Court Of Appeal

Judges

THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE NOEL CUSCHIERI

Sitting of Friday, 2nd March, 2018

Number: 15

Application Number: 2/09 JZM

Andrew Emmanuel Joseph Whibley and Helen Whibley

v.

Nigel Herbert and Paula Herbert

The Court:

Preliminary

1. Defendants Nigel and Paula Herbert filed an appeal from the judgment given by the First Hall of the Civil Court of the 28th February 2013, wherein they requested this court to revoke said judgment and instead to uphold their defence.

2. For a better understanding of this appeal, the judgment of the court of first instance is being reproduced in its entirety:

"**I. The Matter**

"*Having seen* the **sworn application** that was filed on the 5th January 2009, plaintiffs are seeking performance of a written promise of sale agreement, entered into with defendants on the 21st February 2008, for the transfer, by title of sale and purchase, of tenement 232, Two Gates Street, Senglea, bearing another entrance at 108 Parish Priest Frangisk Azzopardi Street, Senglea, free and unencumbered, with all rights and appurtenances, including overlying airspace, with vacant possession, *tale quale*, and in the state and condition as at 21st February 2008".

"*Having seen* plaintiffs` demands to this Court namely –

1. "To declare that the respondents failed to appear on the final act of sale without any valid reason at law ;

2. "*To condemn the said respondents to appear on the publication of the act of sale of premises bearing number two hundred and thirty two at Two Gates Street, Isla (Senglea) with another entrance bearing number one hundred and eight (108) in Triq Kappillan Frangisk Azzopardi, Isla (Senglea) at the price and subject to the terms and conditions agreed upon in the preliminary agreement signed by the parties on the 21st February 2008 and to appoint a notary public, to fix a day, time and place for the publication of the relative act and the payment of the price and to nominate a curator to represent those amongst the respondents who remain contumacious on the said act ;*

3. "Alternatively, in case this Honourable Court does not uphold the exponents` second claim, or in spite of the fact that the respondents are condemned to appear on the final act they fail to do so and to pay the price on the day, time and place established by this Hon. Court, to declare and authorize the exponents to retain the sum of twenty nine thousand and one hundred and seventeen euro (€29,117) which was paid by the respondents to the exponents as a deposit of the price and this as established in the preliminary agreement".

"*With costs , including those of the judicial letter dated 2nd December 2008 against the respondents who are being presently referred to their oaths*".

"*Having seen* the list of witnesses and documents filed together with the sworn application".

"*Having seen* the **sworn reply** which both defendants filed on the 27th January 2009 whereby they pleaded that plaintiffs`claims be rejected as they had valid reason not to appear and sign the final deed of sale, since a condition that was included in the promise of sale, namely the installation of a lift in the present staircase of the premises, was not fulfilled as the lift could not be installed for reasons that will result during the trial".

"*Having seen* the list of defendants` witnesses".

"*Having seen* the **counter claim** where defendants requested this Court to declare that they had valid reason at law not to appear on the final deed of sale, and to order plaintiffs to refund the amount of €29,117 which they had paid them by way of deposit on the sale price, with interest and costs. Plaintiffs were referred to their oaths".

"*Having seen* the list of defendants` witnesses for the purposes of the counter claim".

"*Having seen* plaintiffs` **sworn reply to the counter claim** that was filed on the 13th June 2009 whereby they pleaded that defendants had no valid reason at law not to appear for the conclusion of the deed of sale, that in the promise of sale it was expressly agreed that in case of defendants` default in not appearing on the final deed for any reason unfounded at law, the deposit paid by defendants on account of the sale price would be retained by plaintiffs, that therefore no amount is due to defendants, and that, without prejudice to said pleas, should the Court decide to order a refund of said deposit, half of the amount would be due to by plaintiff Andrew Emmanuel Joseph Whibley and the other half by plaintiff Helen Whibley. With costs and with defendant referred to their oaths".

"*Having seen* plaintiffs` sworn declaration, the list of their witnesses for the purposes of the sworn reply to the counter claim and the list of documents filed".

"*Having seen* the evidence by affidavit of both plaintiffs (fol 44 and 45) and the documents therewith attached".

"*Having seen* the evidence by affidavit of Joseph V. Farrugia (fol 71) and the documents therewith attached".

"*Having seen* the evidence by affidavit of defendants (fol 87 and 88) and the documents therewith attached".

"*Having heard* the testimony given by Notary Dr. Rosalyn Aquilina at the hearing of the 6th May 2010 and that of witness Ignazio Mallia at the hearing of the 25th October 2010".

"*Having heard* the cross-examination of defendant at the hearings of the 25th October 2010 and 18th January 2011 and having seen the documents that were present during the latter hearing".

"*Having noted* its decree given at the hearing of the 22nd March 2011 whereby the Court appointed Perit Valerio Schembri as a technical referee to establish whether a lift could be installed in the property in question without causing damage to the existing structure of the premises".

"*Having seen* the technical referee`s report that was confirmed on oath at

the hearing of the 10th November 2011".

"*Having seen* the notes of submissions filed by both parties".

"Having noted that the Court adjourned the lawsuit for judgement".

"Having seen the acts of the trial".

II. "<u>The Evidence</u>

"**<u>Plaintiff Andrew Whibley</u>** testified that on the 21st February 2008 his wife and himself concluded an agreement with defendants for the promise of sale of premises 232, Two Gates Street, Senglea. The agreement was valid until the 30th November 2008. Four days before the 30th November 2008, he was informed by Notary Dr Rosalyn Aquilina or Pauline of Property Line Real Estate that he should be present for the signing of the final deed. Plaintiff complied and when he went to sign the contract, defendants were not present. The notary telephoned defendant Nigel Herbert who requested an extension of the date for the signing of the final deed without giving any reason for that request. Plaintiff reluctantly agreed to an extension. The notary prepared a note in writing which he signed and the promise was extended till the 5th December 2008".

