Court Of Appeal

Judges

THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE TONIO MALLIA
THE HON. MR JUSTICE JOSEPH AZZOPARDI

Sitting of Tuesday 13th March 2018

Number: 7

Application Number: 233/07 SM

Martin Frederick Searle u martu Genevieve Margaret Ruth Yvette Searle u b'digriet tas-16 ta' Dicembru, 2010, il-gudizzju gie trasfuz f'isem Dr Aldo Vella bhala mandatarju specjali ta' Genevieve Margaret Ruth Yvette Searle armla ta' Martin Frederick Searle debitament awtorizzat permezz ta' prokura specjali

v.

Jonathan Wayne Marks u Veronika Lyzakova

The Court:

Having seen the sworn application brought forward by the plaintiff on the 2nd March, 2007, whereby it was claimed:

> "1. That in virtue of a promise of sale and purchase agreement dated the 20th May 2006 (copy annexed and marked as Document 'A') defendants bound themselves jointly and severally between themselves to sell and transfer in favour of plaintiffs, who on their part accepted and bound themselves to acquire the following immovable property described in the

afore-mentioned promise of sale and purchase agreement as follows: “Villa Chandon, previously ‘Xorbett’, Triq Fomm il-Ghelliem, High Ridge, Saint Andrew’s, formerly indicated as being in the limits of Saint Julian’s/Birkirkara, together with the portion of land forming part of the territory known as ‘Tal-Mielah’ measuring 1,825m^2, over which the said villa was built, bounded the said portion of loand on the North by Triq Wied il-Ghelliem, on the South by Triq il-Pedidalwett, and on the East by property of the successors in title of Saljos Estates Company Limited, as better outlined in the plan annexed to a deed in the records of Notary Doctor George Bonello Dupuis of the 05.03.1987” as better described in the said promise of sale and purchase agreement, as subject to the annual and perpetual ground-rent of one hundred Maltese Liri (Lm100) otherwise free and unencumbered, with all its rights and appurtenances and with vacant possession and with the furnishings listed in the said promise of sale and purchase agreement.

“2. That the said promise of sale and purchase agreement stipulated a global price of eight hundred and eighty thousand Maltese Liri (Lm880,000) subject to the terms and conditions stipulated in the said promise of sale and purchase agreement;

“3. That contextually with the conclusion of the said promise of sale and purchase agreement plaintiffs paid to defendants *inter alia* a deposit in the amount of eighty eight thousand Maltese Liri (Lm88,000) on account of the stipulated price;

“4. That during the term of validity of the afore-mentioned promise of sale and purchase agreement plaintiffs, after having engaged a number of experts to inspect the premises *de quo*, discovered that the said premises were affected by defects of a serious nature;

“5. That in view of the defects that were discovered in the premises *de quo*, plaintiffs elected not to acquire the said premises and informed the defendants about their said choice by means of a legal letter dated 11th January 2007 and a judicial letter dated 6th February 2007.

“6. That in virtue of the afore-mentioned legal letter and judicial letter plaintiffs had also requested defendants to refund *inter alia* the deposit on account of the purchase price in the amount of Lm88,000;

“7. That defendants notwithstanding the said request remained in default and did not refund the said deposit;

“8. That these facts are all known to plaintiffs personally;

“**Cause of the Claim**

“1. Plaintiffs had a valid reason at law not to acquire the property *de quo* in particular since the said property is affected by defects of a serious nature;

"2. Consequently plaintiff's were entitled to request defendants to refund the deposit on account of the purchase price in the amount of Lm88,000 paid by plaintiffs to defendants contextually with the afore-mentioned promise of sale and purchase agreement;

"3. Notwithstanding the fact that defendants were requested to refund the said amount of Lm88,000 even by means of a legal letter dated 11th January 2007 and a judicial letter dated 6th February 2007, defendants remained in default and did not effect the said refund;

"4. Therefore plaintiffs were forced to file this action;

"**Claims**

"Defendants are to state why, in view of the afore-stated reasons, this Court should not, after having issued the required declaration and orders:

"1. Condemn defendants *in solidum* to refund to plaintiffs them sum of eighty eight thousand Maltese Liri (Lm88,000) which sum was paid by plaintiffs to defendants on account of the price stipulated in terms of the promise of sale and purchase agreement dated 20th May 2006 (copy annexed and marked as Document 'A') following, if required, a declaration to the effect that plaintiffs had a valid reason at law not to acquire the property subject of the said promise of sale and purchase agreement;

"With legal interest with effect from the 6th February 2007 and with judicial costs and expenses, including those relative to the judicial letter dated 6th February 2007, and the warrant of prohibitory injunction and the garnishee order contextually filed with this application, at the charge of the defendants who are being summoned forthwith for the reference to their oath".

Having seen the sworn reply brought forward by the defendants in the 21st March 2007, which states as follows:

"1. That the first and second paragraph contained in the ' Statement of the Subject of the Cause' and the 'Declaration of Facts' in plaintiffs' Sworn Application are correct and are being confirmed by the defendants.

"2. That the third paragraph contained in the 'Statement of the Subject of the Cause' and the 'Declaration of Facts' in plaintiffs' Sworn Application is only partially correct in the sense that the deposit on account of the price in the sum of eighty eight thousand Maltese Liri (Lm88,000) was not paid "*contemporaneously with the signing of the promise of sale agreed*", as covenanted, but was effected at a later stage and the funds sent by plaintiffs were short by some three hundred Maltese liri (Lm300), which shortfall was made good for by Frank Salt Real Estate Ltd. and has not been refunded the said sum by plaintiffs.

