point of view, it would have been useless for respondent to come forward with such a judicial intimation;

3. Contrary to what appellant is claiming, there transpired no valid reason at law for the sum paid on account by respondent to be forfeited in his favour after the expiry of the said promise of sale, and he would have been obliged to return the said sum to respondent soon after the expiry of the promise of sale;

4. But the context of the case here is different. The legal basis of respondent's action in court is not related to the rights and obligations arising out of the promise of sale agreement of the 5th June 2006 itself, the effects of which have long since expired. The action here is based on a claim for the refund of the sum of money released and paid to appellant on the 16th June 2008 as a result of a mutual agreement that took place **after** the expiry of the said promise of sale. The legal

parameters of the case are hence different. As the Court of Magistrates rightly pointed out in its judgement –

"Having established that after the 30th June 2007 the Defendant and the Plaintiff were not bound by a valid promise of sale agreement with regard to the transfer of the Property, the Court must now determine whether in the circumstances of this case the payment made by the Plaintiff to the Defendant amounting to Lm3,900, equivalent to €9,084.56, is refundable to the said Plaintiff or otherwise.

As already pointed out above from the records of the proceedings it results that the Plaintiff released the sum of Lm3,900 in favour of the Defendant in July 2008 when the promise of sale agreement dated 5th June 2006 had already expired. Once the Defendant and the Plaintiff were at that point in time no longer bound by a valid promise of sale agreement neither one of them can invoke in his/her favour or expect the Court to apply the principles normally applicable to requests for refund of deposits, be it on account or forfeitable, paid during the term of validity of a promise of sale agreement. Having said that however, the Court is of the opinion that this does not automatically mean that the sum paid by the Plaintiff to the Defendant in July 2008 is not in the circumstances of this case refundable to the said Plaintiff.

The particular circumstances of this case are in the opinion of the Court very pertinent to the outcome of these proceedings because in spite of the way in which the Defendant and the Plaintiff decided to conduct their affairs between them following the expiry of the promise of sale agreement dated 5th June 2006, there undoubtedly was an underlying reciprocal obligation to act in good faith towards each other.

The sum of Lm3,900 paid by the Plaintiff to the Defendant was not a mere payment made in order to secure the Property and to ensure that the Defendant would not negotiate the sale of the said Property with third parties as claimed by the Defendant, neither was it a mere gesture of goodwill on the part of the Plaintiff in the hope that eventually the Defendant, whom the Plaintiff thought might have been short of funds, would complete the Property as soon as possible, but it was a payment actually and effectively made in anticipation of the final transfer of the Property from the Defendant to the Plaintiff, which Property was to be transferred completed to the standard of finish agreed to between them, that is in a shell form state."

6. In the light of the above, the issue that a judicial intimation was not sent to appellant by respondent prior to the expiry of the promise of sale agreement is totally irrelevant, and so is the fact that the said sum was originally transferred by respondent to the Notary during the period of validity of the promise of sale of the 5th June 2006.

This grievance is therefore rejected.

Second grievance: Respondent violated her obligation to act in good faith towards appellant.

Appellant complains that the conclusion reached by the first Court that appellant violated his obligations towards respondent is not entirely correct insofar as respondent herself could not realistically proceed with the acquisition of the property until the end of January 2010. Thus when she declared that she was no longer

interested in purchasing the property two months later, it was a unilateral decision without any prior warning to appellant or without formally calling upon him to finalise the works within a specified time. Moreover, the said Court also disregarded the fact that until February 2010, plaintiff was still showing interest in purchasing the property in question, and her only insistence was that works in the common parts should be completed too, before the deed of acquisition was signed. So it was respondent who, in bad faith, reneged on the understanding that prevailed between the parties up to the end of January 2010.

Appellant also complained that as a result of respondent's bad faith he suffered substantial damages because the property in question was devalued and he subsequently signed a promise of sale agreement with third parties for an inferior value. Had plaintiff acted in good faith and declared her intentions earlier, he would have been at liberty to sell the property at an earlier date. In the light of these circumstances, his-counter claim should be given due consideration and there should at least be a set-off between the respective claims put forward by either party.

