



**CIVIL COURT FIRST HALL
THE HON. MADAM JUSTICE ANNA FELICE**

Sitting of the 2nd November, 2017

Sworn Application Number: 1115/2012 AF

Bonnie Limited (C-18015)

vs

Anthony Michael Henry Hill

The Court,

Having seen the sworn application filed by plaintiff company in the Maltese language which reads as follows:

Il-konvenut Anthony Michael Henry Hill huwa s-sid tal-penthouse internament immarkata bin-numru 7 fi Blokk A, formanti parti minn blokk akbar ta' bini maghruf bhala "Southend" fi Triq il-Gidwet, Marsaskala, liema penthouse l-intimat akkwista mill-poter tas-socjetà attrici Bonnie Limited in forza ta' kuntratt in atti tan-Nutar Dr. Remigio Zammit Pace tat-13 ta' April tas-sena 2008, kopja ta' liema kuntratt hija annessa u mmarkata Dokument "A".

Is-socjetà attrici zammet bi proprjetà esklussiva u assoluta taghha s-soqfa u l-arja tal-istess blokk ta' bini filwaqt li ai termini tal-att pubbliku sopracitat s-socjetà attrici ikkoncediet servitù konsistenti fi dritt ta' access u uzu limitat favur il-konvenut flimkien mal-proprjetarji tal-appartamenti l-ohra fl-istess blokk ta' bini tas-saqaf u l-arja tal-istess blokk ta' bini.

Il-konvenuti, illegalment u abbuzivament, ghamel installazzjoni fuq is-saqaf u l-arja tal-penthouse minnu akkwistata izda proprjetà tas-socjetà attrici u b'hekk il-konvenut qieghed jaghmel uzu minn bejt u arja proprjetà tas-socjetà attrici li fuqha l-konvenut igawdi biss drittijiet limitati ai termini tal-att pubbliku sopracitat.

Minkejja illi l-konvenut gie interpellat diversi sabiex huwa jirrimwovi l-istess installazzjoni huwa baqa' inadempjenti.

B'rizultat tal-agir, abbuziv u illegali tal-konvenut, is-socjetà attrici soffriet u qeghda ssofri telf ta' qliegħ u dana stante illi l-istess socjetà attrici ma setghetx u ma ghadha ma tistax taghmel uzu mill-istess bejt u arja, liema uzu kien jirrendi lill-istess socjetà attrici ntrojt, u dan kif ser jigi ahjar ppruvat waqt it-trattazzjoni ta' din il-kawza.

Intalbet din il-Qorti sabiex:

1. Tiddikjara u tiddeciedi illi l-konvenut qieghed jaghmel uzu illegali u abbuziv mill-bejt u l-arja tal-blokk ta' appartamenti maghruf bhala Southend, fi Triq il-Gidwet, Marsaskala bi ksur tad-drittijiet tas-socjetà attrici.
2. Konsegwentement tordna lill-konvenut sabiex fi zmien qasir u perentorju li jigi ffissat għal dan il-ghan minn din il-Qorti jirrimwovi l-installazzjonijiet kollha li jirrizultaw li l-konvenut installa illegalment u abbuzivament fuq proprjetà tas-socjetà attrici, u fin-nuqqas tawtorizza lis-socjetà attrici sabiex tirrimwovi hija stess l-istess installazzjonijiet taht is-sorveljanza ta' perit nominand a spejjez tal-konvenut Hill.

3. Tiddikjara u tiddeciedi illi s-socjetà attrici, b'rizultat tal-agir illegali u abbuziv tal-konvenut, soffriet telf ta' qligh.
4. Tillikwida, okkorendo bl-opra ta' perit nominand, dik is-somma rapprezentanti telf ta' qligh soffert mis-socjetà attrici b'rizultat tal-agir illegali u abbuziv tal-konvenut u konsegwentement tordna lill-konvenut ihallas lis-socjetà attrici dik is-somma hekk likwidata.

Bl-ispejjez kontra l-intimat li huwa minn issa ngunt in subizzjoni.