"3. That, with regards to the fourth paragraph contained in the 'Statement of the Subject of the Cause' and the 'Declaration of Facts' in plaintiffs' Sworn Application, defendants submit as follows:

(i) "Plaintiffs had seen and thoroughly inspected the villa on more than one occasion prior to the signing of the promise of sale agreement on the 20th of May, 2006;

(ii) "Plaintiffs took possession of the villa on the 2nd of July, 2006, that is, six and a half months prior to their legal letter dated the 11th of January, 2007 whereby they informed defendants that they were not going to proceed with the deal on the allegation that the villa had serious defects.

(iii) "During the period of validity of the promise of sale agreement, whilst plaintiffs were in possession of the said villa, they never told defendants that they did not intend to purchase the villa because it had serious defects, and such a declaration was only made at the eleventh hour by means of the above-mentioned legal letter, after plaintiffs had made use of the villa for all the time they wanted and after the defendants had gone through considerable trouble to vacate the villa in a timely manner in order to accommodate plaintiffs' exigencies;

(iv) "Plaintiffs executed numerous works, even of a structural nature, during the time when they were in possession of the villa, and this clearly shows that plaintiffs accepted the villa in its present state and condition, and the allegation now being put forth that plaintiffs do not want to proceed in order to dishonor their commitments without paying the price – the forfeiture of the deposit – agreed by the parties in terms of the promise of sale agreement;

(v) "The alleged defects in the villa are neither of a latent nor of a serious nature, and the truth is that plaintiffs do not want to proceed with the deal for other reasons which have absolutely nothing to do with the condition of the villa, to the extent that, when third parties involved in the deal, unknown to the defendants, offered to inquire whether the defendants would accept to fork out the expenses to repair the alleged defects themselves, the plaintiffs refused such an offer and said that they no longer wanted to proceed with the deal.

"That, with regards to fifth and sixth paragraph contained in the 'Statement of the Subject of the Cause' and the 'Declaration of Facts' in plaintiffs' Sworn Application, defendants submit the following –

(i) "There was no architects' certificate attached to the legal letter dated the 11th of January, 2007 whereby plaintiffs informed defendants that they did not intend to proceed with the contract because of alleged latent defects in the villa; and

(ii) "The judicial letter of the 6th of February, 2007 was sent after the promise of sale agreement had already lapsed and solely in reply to a

judicial letter filed by defendants on the 30th of January, 2007 prior to the lapse of the promise of sale agreement.

“5. That, with regards to the seventh paragraph contained in the ‘Statement of the Subject of the Cause’ and the ;Declaration of Facts’ in plaintiffs’ Sworn Application, defendants submit that they refuse to refund plaintiffs the sum of Lm88,000 in the light of the fact that, in terms of the promise of sale agreement dated the 20th of May, 2006 it had been covenanted and agreed that the deposit on account of the price was to be forfeited in favour of defendants should the plaintiffs fail to appear for the publication of the final deed of sale and transfer without just cause, and defendants contend that plaintiffs had no just cause to dishonor the agreement.

“6. That these facts are known by defendants first hand.

“*Statement of Defence*

“1. Plaintiff’s demands are unfounded both at law as well as in fact and are to be repealed with costs for the following reasons –

“(i) Plaintiff’s failed to preserve their right to demand a refund of the deposit on account by means of the filing of a judicial letter prior to the lapse of the promise of sale agreed, as required by law and according to jurisprudence, and hence, upon the lapse of the promise of sale agreement, the deposit in the sum of Lm88,000 was automatically forfeited in favour of defendants in terms of the promise of sale agreement since plaintiffs failed to appear for the publication of the final deed of sale and transfer;

“(ii) The villa in question has no latent defects of a serious nature, as is being alleged by the plaintiffs;

“(iii) In any case, plaintiffs had seen and thoroughly inspected the villa prior to the signing of the promise of sale agreement, and their actions both prior as well as after the signing of the promise of sale agreement are tantamount to an acceptance of the villa by plaintiffs in its present state and condition.

“2. The plaintiffs demands are to be repealed with costs.

“3. Defendants reserve the right to file further statements of defence which may be allowed by law and subject to the Court’s authorization”.

Having seen the judgment delivered by the First Hall of the Civil Court on the 17th October, 2013, by means of which decision the case was determined in the sense that it was satisfied that the plaintiffs did not prove the allegations

submitted by them in the initial sworn application. Therefore, on the basis of the considerations made therein, it rejected the plaintiffs' pleas and requests as submitted in the said initial application and also determined that the plaintiffs were to bear the expenses of the proceedings.