"Plaintiff explained that he was eager to conclude the contract of sale of 232, Two Gates Street, Senglea, as he was about to purchase another property in Senglea situate at 125, Victory Street. He had actually signed a promise of sale with regard to this property ; he intended to finance the purchase through the sale of 232, Two Gates Street. Because of the extension, he had to obtain a bank loan to finance the purchase of the other property".

"Plaintiff states that he was aware that defendant wanted to install a lift in premises 232. He confirmed that one of the conditions of his agreement with Herbert was that a lift could be placed in the premises. He had made contact with a number of persons who gave him information and cost estimates for the installation of a lift in the tenement, even though he was under no obligation to make those enquires. He confirmed that he had approached Joseph Farrugia of Carmelo Farrugia Melfar Limited who advised that a lift could be installed in the premises. He forwarded to defendant a quotation that he had obtained from that company for the installation of a platform lift. On the 5th December 2008, he went to the office of Notary Aquilina to sign the contract. Defendants were present but was advised that they were refusing to sign the contract on the ground that they could not find a lift that could be installed in the premises and therefore had every right not to conclude the contract of sale. Plaintiff showed defendants the quotation which was a confirmation that a lift could be installed. Despite that, defendant insisted that the type of lift quoted was inadequate and was not compliant to legal requirements in Malta. Defendant insisted that if by midnight plaintiff would not provide him with another two quotations from two different contractors, they would not sign

the contract".

"Plaintiff states that he made contact with Carmelo Farrugia Melfar Limited u briefed them about defendant`s objections. He was referred to an engineer Edward Scerri who was involved in lift certification. When he contacted this engineer, he was advised that that type of lift could be installed and was complaint at law. He went back to defendant who kept his negative stand. He also consulted IGM Lift Supplies & Services. Its director Ignazio Mallia confirmed that the lift could be installed in the premises in question. He issued two quotations. One quotation varied from the other with regard to the dimensions of the lift shafts and the type of doors. He referred this information to defendant who complained that the prices quoted were exorbitant and demanded a reduction in the price of the sale".

"Plaintiff pointed out that the preliminary agreement did not specify the type and nature of the lift. The condition inserted in the agreement was that a lift could be installed in the staircase. And that was the case. Furthermore the agreement did specify that the lift had to be installed before the signing of the final deed of sale. He was aware that defendant had obtained expert advice that the lift could not be put in place by the 5th December 2008. Plaintiff confirmed that on the 2nd December 2008 he filed a judicial letter against defendants because by then it was evident that they did not intend signing the deed of sale".

"In addition to what was stated by her husband, **plaintiff Helen Whibley** testified that after the promise of sale was signed, defendant came to 232, Two Gates Street, Senglea, with his architect but did not mention the lift. He only stated that he had applied for a MEPA permit without being specific. That in fact was the case as she received a document from the Authority. In October 2008, she enquired with defendant as to whether they were interested in the purchase of the furniture but he declined the offer and insisted that he wanted their belongings removed from the premises by the 30th November 2008. Defendants pointed out room by room what they wanted removed from the tenement. The only furniture they wanted was the kitchen. Helen Whibley stated that she sold what they did not require at very low prices. When the premises was vacated, defendants inspected the premises and she gave them the keys. Herbert requested an extension of the promise of sale because the MEPA permit had not yet been issued for reasons due to alteration of plans on his part. She was reluctant to grant an extension. Nonetheless this was granted and it was agreed that the deed of sale be signed on the 5th December".

"Helen Whibley stated that she was informed by the real estate people that defendants were refusing to sign the deed of sale because, according to them, a lift could not be installed. She stated that defendant had told her that he had two quotations from contractors who had advised him that the lift could not be installed in the staircase. Defendant had also told her that he had changed his mind and that he was willing to place the lift in the internal yard. A few days before the 5th December, defendants informed

her husband and herself that they did not want to purchase the house. No reason was given. She authorised the filing of the present lawsuit".

"**Joseph V Farrugia** Managing Director of Carmelo Farrugia Melfar Limited testified that the company is a specialist in lifts. He was approached by plaintiff for advice as to whether a lift could be installed in his property in Senglea. He went on site on the 28th November 2008. After he took measurements, he advised that the lift could be installed, with doors on all floors except that at ground floor level the door had to be placed on the side due to the position of the existing staircase. He stated that his company provided and installed all types of lifts. In the case in question, he advised a platform lift due to limited space. Platform lifts are recommended for already constructed residences. A normal lift required space at its lower and upper parts of the run. Platform lifts were designed for places whether space was limited".

"**Defendant Nigel Herbert** testified that he wanted to purchase 232, Two Gates Street, Senglea. The property had four floors and it was necessary for the place to have a lift. He had insisted that he would purchase the property if it was possible to install a lift in the existing staircase. The width of the lift had to be less than 720 mm as that was the actual space available. One of the quotations that he was given by plaintiffs indicated a width of 920 mm which he therefore rejected. His architect had made enquires with a number of contractors amongst which JD Lifts and Elmein Limited. They advised that it was not possible to install a lift in that staircase. For that reason, they were not willing to finalise the contract of sale of the property. The promise of sale was extended for a further period. Plaintiffs obtained a quotation from Carmelo Farrugia Melfar Limited for the installation of a lift with a width of 750 mm. His wife and himself were against any alterations to the staircase. For the entire period of the promise of sale, neither plaintiffs nor their architect managed to obtain a quotation for the installation of a lift in the property in question".