Having seen the reply confirmed on oath and filed by the defendant in the Maltese language which reads as follows:

In linea preliminari l-esponent huwa ta' nazzjonalità Ingliza u ma jifhimx il-lingwa Maltija u ghalhekk umilment qed jintalab illi l-proceduri quddiem din l-Onorabbli Qorti jinzammu bil-lingwa Ingliza u dan ai termini tal-Artikolu 21 tal-Kap. 12 u tal-Kap. 189 tal-Ligijiet ta' Malta.

L-esponent ghadu ma giex notifikat b'traduzzjoni bil-lingwa Ingliza tar-rikors guramentat kif tirrikjedi l-ligi.

It-talbiet tas-socjetà rikorrenti huma nfondati fil-fatt u fid-dritt u ghandhom jigu michuda.

L-esponent qatt ma gie interpellat formalment kif mitlub mill-ligi biex inehhi l-installazzjonijiet imsemmija u ghalhekk dan ir-rikors guramentat huwa intempestiv u l-esponent m'ghandux ibati l-ispejjez.

Minghajr pregudizzju ghas-suespost l-installazzjoni tla-water (solar) electricity system fuq is-saqaf u l-arja tal-penthouse mhux talli ma saritx b'agir abbuziv u llegali kif ippremettiet s-socjetà rikorrenti imma dan sar bil-kunsens u bl-ghajnuna ta' wiehed mid-Diretturi tas-socjetà rikorrenti Bonnie Limited cioè Robert Bonnici kif se johrog fit-trattazzjoni tal-kawza. Ghalhekk tali installazzjoni saret legalment u bil-konsapevolezza tas-socjetà rikorrenti.

L-esponent dejjem wera x-xewqa li jasal ghal ftehim bonarju imma billi l-esponent isiefer ta' spiss peress illi mhux residenti f'Malta t-trattattivi kienu diffiċli biex isiru u meta saru proposti mis-socjetà rikorrenti dawn kienu rragonevoli u one-sided.

L-esponent ma kkaguna l-ebda telf ta' qliegh lis-socjetà rikorrenti.

Fi kwalunkwe kaz u minghajr pregudizzju ghas-suespost, is-socjetà rikorrenti ghandha tipprova f'xiex jikkonsisti t-telf ta' qligh imsemmi fit-tielet talba tar-rikors guramentat taghha.

L-esponent jissottometti illi l-kwistjoni kollha inqalghet bi tpattija tas-socjetà rikorrenti ghaliex l-intimat kien oggezzjona (flimkien ma' sidien ohra tal-blokk) ghall-antenna tal-mobiles (Melita p.l.c) fuq il-post tal-esponenti, liema antenna llum tpoggiet fuq il-blokk adjacenti.

B'riserva ghad-danni spettanti lill-intimat minhabba l-agir illegali u abbuziv tas-socjetà rikorrenti.

Bl-ispejjez kontra s-socjetà rikorrenti.

Having seen and examined all evidence, acts and documents submitted by both parties.

Having seen the parties' final notes of submissions.

Having seen the decree whereby the cause was adjourned for judgment for today.

Having seen the acts of the proceedings.

Having considered that it results that the defendant is the owner of the penthouse internally marked with the number 7, in Block A, 'Southend', Gidwet, Street, Marsaskala, which block forms part of a larger development. This penthouse was acquired by defendant from plaintiff company by virtue of a deed dated 13th April 2008 in the records of Notary Dr Remigio Zammit Pace. The plaintiff company retained ownership of the roof and airspace over the said penthouse but granted in

favour of the defendant a servitude consisting of the limited right of access and use of the roof and airspace. According to said contract, the right of use is limited to one water-tank and one communal satellite dish and TV aerial whilst right of access is limited to the carrying out of maintenance on the said water-tank and satellite dish/aerial.

The defendant installed on the roof in question a solar water heating system as well as a photovoltaic (PV) system. Whilst defendant was given verbal permission by representatives of plaintiff company to install the said solar water heating system, no permission was requested and and/or granted with regard to the PV system. The issue between the parties appears to have risen when the defendant, along with other owners of apartments which make up the property, objected to the agreement entered into between the plaintiff company and third parties for the installation of antennae and associated equipment on the roof of the property.