The First Hall Civil Court delivered its judgment after making a number of considerations which are being reproduced hereunder:

> "Considers:
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> "9.0. That the court appointed technical expert made the following considerations:
>
> "9.1. That complainants drew attention to defects in the corridor ceiling at basement level where it:
>
> "9.1.1. Spalled in parts;
>
> "9.1.2. Rusted mesh reinforcement was exposed;
>
> "9.1.3. Had different colour rendering;
>
> "9.1.4. Had a small crack close to the false ceiling fixing support;
>
> "9.2. After being specifically asked by the court expert whether these were the only defects, complainant answered in the affirmative, (see paragraph 26 of the expert's report);
>
> "9.3. Complainant's architect also mentions, but does not ascertain, the following defects:
>
> "9.3.1. Dampness on the rock face at basement level;
>
> "9.3.2. The possibility of structural faults in the pool;
>
> "9.4. Notwithstanding the above paragraph, the court expert clearly indicates that the only defects encountered are those referring to the corridor at basement level;
>
> "9.5. As regards this corridor the court expert affirms the following:

"9.5.1. It actually consists of two separate but adjoining corridors each being fifteen (15) meters in length and two point three, (2.3) meters wide;

"9.5.2. The spalling in question is relatively small;

"9.5.3. The whole corridor is being considered defective as it is not adequately water-proofed;

"9.5.4. The corridor uncludes a false suspended ceiling;

"9.5.5. The actual damages in the corridor do not appear to be of a serious nature;

"9.5.6. The remedial work only consist of finishing works which are not even of a structural nature;

"9.6. On the position taken by the complainants that the villa could not be lived in whilst the remedial works were being executed, the court expert had this to say:

"9.6.1. That the defendants had lived in the villa when remedial works were carried out;

"9.6.2. The corridor which requires these remedial works is situated under the front garden where access to the villa would easily be gained by bridging the corridor in question by using a temporary boardwalk or, simply using another entrance whilst the work was being carried out;

"9.6.3. As the corridor is close to the street, remedial works would not require any access from the inside of the house;

"9.6.4. As to the costs involved the court expert estimates that this would be to the tune of fifteen thousand five hundred and nineteen Ewros, (LM15,519.00), and not as exageratedly projected by the complainants, (see paragraph 34 of the court expert's report);

"9.6.7. Finally, the said court expert also concludes that the works would entail a period of three (3) weeks' work until completion – not as again exageratedly indicated by the complainants, (see paragraph 35 of the court expert's report);

"Considers:

"10. That the basic premises on which the whole edifice of the compainants' legal situation depends is on his claim that he refused to conclude the contract of sale in question on the basis of "serious defects" which he encountered in the villa he had previously intended to buy;

"11. That on the basis of the court expert's report this allegation of serious damage or latent defects does not transpire and was not proved;

"12. That hence, the complainants do not stand on solid ground at all;

"13. That on the contrary it transpires that the remedial work that may be undertaken involves:

"13.1. A minimal expense;

"13.2. A short period of time;

"13.3. No nuisance to the residents of the villa under review;

"14. That it also results that the complainants had not only satisfactorily examined the villa in question before signing the preliminary agreement at issue, but had actually resided in the said villa for well over six (6) months before giving rise to these proceedings;

"Considers:

"15. That as aptly upheld by the defendants in their note of submissions, it is a fundamental principle at law that contracts are to be executed in good faith, (see article 993 of the Civil Code);

"Considers:

"16.0. That as a result of the evidence submitted the following transpires:

"16.1. That the contending parties concluded a preliminary agreement on the 20th May, 2006, as aforementioned;

"16.2. That the complainants paid a deposit as aforementioned;

"16.3. That after residing in the villa in question for over six (6) months the complainants had second thoughts and wanted to renegade the said preliminary agreement and have the deposit returned to them thus, wanting the best of both worlds;

"16.4. That the complainants did not act in accordance to the contract of promise of sale they entered into with the defendants as the judicial letter they sent on the 6th February, 2007, was not within or according to the statutory limit as envisaged at law;"

Having seen the application of appeal filed by Dr. Aldo Vella, as the special attorney of Genevieve Margaret Ruth Yvette Searle, widow of Martin Frederick Searle, in her personal name and capacity, as well as in her capacity as the

person enabled to continue the suit in substitution of her deceased husband, whereby it was requested that this Court revokes the judgment of the First Hall of the Civil Court, dated 17th October, 2013, in the aforementioned names. Furthermore, the appellant nomine pleads that this Court should reject all the defendants' pleas, accede to the demands of the appellant nomine, with interests as claimed and with costs of both instances at the charge of the respondents.

Having seen the reply filed by the respondent defendants, by means of which, and for the reasons contained therein, they respectfully submitted that the appeal filed by the appellant nomine and requests made therein should be rejected in their entirety, and the judgment appealed from confirmed. They further submitted that all costs relative to both instances should be decided against the appellant nomine.

Having seen that during the sitting of the 30th January, 2018, after the legal counsels made their respective oral submissions, it was agreed that the case be adjourned for the judgement of this Court.

Having seen all the acts of the case and the documents exhibited;

Considers:

In this case, the plaintiffs are seeking reimbursement of the deposit paid by virtue of a promise of sale agreement dated the 20th of May, 2006, relative to the purchase of the property known as "Villa Chandon", previously "Xorbett" Triq Fomm il-Ghelliem, High Ridge, St. Andrews, together with interests, as a consequence of the fact that the plaintiffs had a valid reason at law not to acquire the said property which was affected by defects of a serious nature. Consequently, the plaintiffs sustain that they were entitled to request from the defendants a refund of the deposit paid on account of the purchase price.