"When **cross-examined**, defendant stated that the installation of the lift was a problem from the start. And he had informed plaintiffs. The architects he had appointed could not find a solution. He had applied with MEPA to carry out structural alterations in the property. He had drawn plaintiffs` attention to aspects of the property which he did not like. He insisted that plaintiffs were aware of the problem of the lift. He affirmed that the installation of a lift was a precondition for the conclusion of the final deed of sale. He was against the executions of works on the staircase as that feature of the property was distinctive and attractive. For a lift to be installed where intended, the present width had to be reduced by 13 cm. Such a reduction would then trigger the necessity of a shaft and an enclosure. He agreed that in the promise of sale there was no indication that the lift had to have particular features or that no works would be carried out on the staircase. All they wanted was to have a lift in place that would serve its purpose. He agreed that a lift could be installed if works were carried out on the staircase but they were contrary to such works. His architect had suggested that the lift be installed somewhere else but he

disagreed. He did not recall whether he had requested an extension of the promise of sale agreement because the MEPA permit had not yet been issued. He rejected the suggestion that he was willing to buy the property at a discounted price. He also stated that the MEPA permit was required for the property to be converted into four flats. The application was not finalised as they did not pursue the matter further".

"What defendant Nigel Herbert testified was confirmed by his wife defendant **Janet Herbert** in her sworn statement".

"**Notary Rosalyn Aquilina** confirmed that she drafted the promise of sale agreement which the parties signed. Regarding the question of the installation of a lift in the premises, witness explained that it was the prospective buyers` intention to convert the Senglea house into flats and that it was therefore important for them that a lift could be installed in the area of the staircase. The dimensions of the area could not be altered. The installation of the lift was inserted as an important and essential condition in the agreement".

"Dr Aquilina explained that the date agreed by the parties in the promise of sale for the conclusion of the contract was 30th November 2008. As HSBC Bank Malta plc was granting a loan to defendants for the purchase of the property, an appointment was made for 26th November 2008 at 3.00 p.m. for the signing of the contract at the bank offices in Valletta. On the appointed date, she was informed that defendants did not want to go ahead with the purchase. On her part she had everything ready. Until that point, she was not aware of difficulties between the parties. The contract date was extended to 5th December 2008 and she prepared the document which was signed by the parties. According to witness, an extension was agreed because the issue of the lift was raised at the last minute".

"Dr. Aquilina stated that on the 28th November 2008, she received an email from defendants. They stated as follows – *Dear Roslyn, I have just had a long meeting with my architect, we have come to the conclusion that planning may take another six months if granted at all. We have discussed other options for the building but they would only rely on a lift in the existing stairwell. In view of this and the fact that a lift in the stairwell is impossible, we are giving you notice that we will not be proceeding with the contract. With this in mind you may want to bring forward the meeting which would have to take place on the 5th December, given that Mrs Whibley is going to the UK on the 4th.* Defendants were referring to their application to MEPA No. 02949/2008. Witness underlined the fact that the signing of the final deed was not conditional to the issue of a MEPA permit. On the 5th December 2008, she met plaintiff Andrew Whibley and defendant Nigel Herbert in the presence of property negotiators Arlette Grech and David Degiorgio from *Property Line*. Defendant insisted that plaintiff had to give proof that a lift could be installed in the stairwell. Plaintiff was annoyed that defendant was expecting him to do that. In any case, plaintiff managed to obtain a brochure later that same day that the lift could be installed".

"**Ignazio Mallia** testified that his business was the supply and installation of lifts. Plaintiff requested quotations for the installation of a lift. He stated that in an area of 700 mm it was possible to install a lift to carry two or three persons. He issued two quotations on the understanding that there was available space. The variance between the two quotations was in the fact that the point of departure in the first quotation was a lift in a metal shaft while the other was for the installation of a lift within an existing structure. When **cross-examined**, witness confirmed that he had been on site and taken approximate measurements. He pointed out that in order to install the lift, a part of the existing stairwell had to be removed. If the stairwell were removed entirely, access to certain parts of the building would be barred and therefore an architect`s advice was necessary. He stated that the figures quoted as 1200 mm and 1500 mm were examples".

III. "**The report of the technical referee**

A. "**The quotations**

"In his report, Perit Valerio Schembri referred to the quotations that were submitted as evidence".

"With regard to the quotation marked Doc AW1 at fol 37 of the court file, he notes that it was –

> "*… a quotation by IGM Lift Suppliers and Services for a shaft area of 700mm X 1500 mm and a lift shaft construction of metal and gypsum. This implies that one has to add 100 mm each side for the installation of a gypsum wall making the total required space for installation 900 mm X 1600 mm (or 1700 mm depending on whether the doors are installed on the landing or not)*".
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> "With regard to Doc AW 2 at fol 40 of the court file, Perit Schembri points out that the quotation by IGM Lift Suppliers and Services is *for a shaft area of 1200 mm x 1500 mm*".
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> "With regard to the quotation by Carmelo Farrugia Melfar Limited at fol 50, he states that it was a *quotation for a 'Passenger Platform Lift for block of apartments … with lift well dimensions 750 mm x 1210 mm depth*".
>
> "With regard to Doc C at fol 65, he states that it was a *proposal by Apex lifts requiring a clear lift shaft of 1000 mm wide by 1500 mm long. This implies that the width required should add up to a minimum of 1200 mm*".

B. "**Technical considerations**

"The technical referee points out that *the measurements of staircase were taken and a clear opening of 740 mm width and 1760 mm depth (or length) were established in situ as results from drawing prepared …the installation of the 900 mm wide structure (steel/gypsum covering) would imply that the flights on each side have to be reduced by 80 mm. Hence one flight will be 930 mm and the other 940 mm. Neufert Architects' Data specifies that for a family house or dwellings with less than two flats, an effective stair width of*

800 mm is required. In other cases 1000 mm width is required except in the case of high rise flats wherein 1250 mm is required. If a stone/concrete structure is used for the lift shaft walls then the structure will have to have a minimum width of 1000 mm reducing the width of flights in question to 880 mm and 890 mm respectively …"

C. "<u>Conclusions</u>

"Perit Schembri`s conclusions were as follows –

01. "All alternatives for the lifts proposed by plaintiffs are covered by EU Regulations EN 87 -1998 & 95/16 or a Machinery Directive which implies they are safe for use and can be approved by local authorities.