Plaintiff company insists that defendant had no right to install the solar water heater and PV system in view of the fact that the servitude of right of use and access to the roof in question does not permit it. Whilst representatives of plaintiff company, Vincent and Robert Bonnici, concede that verbal permission was granted to defendant for the installation of the solar water heating system, they insist that this permission was granted on mere tolerance.

Plaintiff company is also requesting, by way of damages, compensation for the loss it alleges it is incurring daily by not being able to install its own PV system on the roof of the property due to the fact that the space is being taken up by the defendant's installations.

The Court considers that the defendant's first plea is justified and as a result this decision is being delivered in the English language. The Court shall not be taking further cognizance of the defendant's second plea as it results that plaintiff company filed in the acts of the case a copy of the sworn application drawn up in the English language.

The defendant also pleads that he was not intimidated to remove the installations before plaintiff company proceeded to bring forward its claims against him. The Court considers this plea to be unfounded. The defendant does not say on which article of the law he bases this argument. In addition to the fact that plaintiff company was not required by law to request from him the removal of the installations before bringing forward his claims before this Court, from the acts of the proceedings it transpires that the parties and their legal representatives exchanged numerous e-mails in the span of many months regarding the matter, and the defendant was repeatedly warned that judicial proceedings would be instituted against him should he fail to remove the installations in question.

The defendant rebuts plaintiff company's allegations by pleading that he had permission to install the solar water heater. The defendant also pleads that he was always ready to find an amicable solution in order to resolve the matter but that this was not possible as plaintiff company's proposals were unreasonable. No specific plea was raised regarding the PV system, but the defendant explains that he assumed that no such permission was required and that plaintiff company knew that he was planning on installing the system but made no objection before its installation.

The defendant pleads that these proceedings were born out of spite after he and other owners of apartments which form part of the property objected to plaintiff company's installation of third party antennae and associated equipment on the roof of said property.

The Court begins by stating that plaintiff company is right to claim that the servitude granted to the defendant by virtue of the deed of purchase in the acts of Notary Remigio Zammit Pace does not confer on the defendant the right to install on the roof of the property a solar water heating system and/or a photovoltaic system.

By way of legal considerations, as explained by the First Hall, Civil Court in the case of Joseph Buhagiar et vs George Micallef et, decided on the 6th May 2004:

"Id-dritt ta' uzu ta' bejt huwa servitu' mhux kontinwu, kif inhu s-servitu' ta' moghdija, u dan peress li ghall-ezercizzju tieghu hu mehtieg filwaqt il-fatt tal-bniedem (artikolu 455(3) tal-Kodici civili), u jista' jinghad ukoll li hu servitu' li ma jidhirx, peress li m'ghandux sinjali li jidhru ta' l-ezistenza tieghu (artikolu 455(5) tal-Kodici Civili). Bhala servitu' mhux kontinwu u li ma jidhirx, l-istess servitu' jista' jigi akkwistat biss b'sahha ta' titolu, u ma jistax jigi stabbilit bil-preskrizzjoni jew bid-destinazzjoni ta' sid ta' zewg fondi (artikolu 469(1) tal-Kodici Civili). Dan ifisser li l-atturi jridu juru titolu validu ghall-akkwist ta' dak is-servitu, u dan it-titolu ta' uzu ta' bejt irid jirrizulta derivattiv mill-proprjetarju ta' dak il-bejt, ghax huma biss is-sidien tal-proprjeta' li jistghu jistabilixxu servitujiet (artikolu 454 Kodici Civili)."

The same Court in the case of Louis Gauci vs Angela Attard, decided on the 9th December 2002, held that:

"F'dan il-kuntest l-Artikolu 475 tal-Kodici Civili jippreciza illi "kull min ghandu jedd ta' servitu ghandu jinqeda b'dan il-jedd skond it-titolu tieghu, u ma jista' jaghmel la fil-fond servjenti u lanqas fil-fond dominanti ebda tibdil li jista' jtaqqal izjed il-piz tal-fond servjenti."