The defendants on the other hand contend that the plaintiffs do not have a right to pursue such a claim, given that the plaintiffs failed to preserve their right to demand a refund of the deposit on account by means of the filing of a judicial letter prior to the lapse of the promise of sale agreement as required by law, and thus the deposit was automatically forfeited in their favour as plaintiffs failed to appear for the publication of the final deed of sale and transfer of property. Defendants submit that the villa in question had no latent defects and that in any case, plaintiffs had seen and thoroughly inspected the villa prior to the signing of the promise of sale agreement and that their actions both prior and after signing of the promise of sale agreement, are tantamount to an acceptance of the villa by plaintiffs in its present state and condition.

The first Court held that plaintiffs were not justified in raising their claims as the extent of the damages was relatively small and not that serious as certified

by the court appointed architect, and that the remedial works were carried out over a short period of time and involved a minimal expense and did not cause a nuisance to the residents of the villa. Furthermore, it was decided that whereas the fundamental principle at law is that contracts are to be executed in good faith, it was held that plaintiffs wanted to renege on the said preliminary agreement and have the deposit returned to them, when they did not file a judicial letter within or according to the statutory limit as envisaged by the law.

The appellant nomine felt aggrieved by the said judgment and based the appeal under review on two major grievances: (1) that the Searle spouses had valid reasons at law to withdraw from the promise of sale agreement in question and obtain a refund of the deposit paid to the defendants; and (2) that the First Hall of the Civil Court ignored altogether the submission made by the appellant nomine, to the effect that the defendants' failure to enforce the promise of sale agreement in question, necessarily entailed that the defendants were not entitled at law to retain the deposit.

In their reply the respondent defendants on the other hand, while rebutting the appellant's claims, emphasize that the nature of deposit was that equivalent to earnest and that they were thus entitled to retain the deposit made on the promise of sale agreement.

It should be pointed out that, given the nature of the plaintiffs' claims and of the defendants' first plea of defense, it would have been indicated for the first Court to determine the nature of the deposit made on the promise of sale agreement, that is, whether the said deposit was effected on account of the purchase price or whether it was a forfeitable deposit made by way of earnest. This is being stated as it is held that this bone of contention between the parties to the lawsuit should have been the first legal issue to be determined as it is fundamental, both with respect to the varying obligations which are derived therefrom and with respect to the different outcomes. It is held that in the case where payment of a deposit on account of the purchase price is made on a promise of sale agreement which is allowed to expire and no judicial proceedings are initiated to enforce the reciprocal rights and obligations undertaken by the respective parties to appear on the final contract of sale, this entails that the parties' position should be returned *status quo ante,* and the prospective purchaser would have the right to a refund of the deposit paid on account on the promise of sale agreement. On the other hand, when a deposit is paid in earnest, this entails that the parties would be at liberty to recede from the contract and either the prospective vendor would have the right to retain the payment in earnest, should the prospective buyer fail to pursue his obligations to purchase the property subject of the promise of sale agreement, or the prospective vendor would return double the amount of the earnest, if he would recede from the agreement.

The appellant nomine invokes the applicability of Article 1357(2) of the Civil Code (Chapter 16 of the Laws of Malta) to the case in question which provides that:

> "*1357.(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 cited article of the law it is evident that for the promise of sale to be kept in force, the promisee is to send a judicial intimation to the promisor, prior to the expiry of the promise of sale, **and** in the case of promisor's continued default, the promisee is to file a sworn application within thirty days from the last extended period. The effects of the indicated judicial letter are solely to extend the effects of the promise of sale by a period of thirty days. Before this last extended period expires, for the effects of the promise of sale to be retained and for the purposes of safeguarding the rights arising therefrom, the appropriate lawsuit has to be filed as set out in the above quoted provision of the law. The indicated article of the law establishes the procedure to be adopted in the quest for the safeguard of a party's rights and interests arising out of a promise of sale, in the case that the other party has failed to adhere to its obligations, as arising out of the promise of sale. Failure to act in accordance with the provisions of Article 1357(2) of the Civil Code, will lead to the end of the promise of sale, in that no party can then insist on

either its execution by having the contract published, nor can a party request consequential damages arising from the fact that the contract could not be published. This matter has been the subject of extensive jurisprudence.

The appellant nomine cites jurisprudence to sustain his case namely judgments delivered by this Court such as that in the names of **Gloria Pont v. J.L.J. Construction Company Limited** decided on the 1st February, 2008, **Gerit Company Limited v. A.M. Development Limited** decided on the 29th May, 2015, **Ekaterina Momtcheva v. Danseller Company Limited** decided on the 27th May, 2016, **Kruger Brent Development Limited v P.A.M. Limited** decided on the 25th November, 2016, and more recently **Jeffrey John Mallia v. Adrian Caruana** decided on the 18th July, 2017.