02. "The present width of 940 mm between the two flights of the staircase in question cannot allow for the installation of a lift shaft (including the enclosure) for the sizes of the lifts proposed by the plaintiffs.

03. "The lifts proposed by the plaintiffs cannot be installed unless either the width of flight is reduced by cutting the stone slab proper or fitting in a steel/gypsum structure or building a wall all around the clear shaft width. It is impossible not damage the structure when cutting the stone slab or fitting a steel structure. In the third scenario, it is technically and on paper possible not to damage the stone slabs of the present flight but in practice such a result is very very difficult to achieve and may with time result in irreparable damage to the structure due to settlement.

04. "If the flight is reduced in size by cutting the stone slabs proper if a steel/gypsum structure is installed the flight width is reduced to a minimum of 930 mm which is greater than 800 mm required for single dwellings or buildings incorporating two apartments but less than 1000 mm required for other buildings.

05. "If the flight is reduced in size by building a stone/concrete structure for the lift walls then the flight is reduced to a minimum of 880 mm which is greater than 800 mm required for single dwellings or buildings incorporating two apartments but less than 1000 mm required for other buildings".

IV. "<u>Considerations of this Court</u>

A. "<u>Clause 10</u>

"The issue that is at the basis of this lawsuit is the Clause 10 of the promise of sale agreement –

"*Subject to the condition that a lift will be able to be installed between the staircase*".

"This Court affirms that it does not have the right nor the discretion to change or vary what has been expressly agreed by the parties in the promise of sale, in particular where what is agreed is put down in writing in clear and unequivocal terms. If this Court acts otherwise, then it would be changing what is law between the parties".

"In its judgement of the 29th October 2004 in re **Dr Carmel sive Lino Gauci Borda et vs Carmelina sive Carmela Azzopardi et** the Court of Appeal said that –

> "*Meta … l-kontraenti jintrabtu f' relazzjoni ta' compra-vendita tkun cara, id-dmir tal-Qorti huwa limitat inkwantu hija ghandha l-obbligu li taghti ezekuzzjoni ghal dak li l-partijiet fuq il-konvenju jkunu ftehmu, u xejn aktar.*"

"In that judgement, the Court of Appeal referred to a prior judgement it has given on the 14 January 2002 in re **Nazzareno Vella noe et vs Joseph Abela noe et** where it had stated that –

> "*Meta l-kliem ta' l-att huma cari l-interpretu ghandu joqghod ghal dan il-kliem u mhux jirrikorri ghall-kongetturi …*
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> "*Pero' fl-applikazzjoni tar-regoli ta' interpretazzjoni ma hijiex l-interpretazzjoni tal-kontendenti ghall-kliem tal-konvenzjoni jew is-sens divers minnhom lilhom moghti li jiswa imma hu l-gari oggettiv tal-gudikant li jaghti l-kliem is-sens ordinarju tieghu, fil-kuntest ta' kif gie uzat mill-kontraenti, li ghandu jogghod. Jekk ghall-gudikant id-dicitura wzata ma tistax ma twassalx oggettivament ghal sens car u univoku hu dan is-sens illi ghandu jfisser il-volonta' espresso mill-kontraenti fil-konvenzjoi that ezami. Hu biss meta t-termini tal-kuntratt huma oskuri li jrid jigi kkunsidrat dawk il-pattijiet li l-kontraenti riedu.*"

"In a judgement given on the 29 November 2001 in re **General Cleaners Co. Ltd. vs Accountant General et,** this Court (**PA/RCP**) referred to previous judgements and stated as follows –

> "*Jibda biex jinghad illi bhala principju generali, l-ligi u senjatament l-artikolu 1002 tal-Kodici Civili jghid illi – "Meta l-kliem ta' konvenzjoni, mehud fis-sens li ghandu skond l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghal interpretazzjoni*".
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> "*Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali ghandu jigi rispettat u li hi l-volonta' tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tigi osservata. Pacta sunt servanda". (A.C. 5 ta' Ottubru, 1998 –* "*'**Gloria mart Jonathan Beacom et vs L-Arkitett u Inginier Civili Anthony Spiteri Staines**'*") *.*
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> "*Tkompli tghid din is-sentenza ta' l-Onorabbli Qorti ta' l-Appell –* "*Illi l-gurisprudenza nostrali hi kostanti filli rriteniet li ma hiex ammissibbli li prova testimonjali kontra jew in aggjunta ghall-kontenut ta' att miktub u hi talvalta ammessa biex tikkjarifika l-intenzjoni tal-partijiet meta din hi espressa b'mod ambigwu*" *(**Vol. XXXIV, P. III., p. 746**).*
>
> *Jintqal inoltre illi* "*'Il-Qrati jkunu obbligati jinterpretaw il-konvenzjoni meta f'kuntratt il-partijiet ma jkunux spjegaw ruhhom car jew posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx giet preveduta u li kien hemm bzonn li tigi maqtugha, u din ghandha tigi primarjament interpretata skond l-intenzjoni tal-partijiet li jkunu hadu parti fil-kuntratt u li tkun tidher car mill-kumpless tal-konvenzjonijiet'*" *(**Vol. XXIV, P. I., p.27**) (ikkwotata fis-sentenza* "***'Beacom vs Spiteri Staines'" -*** *ibid;*

> "*"**Suzanne Xuereb vs Gilbert Terreni"**" - P.A. RCP. 12 ta' Lulju 2001;*
> "***"Anton Spiteri vs Alfred Borg"**" - P.A. RCP. 30 ta' Novembru 2000;*
> "***"Emanuel Schembri vs Leonard Ellul"**" - P.A. RCP 30 ta' Ottubru 2001) …*
>
> "*"Jirrizulta, u din hi anke r-ratio tal-ligi, (art. 1004 tal-Kodici Civili) illi l-interpretazzjoni li trid tinghata, meta klawsola tista' tfisser haga w ohra, din ghandha tinftiehem dik il-haga li biha jista' jkun hemm xi effetti milli dik il-haga li biha ma seta' jkun hemm ebda effett. Disposizzjoni li tirrifletti l-principju "'in dubiis interpretatio capienda est, ut dispositio potius valeat quam pereat'".*