*Dejjem in tema tad-disposizzjonijiet tal-ligi in subjecta materia dwar x'inhu permissibbli jew ipprojbit, lanqas ma jista' it-titolari ta' servitu jippretendi estensjoni tas-servitu (Artikolu 476) fuq il-motiv li l-ezercizzju taghha skond it-titolu jkun sar insufficcjenti minhabba tibdiliet. Il-kliem "dak kollu li hu mehtieg" fit-test ta' dan l-artikolu ghandu jigi interpretat b'referenza ghaz-zmien tal-kostituzzjoni tas-servitu u mhux in referenza ghall-izvilupp li jkun ghamel wara dak iz-zmien sid il-fond dominanti ("**Dr. Galea Naudi -vs- Mifsud**", Qorti ta' l-Appell, 27 ta' Mejju 1927; "**Fortunato Farrugia et -vs- Vincenzo Galea**", Prim' Awla, 19 ta' April, 1947;*

Dejjem in tema ta' servitujiet m'ghandux jonqos li jigu senjalati ukoll dawn l-aspetti ta' interess, hekk dottrinalment u giurisprudenzjalment affermati:-

(a) *Is-servitujiet huma 'di stretto diritto' u kull limitazzjoni ghad-dritt li wiehed jisserva liberament bi hwejjgu ghandha tircievi interpretazzjoni rigoruza anke ghaliex is-servitu hi eccezzjoni ghar-regola tal-massimu u liberu godiment ta' fond;*

(b) *Tant dan hu hekk illi jinsorgi l-principju l-iehor li fejn ikun hemm dubbji dwar l-estensjoni ta' servitu`, 'quod minimum est sequimur' ("**Maria Azzopardi -vs- Giuseppe Sciberras**, Appell Civili, 18 ta' Ottubru 1963; **Vol. XXX P I p 139**). Li jfisser li "si deve interpretare in senso restrittivo e qualunque dubbio circa la detta materia si deve risolversi in vantaggio del possessore del fondo serviente...", (**Vol. XVIII P II p 325; Vol. XXVI P I p 759**)."*

The Court also refers to the case in the names of S.M.W. Cortis vs Lewis Press Limited decided by the Court of Appeal on the 31st January 2011:

"In mertu ta' din il-kwistjoni din il-Qorti tixtieq tissenjala dawk il-principji legali li ghandhom relevanza ghas-soluzzjoni ta' tali vertenza kif inkorporati fid-diversi artikoli tal-Kodici Civili. Fl-ewwel lok huwa stabbilit li kuntratt huwa konvenzjoni jew ftehim bejn tnejn minn nies jew izjed, illi bih tigi maghmula, regolata, jew mahlula obbligazzjoni (Art. 960). Kull kuntratt maghmul skond il-ligi ghandu s-sahha ta' ligi ghal dawk li jkunu ghamluh (Art 992). Il-kuntratti ghandhom jigu ezegwiti bil-bona fidi, u jobbligaw mhux biss ghal dak li jinghad fihom, izda wkoll ghall-konsegwenzi kollha li ggib maghha l-obbligazzjoni skont ix-xorta taghha, bl-ekwita`, bl-uzu jew bil-ligi (Art.993). Meta l-kliem ta' konvenzjoni, mehud fis-sens li ghandu skont l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghall-interpretazzjoni (Art. 1002). Fid-dubbju, il-konvenzjoni tigi mfissra kontra dak li favur tieghu saret l-obbligazzjoni u favur dak li ntrabat bl-obbligazzjoni.

Servitu` li tinholoq kemm b'ligi kif ukoll mill-fatt tal-bniedem, huwa jedd stabbilit ghall-vantagg ta' fond fuq fond ta' haddiehor, sabiex isir uzu minn dan il-fond ta'