The respondent defendants on the other hand, sustain that the **Gloria Pont** judgment had not even been delivered by the time the promise of sale in question expired and that there was no authoritative and uniform line of case law holding that defendants had to follow the procedure outlined under Article 1357(2) of the Civil Code in its entirety, in order to ensure that they were entitled to retain the forfeitable deposit paid by the defendants on account of the purchase price. Furthermore, they argue that recent developments in domestic case law have also proved that the **Gloria Pont** judgment should not be inflexible and absolute in its application. It is thus sustained by the respondent defendants that, where monies are paid on a promise of sale

agreement by way of a forfeitable deposit or earnest, rather than as a simple payment on account, then the procedure outlined in Article 1357(2) need not be followed for the vendors to retain such money. This in line with a judgment of this Court which considered this matter in the names **Chain Services Limited v. Leo u Inez konjugi Micallef**, decided on the 27th January, 2017, wherein it was held that where earnest is given on a promise of sale as a *locus poenitentiae*, parties are at liberty to recede from the contract under payment of a penalty, by way of forfeiting such payment. It was also held that given parties are at liberty not to proceed with the publication of the contract, it does not make sense that a party would still be obliged to follow the procedure outlined in Article 1357(2) of the Civil Code. Thus, it has been held that when a party chooses not to proceed with the publication of the contract where the deposit is said to be forfeitable and with the right to recede, there is no need for the party to extend the validity of the promise of sale or that a lawsuit be initiated to enforce the promise, which a party was at liberty to renounce.

It is held appropriate at this stage to examine the relevant clause used in the promise of sale agreement in question to determine the nature of the payment:

> "*Purchasers are paying here and now to vendors who accept a deposit of Lm88,000 on account of the purchase price of Lm880,000. Purchasers will forfeit this sum in favour of vendors if purchasers do not sign the final deed for a reason that is not valid at law by the 31.1.2007. The deposit will be returned to purchaser if the final deed cannot be signed for a reason that is valid at law…*".

The purchasers, therefore, did not retain the right to recede but only the right not to proceed with the sale for a reason that is valid at law. In this case under review, it is uncontested between the parties that they entered into a promise of sale agreement on the 20th May, 2006, with the intention of entering the final deed of sale by the 31st January, 2007. Simultaneously, the parties entered a rental agreement for plaintiffs to lease the property in question between the 1st of July, 2006 and the 31st of January, 2007. The plaintiffs sent a legal letter on the 11th January, 2007, advising the defendants that, due to the fact that the property subject of the promise of sale was damaged, it was not their intention to proceed with the sale and requested a refund of the deposit. The defendants, on the other hand, sent a judicial letter a day before the lapse of the promise of sale agreement, calling upon the plaintiffs to complete the sale of the villa. The plaintiffs replied to this judicial letter on the 6th February, 2007, to the effect that it was not their intention to proceed with the sale because of the damages which developed in the villa during the term of the promise of sale agreement and again called upon them to refund the sum of Lm88,000 they had paid by way of deposit. No judicial proceedings were filed in court to enforce the completion of the sale.

After outlining the salient points at issue, this Court is well aware of the fact that this matter has been the subject of numerous cases before it and that the outcome may be seen to have always been concordant. However, in this particular case, the parties did not make use of the term earnest when

undertaking the promise of sale agreement, but they simply referred to it as a deposit on account, which was subject to forfeiture, should purchasers fail to sign the final deed of sale for a reason that is not valid at law, but would be entitled to the refund of the deposit if failure to appear on the final deed of sale was for a reason that is valid at law. Neither did the parties give each other the right to recede from the contract. Had parties made use of the word earnest, or had it resulted otherwise that earnest was being given, it would have been evident that the provisions of the law as outlined under Article 1359 of the Civil Code, would have been applicable, that is:

> "*1359. Where in any promise to sell, earnest has been given, each of the parties shall be at liberty to recede from the contract: the party giving the earnest forfeiting such earnest, and the party receiving the earnest returning double the amount thereof, saving any other usage in regard to the particular contract in respect of which earnest has been given*".

However, once in the case under examination the parties did not make use of the word earnest, nor did they provide for the effects of earnest, then it is held that the parties are bound by the terms of the promise of sale agreement that they subscribed to. This was the same position adopted by this Court in its judgment of the 18th July, 2017, in the names **Jeffrey John Mallia v. Adrian Caruana**, which addressed the same situation at hand when it said:

> "*Skont kif qalet din il-Qorti fil-kawza Cassar v. Camilleri, deciza fis-6 ta' Gunju 1986:*
>
>> "*Il-kaz ta' kapparra penitenzjali hija l-unika xorta ta' kapparra prevista fil-ligi taghna billi kull wahda mill-partijiet tista' terga' lura mill-konvenzjoni billi titlef il-kappara moghtija jew tizborsa d-doppju skond il-kaz".*

"*Fil-kaz meritu ta' din il-kawza, ma ntuzatx il-kelma kapparra u lanqas ma gew stipulati l-effetti tal-kapparra, cioe`, id-diritto di ritirarsi. Jinghad fil-konvenju li x-xerrej jitlef id-depozitu jekk ma jersaqx ghall-kuntratt minghajr raguni valida fil-ligi, izda jiehu lura d-depozitu jekk ghal dan in-nuqqas ikollu raguni valida. X'jigri jekk il-venditur ma jersaqx ghall-pubblikazzjoni tal-att ma jinghad xejn fil-konvenju. Kieku ntuzat il-frazi kapparra, l-effetti kienu johorgu mil-ligi, pero`, meta ma tintuzax din il-frazi, biex ikun jista' jinghad li hemm kapparra, iridu jigu stipulati l-effetti relattivi fil-konvenju.*