"In a judgement given by this Court (**PA/JRM**) on the 20th March 2003 in re **Hecnef Properties Limited vs Stephen Koludrovic,** the following was stated –

> "*Illi, bhala aspett guridiku tal-effett al-weghda li ghaliha japplika l-artikolu 1357 tal-Kodici Civili, jinghad li l-weghda tal-persuna li tbiegh gid taghha hija wahda unilaterali, daqs kemm unilaterali hija l-weghda ta' min jghid li jrid jixtri. Fi kliem iehor, il-konvenju huwa 'obbligazjoni bilaterali li tibqa' dejjem guridikament diviza b' zewg obbligazzjonijiet unilaterali li f' kull wahda minnhom hemm il-kreditur u d-debitur tal-obbligazzjoni, fis-sens illi hemm dak li jrid jippresta u hemm dak li jiehu l-beneficcju tal-prestazzjoni'. (Prim' Awla,12 ta' Jannar 1998, **Humprhreys et vs Tonna et**).*
>
> *Illi jidher ghalhekk, mill-kliem innifsu tal-ligi li l-ghan ta' dak l-artikolu huwa wiehed li jipprovdi ghall-ezekuzzjoni ta' weghda maghmula bejn zewg partijiet, liema weghda trid tkun tiswa u ma tkunx saret ghal ragunijiet li l-ligi ma tippermettihomx. L-izjed importanti, imma hu li r-rwol tal-Qorti huwa dak li tara li l-weghda tiswa u li tordna lill-parti li tkun qeghda zzomm lura milli tersaq ghall-ftehim biex taghmel dan kif miftiehem.* ***Ma jidhirx li l-Qorti hija moghtijia s-setgha li tindahal hi f' dak li l-paritjiet ma ftehmux, jew li tibdel xi kundizzjoni minn fost dawk li gew maqbula mill-partijiet fuq l-att tal-konvenju.***
>
> *Illi* ***l-bixra wahdanija f-ghadd ta' decizjonijiet li l-Qrati taghna taw dwar din id-disposizzjoni tal-ligi kienet fis-sens li jekk ikun hemm xi cirkostanza li tirrizulta wara li jkun sar ftehim bhal dak jew li ma kinitx maghrufa lil xi parti meta tkun saret il-weghda ta' bejgh u xiri, dik il-parti jkollha raguni tajba biex ma tigix mgeghla tersaq ghall-ftehim ahhari. Imkien ma nghad xi darba li l-Qorti tista' tordna li jsir ftehim ahhari mibdul jew differenti minn dak li l-partijiet kienu originarjament ftehmu. Li kieku jsir hekk, jigri li l-Qorti tkun qeghda tohloq ftehim gdid u mhux taghti ezekuzzjoni ta' ftehim imwieghed.***" (bolding by this Court)

"On the strength of the above, it is evident that the function of the Court is not to create new obligations for the parties, but to decide on the performance of what they had expressly agreed".

"It is the considered view of this Court that Clause 10 of the promise of sale is clear, unequivocal and does not give rise to interpretation. It stipulates that the final deed of sale would be concluded *subject to the condition that a lift will be able to be installed between the staircase.* Nothing is said in the agreement that the staircase should remain intact. Nor does the agreement exclude alterations to the staircase that when

completed would still retain the staircase. The Clause in question speaks of the installation of a lift in the existing staircase".

"It does result from the evidence on file that a lift can be installed in the staircase if certain alterations are carried out. This Court does not endorse the argument put forward by defendants that once the staircase has to be touched, then the condition of Clause 10 is applicable. Had defendants restricted Clause 10 in the sense that no works whatsoever could be carried out on the staircase to install the lift, then the matter would have been different. In real terms, Clause 10 refers *sic et simpliciter* to the installation of a lift between the staircase. This Court is of the opinion that it would be acting *ultra vires* if it attempts to extend the application of Clause 10 to fit defendants` pretentions. Such would amount to an improper interpretation of a provision that is clear in its extent and applicability. In any case, it does result from the evidence in its entirety that the spirit of the provision will stay as any works on the staircase are minimal in nature and will not prejudice the installation of the lift and the conservation of the staircase".

"Defendants` stance is not likely. Despite the fact that defendants were indeed aware of Clause 10, they nonetheless did desist in their attempt to obtain a bank loan to finance the purchase of the property. They continued to discuss with Helen Whibley what they wanted to keep or what intended to reject from what was inside the property. They kept the keys of the property for a good part of the original period of the promise of sale. They even went so far as to consider an alternative sitting for the lift. These are facts which went added together point out that defendants, rather than Clause 10, had other reasons for not wanting to conclude the sale. Defendants did not disclose these reasons so the Court is not in a position to assess whether they were founded or not. However defendants` attempt to justify their refusal not to appear on the final deed of sale on the basis of Clause 10 is unfounded".

B. "**<u>The deposit</u>**

"As regards the refund of the deposit, the Court refers to plaintiffs` third demand. The line taken by our Courts is that where a deposit on account of the price is paid on a promise of sale, and the parties agree that the deposit will be forfeited if the buyers fail to appear on the final deed of sale without valid reason, then the prospective vendors have the right to retain as theirs the deposit".