haddiehor jew sabiex ma jithalliex li sidu juza minnu kif irid. Is-servitu` ta' moghdija, in kwantu servitu` mhux kontinwa, tehtieg l-att pubbliku biex tohloq titolu (Art. 458). Kull min ghandu jedd ta' servitu` ghandu jinqeda b'dan il-jedd skond it-titolu tieghu, u ma jista' jaghmel la fil-fond serventi u lanqas fil-fond dominanti ebda tibdil li jista' jtaqqal izjed il-piz tal-fond serventi (Art. 475). Meta tigi stabbilita` servitu`, jitqies li maghha gie moghti dak kollu li hu mehtieg ghat-tgawdija ta' dik is-servitu` bl-anqas hsara li jista' jkun tal-fond serventi. (Art. 470). Finalment meta jkun hemm dubbju dwar l-estensjoni tas-servitu`, wiehed ghandu jinqeda biha fil-limiti ta' dak li hu mehtieg billi jittiehdu b'qies id-destinazzjoni li l-fond dominanti kellu fiz-zmien li giet stabbilita` s-servitu` u l-uzu konvenjenti ta' dak il-fond, bl-anqas hsara tal-fond serventi (Art. 476).

Din il-Qorti ghamlet rassenja tad-diversi artikoli tal-Kodici Civili hawn fuq riportati billi thoss li l-ligi taghna hija provvida u la hemm htiega li wiehed jiccita awturi esteri u lanqas giurisprudenza estera jew nostrana hlief fejn jkunu mehtiega xi kjarifiki. Il-kliem tal-ligi huma cari, u daqstant hija cara l-klawsola li permezz taghha nghatat din is-servitu`. Konsegwentement kif jinghad fl-Artikolu 1002 meta l-kliem huma cari ma hemmx htiega ta' interpretazzjoni billi b'dak il-mod tista' tigi sostitwita l-intenzjoni tal-kontraenti b'dik tal-gudikant."

However, notwithstanding the fact that the servitude of right of use and access over the roof in question does not extend to the said installations, the Court finds that with regard to the solar water heater, the defendant is justified in pleading that plaintiff company effectively granted permission for the installation. Plaintiff company confirms that this permission was granted but asserts that the installation was permitted on mere tolerance and that it has the right to request defendant to remove it at any time.

The Court does not share plaintiff company's view that it was simply tolerating the installation of the solar water heater when not only was specific permission granted to the defendant for

its installation, but it also transpires that representatives of the company assisted the defendant in its purchase and installation. In fact, Vincent Bonnici confirms that he advised the defendant regarding the purchase of the solar water heating system. A solar water heating system is not an installation one can simply remove and place elsewhere and as a result, the Court is morally convinced that when granting permission to the defendant, plaintiff company was binding itself by way of a personal obligation towards the defendant and not simply allowing the installation on mere tolerance.

The Court also considered the evidence given by Stanley Bonello, the estate agent who had negotiated the sale of the property between the parties, as well as the content of the e-mail dated 12th September 2011 whereby Stanley Bonello confirmed to the defendant that:

"At the time of the signing of the 'promise of sale' and eventual 'contract' Robert and Vince had agreed with you, verbally, that you are allowed to have 1 solar installation of your choosing. Also I agree with you that they were very convinced of this decision at the time."

In the judgment delivered by the Commercial Court of Appeal in the names of Carmelo Farrugia vs Emanuele Farrugia, decided on the 4th May 1956, it was stated that:

"Il-kriterji biex wiehed jiddecidi jekk hux il-kaz jew le ta' tolleranza, li x' aktarx hija tacita, u anzi prezunta, ghandhom jigu dezunti .. mir-rapport ta' familjarita', ta' hbiberija, ta' bwon vicinat, minn dak li komunement hu uzat li jsir f' pajjiz,u mill-entita' tal-aggravju, ftit jew ljevi, li l-att jarreka lil min jittolerah; izda l-prezunsjoni tat-tolleranza tkun inverosimili f' kaz ta' attijiet importanti u gravi."

In the case of Carmelo Calleja et vs Godfrey Zammit et, decided by the Court of Appeal on the 11th February 2014 it was said:

"Jinsab preċiżat, kemm dottrinalment kif ukoll fil-gurisprudenza, illi l-atti ta' tolleranza huma dawk li għandhom insit fihom elementi ta' transitorjeta` u saltwarjeta` u jsibu orġini mir-rapport ta' ħbiberija, familjarita` u l-buon vicinat (Kollez. Vol. XL p.I, p.534). Għalkemm id-durata mhux bil-fors indikazzjoni ta' assenza ta' tolleranza, iż-żmien jintegra fih element preżuntiv in bażi għal liema tista' tiġi negata s-sussistenza tas-sempliċi tolleranza."