On the other hand respondent rebutted that it is not true that the contract of sale was not signed in February 2010 because of respondent's lack of funds. The only reason was because appellant had reneged his promise of finishing the works and he also lied to her by saying that it was ready when it wasn't. Moreover, she argued that appellant failed to adopt the remedies stipulated at law with regard to damages.

This grievance is related to the first court's appreciation of the evidence. At the outset of its considerations the Court highlights the long-standing established principle that this Court does not interfere in the first court's discretion unless a manifest error results which, if not rectified, will give rise to a serious injustice.

The Court considers that -

i. As the Court of Magistrates rightly pointed out –

"Even though the contract of works dated 6th June 2006 and signed between the Defendant and the Plaintiff was intrinsically connected to the promise of sale agreement dated 5th June 2006, which it is being reiterated had expired, the mere fact that the parties had entered into that agreement sufficiently shows that their intention with regard to the standard of finish of the Property to be transferred by the Defendant to the Plaintiff was very clearly set out between them. From evidence submitted during the hearing of these proceedings it does not result that the parties reached a different agreement with regard to the standard of finish of the Property to be transferred and therefore it is safe to state that the Plaintiff expected to receive from the Defendant the Property finished in shell form with the common parts of the garage complex finished as per specifications indicated in the contract of works, that is with an electricity operated gate to the garage complex with optional remote control unit, automatic sensor lighting, lighting points, trunking systems for water and electricity services to the garage, plastering and pointing of the garage common parts and garage, which was the standard of finish being promised by the Defendant but which ultimately was not delivered by him."

ii. After the expiry of the promise of sale agreement, the parties did not set a specific date within which the property in question had to be finished as agreed, but it transpires that from time to time respondent enquired with appellant about the progress of the works –

- **On the 16th June 2008** respondent asked appellant whether everything was going well with the demolition of the building[24] to which appellant replied on the same day[25] informing her that unfortunately this had not yet been done because the contract with the owners of the original property had not yet been signed. In that same email appellant complained that the Notary was *"working really slowly"* but that the contract should be concluded in three weeks.

It is also pertinent to note that in her same email of the 16th June 2008, respondent informed appellant that the sale of her property in the UK had fallen through and that she was pushing on to try to find a new purchaser. She added that, *"....at least the delay with the planning in Malta has given me a bit more time to sort everything out[26]";*

- **On the 30th November 2009**[27], respondent sent the following email to Notary Pierre Cassar, **copied to appellant**, stating that:

"I understand from Nicholas that the property is nearly finished at shell form."

In that same email, respondent informed the Notary that in the meantime she had sold her property in the UK and that she was hoping to complete the transfer the money for the contract to be finalised by end of December 2009, beginning of January 2010 as requested by appellant.

As already stated, the records of the proceedings show that these funds were transferred on the 26th January 2010[28], meaning that respondent had prepared everything on her part to sign the contract as indicated;

iii. Yet, as appellant himself confirmed on oath[29], by the 4th February 2010 the property in question was neither finished in shell form and nor were the communal parts including the garage as clearly confirmed by the photographs exhibited as evidence[30]. As respondent stated in court when asked why wasn't the contract published during February 2010:

[24] Email at fol 52.
[25] Fol 52.
[26] Fol 52.
[27] Fol 50.
[28] Fol 126.
[29] Fol 114.
[30] Fol 108-112.