"In a judgement of the 26th June 1991 in re **<u>Natalina sive Natalie Mifsud illum mart Stephen Ward vs. John Mifsud</u>** the Court of Appeal stated –

> " *... ghalkemm il-konvenju juza' l-kelmiet 'akkont tal-prezz' u 'deposit' meta saret riferenza ghas-somma ta' Lm 1,000 li ghaddiet minghand id l-attrici ghal id il-konvenut fuq l-istess konvenju, dina s-somma kellha 'tintilef favur il-venditur fil-kaz li l-kompratrici (sic) terga' lura minn dana l-ftehim minghajr*

raguni valida u dina l-kondizzjoni allura tfisser li l-ammont ta' Lm 1,000 tqieghed f' idejn John Mifsud bhala 'kaparra' ;; u l-Qorti, fl-interpretazzjoni li qeghdha taghti lil dana l-kliem ma ghandhiex ghalfejn tirrikorri ghal ghejjun ohra barrannin ghal konvenju stess.'"

"In a judgement of the 14th January 2002 in re **Nazzareno Vella noe vs Joseph Abela noe** the Court of Appeal dwelt on the principle of "forfeitable deposit" and made these observations –

"*Din il-Qorti finalment tosserva wkoll illi t-telfien ta' parti mill-prezz depozitata mill-kompratur f' kaz li jonqos li jersaq ghall-kuntratt definittiv bla raguni valida fil-ligi kienet klawsola li timporta penali li kellha allura tigi interpretata b'mod restrittiv u limitattiv fl-effetti taghha. F' kaz ta' dubbju kif kjarament jirrizulta fil-kaz taht ezami li hemm, dan kellu jmur favur il-parti li kienet altrimenti tkun ser tinkorri fi hlas ta' penali. Infatti l-klawsola 5 tal-konvenju hi fis-sens illi l-partijiet ftehmu illi jekk il-kompratur ghal xi raguni li ma tkunx wahda valida fil-ligi jonqos li jidher ghall-att finali, l-venditur ikollu dritt jew li jobbliga lill-kompratur li jixtri jew inkella li jtellfu d-depozitu. Kien allura kaz ta' forfeitable deposit fejn il-venditur inghata ghazla jew li jiehu d-depozitu jew li jezigi li l-kompratur jersaq ghall-pubblikazzjoni tal-kuntratt. Klawsola din li kif inghad ghandha min-natura ta' klawsola penali fejn il- kreditur 'jista' jagixxi ghall-esekuzzjoni tal-obbligazzjoni principali minflok ma jitlob il-penali li fiha waqa' d-debitur'. Fil-kaz taht ezami, s-socjeta' appellata ghazlet illi zzomm id-depozitu ghax dehrilha illi s-socjeta' appellanti ma kellhiex raguni valida fil-ligi biex tonqos li tidher ghall-att finali ghall-pubblikazzjoni tieghu kienet giet interpellata …*"

"In a judgement by this Court (PA/RCP) decided on the 30th May 2002 in re **Carmelo Cassar Limited vs. Bezzina Joseph et** it was held that –

"*Meta l-effetti ta' weghda ta' bejgh jispiccaw, kwalsiasi depozitu mhallas akkont mill-kompratur ghandu jigi rifuz lilu. Kwalunkwe raguni valida fil-ligi tintitola l-kompratur prospettiv li ma jersaqx biex jiffirma konvenju u b' rizultat li mbaghad jkollu d-dritt ghar-rifuzzjoni ta' l-elf lira li kienet thallset bhala forfeitable deposit. Hija raguni valida fil-ligi li persuna ma tersaqx ghall-pubblikazzjoni ta' kuntratt minhabba l-fatt li ma tkunx tista' ssehh kundizzjoni li fuqha jkunu ftehmu il-partijiet.*"

"In another judgement by the Court of Appeal in re **Reginald Vella et vs Angela Galea et** of the 14 May 2010, it was stated that –

"*Dak li kellu fl-ewwel lok jigi determinat huwa n-natura tal-ammont imħolli mill-attur qua kompratur prospettiv mal-konvenuta venditrici (jew man-nutar). Dan l-ammont kien depożitu akkont tal-prezz tal-bejgħ (kif isostni l-attur) jew kien depożitu penitenzjali, ossija kapparra (kif invece sostnut mill-konvenuta) ? Id-differenza bejn dawn iż-żewg tipi ta' depożitu hija waħda fundamentali għaliex l-obbligi li jixħtu fuq naħa u oħra mill-partijiet kontraenti tvarja …*

Fil-kaz in eżami l-konvenju bejn il-partijiet sar bil-lingwa ingliża. Għalhekk ma setgħetx tintuza l-kelma 'kapparra'. It-test ingliz tal-artikolu [1359 tal-Kodici Civili] juża l-kelma 'earnest' għal ekwivalent tal-kelma Maltija 'kapparra'. Biss jekk id-depożitu jissejjaħ 'earnest' jew b'xorta ta' kliem oħra, kemm-il darba l-elementi ta` 'kapparra, cioè li dak id-depożitu jintilef kemm-il darba min ikun għamlu ma jersaqx, għandhom japplikaw is-sanzjonijiet imsemmija fl-artikolu

1359 anke fil-konfront tal-venditur. Fil-każ in eżami l-kelma 'deposit' giet ikkwalifikata bil-kelma 'forfeitable' u cioè l-attur kien jitlef l-ammont imħallas kemm-il darba ma jersaqx. Dan, fl-opinjoni tal-qorti, huwa ekwivalenti għal meta f'konvenju jingħad li qed jitħallas certu ammont bħala 'kapparra' u għalhekk ma kienx hemm għalfejn li l-partijiet joqogħdu jispjegaw fil-konvenju x'kien jigri kemm-il darba kien il-venditur li ma jersaqx …

Isegwi, mela, kif tajjeb gie sottomess mill-appellanti illi d-depożitu mħolli għand in-nutar kien jikkonsisti f`kapparra u mhux f'depożitu akkont tal-prezz kif ippretenda l-attur appellat. Dan hu sewwa sew hekk għar-raguni li l-istess partijiet jiddefinuh bħala wieħed "forfeitable" – u dan dejjem fil-każ li l-att finali ma jkunx sar bla raguni valida."