Article 992 of the Civil Code lays down that contracts legally entered into shall have the force of law for the contracting parties, whilst the next article provides that contracts must be carried out in good faith. The First Hall, Civil Court in the case of Joseph Saliba pro et noe vs Leonard Cutajar, decided on the 7th July 2004 reiterated that:

"Obbligazzjoni personali ma tohloq ebda dritt reali inerenti għall-fond, pero', hija enforzabbli bhal kull obbligazzjoni ohra (ara "Muscat Scerri vs Montebello", deciza mill-Onorabbli Qorti ta' l-Appell fl-14 ta' Ottubru, 1987, u "Aquilina vs Gauci", deciza minn din il-Qorti fit-28 ta' Jannar, 2004). Ikun gwaj kbir kieku l-Qrati kellhom jiddiskonoxxu dan il-ftehim semplicement ghax jista' ma jkollux l-elementi kollha mehtiega ghal kostituzzjoni jew terminazzjoni ta' dritt ta' servitu'; fil-fatt, kif inghad, il-Qrati taghna minn zmien irrikonoxxew il-legalita' ta' ftehim simili (ara wkoll Vol. XXVI.II.254 u Vol. XLII.I.47I)."

Plaintiff company specifically allowed the defendant to install the solar water heating system and this is confirmed by the fact that Vincent and Robert Bonnici assisted in its purchase and installation. A personal obligation was entered into to this effect and no compelling reasons were forwarded to justify plaintiff company's decision to unilaterally refuse to honour its obligation.

The matter is different altogether as regards the PV system installed by the defendant in that no permission was requested much less granted and so the Court finds that plaintiff company is justified in requesting its removal.

The defendant claims that plaintiff company gave its tacit approval for the installation of the PV system as Vincent Bonnici knew of the defendant's intentions and did not object to the installation. The defendant bases his argument on the minutes of the residents' association meeting dated 24th September 2010 whereby it was minuted that Vincent Bonnici, who was present for the meeting, stated that the defendant wanted to install a PV system on the roof of the property. However, this statement cannot in any way be interpreted as amounting to tacit approval by plaintiff company for the installation of the said PV system as Vincent Bonnici was simply stating a fact which had come to his attention.

Plaintiff company is also requesting damages by way of compensation from the defendant. This claim is based on the allegation by plaintiff company that it had intended to install its own PV system on the roof in question but could not do so due to the installations belonging to the defendant. On his part, the defendant pleads that he did not cause any damages to plaintiff company. The Court finds that this plea is justified. No concrete proof was brought forward by plaintiff company to substantiate its claim that it planned to install its own PV system, let alone that it could not do so because of the installations belonging to the defendant. Whilst plaintiff company claims that it had already installed such a system on the roof of another property which it had developed, no proof of this alleged installation was forthcoming. Neither did plaintiff company substantiate its claim that it had already requested a quotation from a supplier for the provision of such a system. Lastly, the Court also considers that no evidence was brought forward by plaintiff company to show that the installations belonging to the defendant took up so much space on the roof in question that it was effectively impossible for it to install its own system.

For these reasons the Court is hereby deciding the cause between the parties as follows:

1. The Court upholds the defendant's first plea;
2. It abstains from taking further cognisance of the

defendant's second plea;

3. The Court upholds plaintiff company's first demand only insofar as it is directed towards the installation of the photovoltaic (PV) system by the defendant;
4. The Court upholds plaintiff company's second demand only insofar as it is directed towards the installation of the photovoltaic (PV) system by the defendant. The Court is thereby ordering the defendant to remove the photovoltaic (PV) system within sixty (60) days of the date of this decision and it is hereby authorising plaintiff company to remove the installation itself at the defendant's expense should it not be removed within the stipulated time;
5. The Court rejects plaintiff company's third and fourth demands.

Costs of the proceedings are to be borne by the parties in equal shares.

JUDGE

DEP/REG