"*Kif qalet il-Qort tai tal-Kummerc (per Imhallef M. Caruana Curran) fil-kawza fl-ismijiet Borg v. Borg deciza fis-7 ta' Gunju, 1983, kieku l-partijiet riedu jirreferu ghad-depozitu bhala kapparra, kienu hekk jiktbu fuq il-konvenju. Meta fil-konvenju jintuzaw kliem li ma jwasslux ghall-effetti intiera ta' kapparra, ma jistax jinghad li riedu jirreferu ghad-depozitu bhala kapparra.*

"*Kif inghad il-kapparra ghandha effetti partikolari fuq iz-zewg partijiet fuq il-konvenju, u bil-fatt li fil-konvenju jissemma l-effett li hemm fuq ix-xerrej, u ma jinghad xejn dwar il-posizzjoni tal-venditur, ma jistax jitfisser li l-partijiet riedu l-effetti kollha tal-kapparra. Il-konvenju jrid jinqara u jigi interpretat fid-dawl ta' dak li rrizulta mill-miktub, u darba li ma ntuzatx il-frazi kapparra, u ma gewx stipulati l-effetti kollha ta' tali frazi, ma jistax l-interpretu jaghti tifsira wiesgha ghal dak li stipulaw il-partijiet, u jorbot parti b'effetti li ma jirrizultax li riedu. Kif inghad, kieku l-partijiet riedu jirreferu ghall-kapparra, ma kien hemm xejn xi jzommhom milli hekk jikwalifikaw id-depozitu li sar. Anke fl-Italja, li wkoll ghandhom il-kuncett ta' "caparra penitenziale", fl-Artikolu 1386 tal-Kodici Taljana, jinghad li "si richiede per la configurabilita` della caparra di cui all'art. 1386 la esplicita conclusione del patto di recesso verso il pagamento di un corrispettivo" ("Codice Civili annottato" ta' Pescatore e Ruperto, Nuova Edizione, 1993). Kif intwera, f'dan il-kaz, ma hemmx patt esplicitu dwar il-posizzjoni tal-venditur li, allura, juri li ma kienx il-hsieb tal-partijiet li jdahlu fil-ftehim l-kuncett tal-kapparra.*

"*Ta' interess hija s-sentenza li tat din il-Qorti (allura ppreseduta mis-S.T.O. J. Said Pullicino) fil-kawza Vella v. Abela, deciza fl-14 ta' Jannar, 2002. Il-kawza kienet titratta l-istess meritu bhal ta' din il-kawza, u din il-Qorti ma qaletx li d-depozitu kellu natura ta' kapparra, izda li ghandha natura ta' klawzola penali, li trid tintalab gudizzjarjament qabel dak li jkun jista' jghid li hu intitolat ghaliha. Il-parti rilevanti tas-sentenza hija s-segwenti:*

> "*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 tinkori fi hlas tal-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 dan 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 jkun 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 li ghall-pubblikazzjoni tieghu kienet giet interpellata. Ammont imhallas akkont tal-prezz fuq konvenju kellu bhala regola jithallas lura lill-kompratur jekk il-bejgh bejn il-partijiet ma jsirx (Victor Cini vs Andrew Agius, deciza minn din il-Qorti fid-9 ta' Marzu 1988 u Aldo Ciantar vs Alfred Vella, deciza mill-Prim'Awla fit-18 ta' Novembru 1988). Dan ghaliex hekk kif jiskadi l-konvenju l-effetti tieghu jispiccaw u l-partijiet "jitpoggew fil-posizzjoni taghhom qabel ma sar il-konvenju" (l-artikolu 1357 (2) tal-Kap16).*
>
> "*It-telfien tad-depozitu allura necessarjament jimplika sanzjoni u allura penali. Il-Qorti kellha allura sewwa tanalizza x'kienet l-intenzjoni tal-partijiet biex tkun tista' tiggustifika l-imposizzjoni tas-sanzjoni u l-konsegwenti telfien tad-depozitu*".

Whereas this Court reiterates the above interpretation, from the aforesaid it is evident that the restrictive stance adopted by this Court in the **Gloria Pont** judgment was not something recent but has also been the stand adopted by our Courts for quite some time. This Court is of the view that, once the prospective purchaser fails to appear on the final contract of sale, the law imposes on the person who expects to retain the deposit paid as a form of penalty that he proceeds with a lawsuit within the timeframe established by law, so that his claim for damages (even if pre-liquidated by way of a penalty clause) is confirmed by means of a judgment in line with the provisions of Article 1357(2) of the Civil Code.

Once the promise of sale was left to expire, the prospective vendor can no longer invoke the provisions of the promise of sale to retain the deposit. To this effect, reference is also hereby being made to the judgment of this Court of the 29th May, 2015 in the names **Gerit Company Limited v. A.M. Developments Limited** and to the extensive jurisprudence cited therein.

Given that in the current case, the respondent defendants did not seek the judicial remedy of claiming that the deposit paid be retained by way of penalty, then the deposit in principle should be returned to the plaintiffs and the appellant nomine's grievance in this sense results as justified and thus merits being upheld.

In their appeal, the appellants further sustain that they were justified in refusing to purchase the property in question, considering that the property had substantial damages and that they were under no obligation to sign the final deed of sale once they had a valid reason at law to refuse buying the property in question. They sustain that in accordance with caselaw, they were not to be held in breach of the promise of sale agreement, or liable to forfeit the deposit paid on account of the price, once there are valid reasons at law to withdraw from the promise of sale.