"Because before we had gone to Pierre Cassar's Offices which was book(ed) to Saturday, I had actually gone to see the property and (recte) saw that it was not ready at shell form so I phoned Pierre Cassar and said to him that at this moment in time there was no roof on the property and the common parts weren't finished, the garage ramp wasn't even there and there were no workmen on the site. I explained this to Pierre Cassar and he advised me not to pay any money because this could lead to complications[31].";

iv. **On the 12th February 2010**, according to respondent, she inspected the inside of the property and although the roof had been laid, the inside of the property was still not finished in shell form and no workmen were working[32]. Appellant did not deny this. In his evidence he said that as at February 2010 *"I confirm that the common part even though the ceiling of apartment number 4 was not completed it was shuttered and therefore all that had to be set was the concrete. So much so that by the end of February 2010 the ceiling was ready. The façade was not pointed and the ramp was under construction, how in fact that by the end of February 2010 it was ready[33]."*;

v. It is to be further noted that at that time appellant was also still liaising with MEPA with regard to an application which included *"internal alterations to residential units",* which development permit was issued on the **6th March 2010**[34], meaning that more work needed to be done in the apartment intended for respondent **after** that date;

In view of all this the Court cannot give credibility to appellant's evidence[35] and arguments that the delay in concluding the contract of sale was because of respondent's lack of available funds pending the sale of her UK property. Moreover, respondent had also addressed this allegation made by appellant –

"Even though I actually had the money in hand in January 2010, had the apartment and the common parts been ready before, I would have borrow(ed) the money and been able to purchase the same. It wouldn't have been a problem to obtain a loan from a bank in the UK since at the time I had two properties in my name. However I confirm that I explained to the defendant that I preferred paying in cash rather than taking a loan[36]".

The Court sees no reason why respondent should not be believed with regard to this statement.

In conclusion, neither can the Court overlook the expectations that appellant had been raising for respondent since the time when the promise of sale agreement was

[31] Fol 123-124.
[32] Fol 55.
[33] Fol 114.
[34] Fol 102.
[35] Affidavit at fol 22 paragraph 10 – Appellant stated that: ***"There was no haste on plaintiff's part, and neither was I trying to conclude construction works as soon as possible, as I did not know when payment by plaintiff could be effected. Plaintiff repeatedly informed me that she would not be in a position to finalise the purchase of property in Malta until the sale of her property in the UK was concluded. Consequently I had no clear indication of when the deed of sale with plaintiff was going to be finalized."***
[36] Fol 130.

in vigore (despite the difficulties he was facing with MEPA regarding the issue of the development permits) and even subsequently:

- **In his email of the 24th August 2006** he reassured respondent – "*Yes for now just let the photograph (of the Kalkara harbour) fulfil your dreams, in one year you will be thinking of how to move your things!* [37]";

- **In his email of the 18th April 2007** despite problems with the issue of the MEPA permit, appellant still told respondent *"But I am still very confident that if I'll have the contractor ready to start as soon as the permit is issued I'll be able to finish the project in time*[38]*";*

- **In his email of the 7th November 2007** he told respondent – *"I am really eager to start the project up and running and finally start the works!* [39]*"*

All the above leads the Court to the same conclusion of the Court of Magistrates, that is, that appellant had persistently kept respondent hanging on and waiting for four years in vain, leading her to believe for so long that the property will be finished in shell form. Yet when respondent came to Malta in the first week of February 2010, **specifically to sign the contract** thinking that the apartment was ready as she was told by appellant, she discovered that this was not the case.

Therefore it was the appellant who miserably failed to perform his obligaton.

In the circumstances respondent was justified to withdraw from the deal without waiting any further. As she stated in her evidence –

"When I came over I was eager to start work on this apartment, since it was my dream apartment since 2006, and when I came over and saw that the works were not completed it was a great disappointment to me. As I already stated this was the last stroke in the whole situation[40]*."*

The Court cannot therefore consider respondent's letter of the 2nd March 2010[41], by virtue of which she declared her loss of interest in purchasing the property in question as a unilateral withdrawal in breach of her good faith obligation towards appellant.

In the light of the above, the Court fully concurs with the conclusions reached by the first court and thus concludes that his complaint is totally unfounded.

For all the above reasons the Court rejects the appeal with costs against the appellant.

[37] Fol 39.
[38] Fol 63.
[39] Fol 68.
[40] Fol 130.
[41] Fol 55.

Anthony Ellul