

CONTRA SCRIPTUM TESTIMONIUM, NON SCRIPTUM TESTIMONIUM

NON FERTUR



**QORTI CIVILI  
PRIM' AWLA**

**MHALLEF**

**ONOR. LORRAINE SCHEMBRI ORLAND  
LL.D., M.Jur. (Eur.Law), Dip.Trib.Eccles.Melit.**

**Seduta ta' nhar il-Tlieta, 16 ta' Lulju 2019**

**Kawza Numru : 16**

**Rikors Guramentat Numru : 1017/2017/LSO**

**Roger Dudley Ward**

**VS**

- 1. Mary Gabrielle Said**
- 2. Valerie Jane Shillito**
- 3. Sarah Valarie Said  
Turner**

**Il-Qorti,**

**16<sup>th</sup> July 2019**

## I. PRELIMINARI.

Rat ir-rikors guramentat ta' Roger Dudley Ward (ID No 76504 (L) datat 7 ta' Novembru 2017 fejn bil-gurament tieghu kkonferma.

Illi l-esponenti ghandu diversi sehmi individwi f'proprietajiet mal-qraba tieghu li huma l-intimati u l-istess partijiet kienu ftehm u illi r-rikorrenti kellu jixtri dawn is-sehmi individwi kollha;

Illi bhala fatt sar kuntratt datat dsatax ta' Settembru tas-sena elfejn u hamsa (19/09/2005) Dok "A" quddien in-Nutar Malcolm Mangion fejn gew menzjonati diversi sehmi ta' proprietajiet li gew mibjugha bil-prezz miftehem;

Illi gara li l-partijiet biz-zvista innew xi sehmi oħra barra u bhala fatt sar dan l-izball u gie abbozzat kuntratt b'att korrettorju iehor u l-intimati qieghdin igibuha bi kbira sabiex jiffirmawh kif ukoll il-prokuratur tagħhom ma ghadux jahdem bhala avukat;

Illi s-sehmi tal-proprietajiet li gew biz-zvista ma gewx imsemmija huma s-segwenti:

1. Kwart sehem individwi jew sehem aktar kbir tal-art jew drittijiet ta' kumpens assocjata magħha tal-art li tinsab għwa limiti ta' Birzebbuga fid-distrett magħruf bhala "Bengħajsa" magħruf bhala "Ta' Wied ix-Xoqqa" u li

ghanda kejl ta' mija u tnejn mitejn u tlieta u disghin metri kwadri (102,293 sm) u tmiss mal-bahar u fit-tramuntana u majjstral bi proprjeta` tal-Gvern u soggett flimkien ma' artijiet maghrufa bhala "Ta' Ghelligluela" soggett ghac-cens annwu u perpetwu ta' tlieta u ghoxrin ewro u disgha u ghoxrin centezmi (€23.29) liema art kienet intenzjonata li tigi esproprijata;

2. Wiehed minn tmienja sehem indiviz jew sehem aktar ta' fond numerat sittin (60) Old Hospital Street, Valletta ma' flettijiet innumerati wiehed (1), tnejn (2), tlieta (3), hamsa (5), sitta (6), disgha (9), ghaxra (10), hdax (11), tnax (12), tlettax (13), erbatax (14), hmistax (15), sittax (16), sbatax (17) u tmintax (18), sittin ittra B (60B), Old Hospital Street, Valletta, wiehed u sittin (61) gewwa Old Hospital Street, Valletta kantuniera ma' Triq San Guzepp gewwa l-istess lokalita` kif ukoll erbgħa u hamsin (54) hamsa u hamsin (55), hamsa u hamsin ittra B (55B) sitta u hamsin (56), sitta u hamsin ittra B (56B) u sebgha u hamsin (57) gewwa Triq San Guzepp, Valletta u dan minghajr pussess vakanti;

Illi għalhekk hemm bzonn sabiex jigi amendat il-kuntratt originali billi jsir att korrettorju u jigi amendat il-kuntratt originali;

Illi l-intimati gja bghatu prokura lir-rikorrenti halli jsiru l-korrezzjonijiet necessarji pero` l-att korrettorju ma sarx;

Għaldaqstant l-esponenti qieghed jitlob lil din l-Onorabbli Qorti sabiex joghgobha:

1. Tiddikjara u tiddeciedi illi biz-zvista ma gewx imsemmija s- sehmiel tal-proprjetajiet hawn fuq imsemmija li kellhom jinbieghu u ghandhom jizdiedu ma' dawk is-sehmiel tal-proprjetajiet l-ohra li huma indikati hawn taht jigifieri:

- Kwart sehem indiviz jew sehem aktar kbir tal-art jew drittijiet ta' kumpens assocjata maghha tal-art li tinsab gewwa limiti ta' Birzebbuga fid-distrett maghruf bhala "Benghajsja" maghruf bhala "Ta' Wied ix-Xoqqa" u li ghandha kejl ta' mija u elfejn, mitejn u tlieta u disghin metri kwadri (102,293 mk) u tmiss mal-bahar u fit-tramuntana u majjstral bi proprjeta` tal-Gvem u soggett flimkien ma' artijiet maghrufa bhala "Ta Ghelligluela" soggett ghac-cens annwu u perpetwu ta' tlieta u ghoxrin ewro u disgha u ghoxrin centezmi (€23.29) liema art kienet intenzjonata li tigi esproprijata; u