The respondent defendants, on the other hand, insist that this grievance is totally unfounded as the alleged defects were neither latent nor sufficiently serious as to constitute a valid reason at law for the appellants to forego appearing on and executing the final contract of sale as they had obliged themselves to do on the promise of sale agreement. The defendants argue that the appellants merely used the minor defects as an excuse to try and free themselves of the obligations they freely assumed. They sustain that the first Court's decision is right when it held that the serious damage and latent

defects did not transpire nor were they proved, and further implied that the appellants' claims verged on the frivolous. Furthermore, the appellants had inspected the property various times prior to moving to live in it and had lived thereat for six months, thus they had every opportunity to survey same and ascertain any defects. Furthermore, once the appellants became aware of the potential problem, they did not inform vendors immediately of the problem, nor did they take the required judicial action to release themselves from their obligation to purchase the property, thus they could not rely on this defence as a valid reason at law not to execute the final contract of sale. They additionally submitted that the fact that the remedial works entailed a minimal expense and were carried out in a short period of time and with little to no nuisance to the residents, which was confirmed by the Court appointed technical expert, shows that the defects where not serious enough to provide a justifiable valid reason at law for them to forego executing their obligations.

It is held by this Court that it has already been determined that the nature of the deposit paid was not in earnest, but simply a forfeitable deposit which was more of a penalty envisaged as a form of pre-liquidated damages payable by the prospective purchasers should they renege on their obligation to enter the final deed of sale without a valid reason at law. It thus follows that once neither one of the parties enforced their reciprocal right to keep the promise of sale binding, this means that the situation should be reversed to that which the parties enjoyed prior to entering the promise of sale agreement. Thus, the

first plea raised by the defendants and the observation made by the first Court to the effect that the plaintiffs did not file their judicial letter within the statutory limit envisaged at law before the expiry of the preliminary agreement, does not hold. The plaintiffs' initiative to proceed with the current lawsuit to demand the refund of the deposit paid is deemed by this Court to be well-founded. Strictly speaking, once it has been determined that the situation and the parties to the promise of sale should be reversed to the *status quo ante,* there is no need for the Court to examine whether the plaintiffs had a valid reason not to appear on the final contract of sale. However, it is held appropriate that this Court should also delve into this matter, in view of certain legal issues which arise and which in this Court's view were addressed incorrectly by the first Court.

It should be made clear that this Court holds that whoever, for no valid reason at law, fails to fulfil an obligation he should be held liable for the payment of any penalty envisaged in the case of failure to adhere to such obligation , and this is being stated in line with the principle of *pacta sunt servanda*. However, such a penalty clause ought to be interpreted restrictively, this is in line with the judgment in the case in the names **Nazzareno Vella v. Joseph Abela,** (Kollez. Vol LXXXVI pt ii pg 165) which held that:

> "*il-Qorti tosserva wkoll illi t-telfien ta' parti mill-prezz depozitata mill-kompratur f'kaz illi jonqos li jersaq ghall-kuntratt definittiv bla raguni valida fil-ligi, kienet klawsola illi timporta penali illi kellha allura tkun interpretata b'mod restrittiv u limitattiv fl-effetti taghha. F'kaz ta' dubbju dan kellu jmur favur il-parti li kienet altrimenti tkun ser tinkorri fil-hlas tal-penali*".

In the judgment of the First Hall of the Civil Court of the 8th March, 2002, in the case in the names **Ralph Altenhoener et v. Christopher Grech noe** the Court observed that:

> "*Id-duttrina li qed tigi applikata fil-kaz f'dac-cirkustanza, giet ampjament trattata fil-kawza "J. Pleasant vs Carmelo Caruana" deciza fl-Appell fis-7 ta' Lulju tal-1998. Dan huwa kaz simili hafna ghal dan odjern u l-Qorti tal-Appell kkunsidrat li minkejja l-klawsola ta` telfien tad-depozitu mhallas fuq konvenju, tali telf ma jsehhx jekk ikun hemm raguni valida fil-ligi*".

Furthermore, this court in its Inferior Jurisdiction, in its judgment of the 13th March, 2009 in the case in the names **Dr. Charles Mallia et v. Carmelo Sammut et,** held:

> "*Xerrej promittenti ma ghandux ikun assoggettat ghal perikolu li jista' jigri 'l quddiem fil-beni komprat jew fil-hwejjeg li jkunu sitwati fih. Lanqas ma ghandu jitqies inadempjenti, u allura koercibbli li jersaq ghall-kuntratt, ghax inkella jsofri t-telf tad-depozitu, jekk kif inhu l-kaz hawnhekk, jezisti dak il-motiv gust li jillegittimah jirretrocedi mill-ftehim;*".

With these principles in mind, when this Court examined the facts of the case under review, it transpires that, as outlined by the court appointed architect, the main contention relates to the corridor structural ceiling at basement level, which was covered by a false suspended ceiling. From a review of the evidence gathered before such expert it results that the plaintiffs' concern regarding the ceiling arose well after they entered the promise of sale agreement and well into four months after the rental agreement of the villa. During the lease the plaintiffs were living at the villa and at the same time seeing to some minor repair works at the villa, when there occurred spalling in a relatively small part of the basement's ceiling following a rainstorm towards

October/November 2006. Although the parties do not agree as to who informed the defendant vendors, from the evidence given by both parties it results that vendors were informed of this episode, so much so that the defendants state that they had called to visit the property to inspect the damages complained of by the plaintiffs but no one answered. Plaintiffs were taken aback by this episode and after consulting a number of architects they decided that they did not want to proceed with the purchase of the villa, as they held that the damages were considerable and that they would have to vacate the property while the remedial works were completed.