"In the promise of sale in question, the parties included as part of Clause 1 in the agreement a clear and express provision which stated as follows –

"*…The sum of twenty nine thousand one hundred and seventeen Euro (EUR29,117) equivalent to twelve thousand four hundred and ninety nine Maltese liri (Lm12,499.93) is being paid as a deposit on account of the price to Notary Dr Rosalyn Aquilina who tenders due receipt thereof. (This cheque is to be kept by Notary Rosalyn Aquilina and will be paid as to one half to Andrew Whibley and as to the other half to Helen Whibley, separately by separate cheques once the sanction letter is issued. This cheque will be lost by the purchasers in favour of the vendors if they do not appear for the final contract because of a reason which is not valid at law. In case the final contract may not take place because of a reason which is valid at law then the deposit will be returned in its entirety to the purchasers*".

"This Court is of the view that the issues raised by the above quoted judgements of these Courts are applicable to the matter between the parties to this cause without further comment".

"**<u>Decision</u>**

"**For the reasons above, this Court is hereby deciding the cause between the parties as follows –**

"**Rejects the entire line of defence taken by defendants in their sworn reply to the sworn application.**

"**Accepts the first three exceptions submitted by plaintiffs in their sworn reply to the counter-claim and abstains from taking further cognizance of the fourth exception.**

"**Rejects the counter-claim in its entirety.**

"**Accepts and accedes to plaintiffs` first demand.**

"**Accepts and accedes to plaintiffs` second demand. Orders defendants to appear on the contract of sale of the premises number**

two hundred and thirty two (232) Two Gates Street, Senglea, having another entrance at number one hundred and eight (108) Triq il-Kappillan Frangisk Azzopardi, Senglea, for the price and according to the terms and conditions of the promise of sale agreement signed by the parties on the 21st February 2008. Appoints Notary Dr. Rosalyn Aquilina to publish the contract of sale. Orders that the contract of sale be published on Tuesday 30th April 2013 at noon on the Second Floor of the Courts Building in Valletta. Orders that payment of the entire balance of the purchase price be effected on the date appointed for the publication of the contract of sale. Appoints Advocate Dr. Anna Mifsud Bonnici as curator to attend and represent on the contract of sale any party who is absent or defaults.

"**Accepts and accedes to the second part of plaintiffs` third demand. Orders that should defendants fail to attend on the appointed date for the publication of the contract of sale or should they fail to pay the entire balance of the purchase price on the appointed date for the publication of the contract of sale, then plaintiffs will be entitled to retain as their property the sum of twenty nine thousand one hundred and seventeen Euro (€29,117) that was paid by defendants by way of deposit on the promise of sale.**

"**Orders that all the costs of this cause be borne by defendants, including the costs of the judicial letter of the 2nd December 2008**".

Appeal application filed by defendants Nigel and Paula Herbert (20.03.2013):

3. Defendants (appellants) Herbert felt aggrieved by the judgment given by the court of first instance, and consequently lodged this appeal.

4. They point out that the matter at issue turns around Clause 10 of the promise of sale agreement dated 21st February 2008, which states:

> "*Subject to the condition that a lift will be able to be installed between the staircase*".

and underline the fact that court expert Architect Valerio Schembri concluded that the lift cannot in fact be installed between the staircase as is, and that for

it to be actually installed "*between the staircase*", alterations would need to be carried out to the existing staircase.

5. Appellants emphasise that by carrying out alterations on the "*large, imposing staircase*" the character of such staircase would be shattered. They explain that they had fallen in love with the house primarily on account of the imposing staircase, and argue that by altering such an embellishment the whole purpose of the purchase would be defeated.

Reply of plaintiffs (now respondents) Andrew Emmanuel Joseph and Helen Whibley to the appeal application (21.05.2013)

6. Respondents Whibley submit that appellants' appeal is unfounded and does not deserve to be upheld for the following reasons.

Judgment on counter-claim is now "res judicata"

7. In the first place they point out that the First Hall's judgment of the 28th February 2003 determined not only plaintiffs' demands and defendants' pleas but also defendants' own counter-claim (to have deposit of €29,117 refunded to them) and plaintiffs' pleas thereto. They highlight the fact that defendants' appeal does not refer to that part of the judgment which rejected defendants' counter-claim, because what the defendants are actually asking in this appeal

is that this Court should uphold their defence. Consequently that part of the judgment relative to the counter-claim has now become "*res judicata*" and cannot be changed, irrespectively of whether this court accepts defendants' appeal or not.

Judgment is sound and not manifestly erroneous

8. Plaintiffs insist that in line with this court's case law this court should not disturb the first court's evaluation of the evidence since this court as a court of revision should only do so where it deems the first court's evaluation and judgment were manifestly erroneous.

The merits of the case

9. Plaintiffs argue that a lift in actual fact can be installed between the staircase provided minor alterations are made. They add that defendants' insistence that the lift must be installef without any modifications whatsoever to the present staircase is nothing more than a pretext to justify their decision not to honour the promise of sale/purchase. They point out that the condition in clause 10 does not exclude alterations to the stairs.

10. Finally they point out that the court expert gave more than one option as to how the lift could be installed (with very minor alterations), discrediting the defendants' theory that a lift cannot be installed. Thus, they argue, the

condition laid down in Clause 10 is satisfied. They also highlight the fact that defendants failed to raise any criticism of the findings of the expert and did not feel the need to put any questions to him after he filed his report.

Considerations of this court

11. This court, having condsidered the judgment of the court of first instance, the appellants' grievance, respondents' replies, the evidence produced and all the acts of the proceedings, makes the following considerations.

12. Contrary to what plaintiffs argue, defendants appealed from the whole judgment given on the 28th of February 2013: i.e. not only from the part relating to plaintiffs' claim, but also from the part relating to their counter-claim. This results from the fact that defendants asked this court to "*quash and revoke the first judgment*". While with regards to the part relating to plaintiff's claim defendants asked this court to uphold their defence, with regards to their own counter-claim they evidently failed to ask this court to uphold their counter-claim. Such a situation and its relative remedy, however, is dealt with in Article 143(1) and (5) of Chapter 12 of the Laws of Malta respectively:

> (*1).* "*The application for the reversal of a judgment shall contain a reference to the claim and to the judgment appealed from together with detailed reasons on which the appeal is entered and a request that the said claim be allowed or dismissed*".
>
> *(5).* "*The default of compliance with any of the requirements of sub-articles*

> *(1), (2) and (3) shall not make void the application; but the court shall, in any such case, make an order directing the appellant to file, within two days, a note containing such particulars as are required by law and which have not been duly stated in the application".*

13. Thus plaintiffs are wrong in arguing that the first court's dismissal of defendants' counter-claim is now *res judicata*.

14. Clause 10 ("*Subject to the condition that a lift will be able to be installed between the staircase*") is linguistically incorrect to the point that it technically does not make any sense. Ironically, both plaintiffs and defendants, who on the 29th of September 2009 asked the First Court to conduct proceedings in the English Language (since English happens to be the mother tongue of plantiff Andrew Whibley[1] and defendant Nigel Herbert[2]) failed to point out to the notary that Clause 10 was linguistically non-sensical.

15. The Oxford online dictionary defines the word "between" as *"at, into, or across the space separating two objects or regions*". Hence it is incorrect to describe something as being "between" one singular object. The preposition "between" necessarily implies that there are two objects (or two groups of objects). A staircase is a singular item, and not two items, hence once cannot speak of something being "between" a staircase. In fact plaintiffs themselves in their own note of submissions explained that the Oxford online dictionary

[1] born in Brighton, England
[2] born in Oxford, England

defines the word "staircase" as "*a*[3] *set of stairs and its surrounding walls or structure"*. (They were trying to point out that stairs are just part of a staircase, and that a staircase comprises the stairs and all that is situated within the walls or structure surrounding such stairs, including the walls or structure.)

16. The first court explained that "*The clause in question speaks of the installation of a lift **in** the existing staircase*." But this is not at all precise. What the court did here (in an attempt to give sense to a non-sensical phrase) was to substitute the preposition "between" with the preposition "in". Of course, if Clause 10 read "*Subject to the condition that a lift will be able to be installed in the staircase*", then this court would most certainly agree with the first court that such clause would allow for any alterations to be made in order for the lift to be installed "*in the staircase"*, which as the plaintiffs rightly pointed out, comprises the stairs, the walls and the whole structure itself.

17. The particular choice of the word "*between*" in Clause 10 however, cannot be ignored. The word "between" indicates an understanding between plaintiffs and defendants that the lift should be able to be installed between one flight of stairs and the other flight of stairs on the opposite side. Clause 10 should actually read "*Subject to the condition that a lift will be able to be installed between the flights of stairs*." (i.e. in the space between said flights of stairs). It turns out, however, that no lift shaft (including enclosure) for the sizes of the lifts proposed by plaintiffs can actually be installed in the space

[3] a = one singular object

between the flights of stairs, unless:

(a) the flight is reduced by cutting the stone slab proper, or

(b) a steel/gypsum structure is fitted in, or

(c) a wall is built around the clear shaft width.

18. The court expert explained that in the first two cases (a) & (b) "*it is impossible not to damage the structure*" and that in the third case (c) although "*it is technically and on paper possible not to damage the stone slabs of the present flight.in practice such a result is very difficult to achieve and may with time result in irreparable damage to the structure due to settlement".*

19. This court is of the opinion that Clause 10 as construed ("*Subject to the condition that a lift will be able to be installed between the flights of stairs*") does not allow for such alterations (which damage the flight structure) to be made. At best (for the plaintiffs) it is doubtful whether it allows for such alterations to be made.

20. But even so, according to Article 1009 of the Civil Code (Under the sub-heading: *Of the Interpretation of Contracts*):

> "*In case of doubt, the agreement shall be interpreted against the obligee and in favour of the obligor*".

21. The obligor within this context are the defendants, since the reason

plaintiffs are suing defendants is precisely to demand the court to order them to honour the obligation they assumed in the promise of sale of the 21st February 2008 i.e. to appear for the publication of the act of sale of premises in question.

22. Thus this court is satisfied that defendants were justified in refusing to appear to sign the final deed of sale with regards to property 232 Two Gates Street, Senglea/ 108, Parish Priest Frangisk Azzopardi Street, Senglea.

Decide

For the above mentioned reasons, this court allows defendants' appeal, revokes the judgment of the 28th February 2013, and

(a) upholds defendants' pleas to plaintiff's claim and rejects plaintiff's claim; and

(b) rejects plaintiffs' pleas to defendants' counter-claim, and accepts defendants' counter-claim.

Moreover this court upholds plaintiffs' fourth plea that should a refund be ordered, (as is the case here) half of the amount should be due by plaintiff Andrew Emmanuel Joseph Whibley and the other half by plaintiff Helen Whibley. This court makes reference to the promise of sale agreement, where

with regards to the deposit of €29,117 which was paid by defendants, the following was explained:

> "*This cheque is to be kept by Notary Rosalyn Aquiina and will be paid as to one half to Andrew Whibley and as to the other half to Helen Whibley, separately by separate cheques once the sanction letter is issued*".

Hence this court orders plaintiff Andrew Emmanuel Joseph Whibley and plaintiff Helen Whibley to each refund to defendants the sum of €14,558.50 which was paid by them by way of deposit on the promise of sale, with interest from the 14th May 2009, the date when the counter-claim was notified to them.

Costs of first and second instance proceedings are to be borne by plaintiffs.

Silvio Camilleri Chief Justice	Giannino Caruana Demajo Judge	Noel Cuschieri Judge

Deputy Registrar
rm