Due to the costs involved and the inconvenience of all this, bearing in mind the substantial price of Lm880,000 they were going to pay for the said property, the plaintiffs instructed their lawyer to inform vendors that they would not be completing the purchase and to demand the return of the deposit paid. After receipt of the legal letter, the defendants did effectively call at the property in question (to pick up a guitar which was part of the deal) and although the defendant did not inspect the damages he offered to repair the defects at his expense, but the plaintiffs insisted that they would not proceed with the purchase. The plaintiffs vacated the property at the end of January 2007 and the defendants moved back in. As indicated before, although defendants filed a judicial letter against the plaintiffs before the expiry of the promise of sale agreement, they did not follow it up with the relative lawsuit. Subsequently the defendants after appointing their own architect, carried out

the necessary remedial works at a cost of €10,485 (excluding VAT), over a couple of weeks, while they were still living at the villa.

The Court appointed expert in his report states that:

> "*Although the spalling in question occurred in a relatively small part of this ceiling, **the whole corridor ceiling is being considered defective as it transpires that the whole ceiling is not adequately water-proofed***".

Although the Court appointed architect describes the remedial works as being of a finishing nature rather than structural in kind, it is held by this Court that there undoubtedly resulted a latent defect in the property which was not apparent at the moment the parties entered the promise of sale agreement (as it was covered by the suspended false ceiling). It is thus held that the fact that the plaintiffs were living in the property on the basis of a rental agreement while carrying out minor works in anticipation of their buying the said property should not be taken that they were renouncing to their right to acquire a property free from defects, defects they were not aware of when entering the promise of sale agreement. Although the court appointed expert indicated that these damages were not extensive, and could be remedied at a relatively minor cost, there remains the fact that the property was afflicted with defects consisting of a spalling ceiling at basement level and exposed rusted mesh, which is of a serious nature and definitely required remedial works.

Furthermore, when the promise of sale agreement was set to expire, the remedial works had still not yet been carried out. At that point in time the plaintiffs had definitely a valid reason at law to renounce signing the final deed of sale. Indeed, as was said in the case in the names **Emanuel Bezzina et v. Edward Psaila,** decided by this Court, Inferior Jurisdiction, on the 4th October, 2016:

> "*meta wiehed ghandu motiv gust biex jirrisilixxi minn dik il-promessa, ma tistax il-parti l-ohra, bir-rimozzjoni ta' dak il-motiv wara li jkun ghada z-zmien tal-promessa, tobbligah jezewgwiha*".

Similarly, this was specified by this Court in its judgment of the 6th of February, 2015, in the case in the names **Carmelo Byers et v. Paul Caruana et**, wherein it was held that:

> "*…f'kull kaz, wiehed irid ihares lejn l-ezegwibilita' o meno tal-konvenju fil-mument li kellu jsir il-kuntratt, u cioe', sad-data tal-gheluq tieghu. Hekk, per ezempju, permessi tal-bini li johorgu wara li jiskadi l-konvenju jew xogholijiet ta' tiswija fil-fond li wkoll isiru wara dik id-data, ma jrendux konvenju li ma setax isir fid-data tal-iskadenza tieghu, esegwibbli (ara Galea v. Calleja deciza minn din il-Qorti fil-25 ta' Mejju, 2001 u Vella v. Farrugia deciza wkoll minn din il-Qorti fid-9 ta' Ottubru, 2001, fejn inmtqal; li bdil ta' cirkostanzi wara li l-posizzjoni tkun kristallizata fil-mument ta' skadenza tal-konvenju, ma jbiddel xejn mis-sitwazzjoni tal-kaz)*".

In the same vein is the judgment in the case in the names **George Xuereb v. Carmelo Pace** delivered by this Court on the 8th of June, 1964.

It is also an accepted principle that purchasers on a promise of sale agreement have the right to purchase the property in a good state and condition, and not repaired. Purchasers would be paying good money

expecting the immoveable property to have been built according to prescribed technical standards, and not one that is in need of repair. Even if the object of the agreement could be repaired, purchasers have still a right not to purchase the same as the nature of the object is to be determined at the moment of conclusion of the promise of sale agreement, and not on a subsequent date. Thus, even this complaint of the plaintiffs is deemed to be justified and should consequently be upheld.

Therefore, for the reasons explained above, the Court disposes of the appeal filed by the plaintiff nomine by granting the appeal in the sense that, whereas it revokes the appealed judgment of the 17th October, 2013, of the First Hall of the Civil Court in the afore mentioned names, it instead accedes to their claims in full, and thereby condemns the respondent defendants *in solidum* to refund the sum of €204,984.86 (equivalent to Lm88,000), to the plaintiffs, with legal interest from the 6th February, 2007.

As for the costs, it is held that the respondent defendants should bear the total costs of both proceedings *in solidum* between them.

Silvio Camilleri	Tonio Mallia	Joseph Azzopardi
Chief Justice	Judge	Judge

Deputy Registrar
mb/rm