■ Wiehed minn tmienja sehem indiviz jew sehem aktar ta' fond numerat sittin (60) Old Hospital Street, Valletta ma flettijiet innumerati wiehed (1), tnejn (2), tlieta (3), hamsa (5), sitta (6), disgha (9), ghaxra (10), hdax (11), tnax (12), tlettax (13), erbatax (14), hmistax (15), sittax (16), sbatax (17) u tmintax (18), sittin ittra B (60B), Old Hospital Street, Valletta, wiehed u sittin (61) gewwa Old Hospital Street, Valletta kantuniera ma' Triq San Guzepp gewwa l-istess lokalita` kif ukoll erbgha u hamsin (54) hamsa u hamsin (55) hamsa u hamsin ittra B (55B) sitta u hamsin (56), sitta

u hamsin ittra B (56B) u sebgha u hamsin (57) gewwa Triq San Guzepp, Valletta u dan minghajr pussess vakanti;

2. Tikkundanna lill-intimati sabiex jitrasferixxu s-sehmiet tal-proprjetajiet hawn fuq indikati;

3 Tinnomina kuraturi deputati f'kaz li l-intimati ma jersqux ghall-att korrettorju;

4. Tinnomina nutar sabiex jabbozza u jinsinwa l-kuntratt tas-sehmiet hawn fuq imsemmija.

Bl-ispejjes kontra l-intimati li huma ingunti ghas-subizzjoni.

Rat li din il-kawza giet appuntata ghas-smigh ghas-seduta tas-16 ta' Jannar 2018.

Rat il-verbal tas-seduta mizmuma l-Hamis, 23 ta' Meju 2019, fejn is-seduta saret bil-lingwa Ingliza. When the case was called there appeared the plaintiff assisted by Dr Martin Fenech. The Court heard the oral submissions of Dr Martin Fenech, which was recorded on the electronic system. Plaintiff is to submit a note of final written submissions within one week of the present. Case is put off for judgement for 16<sup>th</sup> July 2019 at 9:30a.m. and defendants were accorded twenty (20) days from this sitting to make their own final submissions.

Hadet konjizzjoni tal-provi prodotti.

Illi *stante* l-verbal li din il-kawza ser titkompla bil-lingwa Ingliza, din il-Qorti ser tirredigi s-sentenza bl-Ingliz.

## **II. CONSIDERATIONS**

The plaintiff's claim in this case, is for the court to order the correction of the deed of sale dated 19<sup>th</sup> September 2005, exhibited with the sworn application as Dok A, in terms of which defendants assigned and transferred undivided shares in various properties therein mention. Plaintiff claims that some of the shares were erroneously omitted from the transfer, and a further deed was drawn up (Dok C) in order for defendants to transfer the portions of properties that were omitted in Dok A.

According to the record of the sitting dated 14<sup>th</sup> February 2019, the Court, after having reviewed the acts, and heard the evidence of the Court Marshall, deemed the notification of defendants to be valid according to law. (page 68). The defendants failed to present a reply in the period of time as required by the law and consequently were declared to be in default (*kontumaci*).

### **Facts:**

The parties entered into a contract of sale in the records of Notary Malcolm Mangion of the 19<sup>th</sup> day of September 2005, (Dok A). This contract of concerned the sale of various portions pertaining to the defendants and which were originally acquired by title of inheritance. The plaintiff

realised later that some portions of the property, which he claims were to have been included in the sale, were omitted. The plaintiff had contacted Notary Malcolm Mangion for the correction of this contract of division. However it resulted that the prepared draft of the deed of correction was not signed by the parties to the original deed of sale.

**Evidence:**

**Roger Dudley Ward** gave evidence in the sitting of the 2nd April 2019 (fol 110-112)<sup>1</sup>. He declared that he had inherited property in Malta and in 1984 and consequently the co heirs had divided the properties. The deed of division was published in the records of Notary Paul Pullicino of the 12th December 1984 (fol 91). In terms of this deed, it was declared that the heirs held as to one third (1/3) undivided portion by his cousins Simon (Said) and his (three other) siblings, one third (1/3) undivided portion was assigned to his cousins in England, Roger (Said) and Valerie (Shillito) in equal shares between them and the remaining one third (1/3) was assigned to him.

He explained that after his father's death, he came to Malta, and met the administrator, who was Dr. Philip Bianchi. Subsequently, he said that Dr. Philip Bianchi was given a power of attorney by his cousins in England to represent them, and thus the sale occurred. His cousins, vendors on deed, were duly paid. He explained that years

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<sup>1</sup> Sitting of the 2nd April 2019.

later, Dr. Philip Bianchi was about to retire and asked him to provide information about some rents he had collected as he wished these would be divided according to the proper shares. Dr Bianchi was also going to hand over the administration to another administrator. He informed Dr Bianchi that he had bought everything that is all the shares in the property. Consequently he said, he was going to ask for a correction of the contract.

He was corresponding with James Shillito, Valerie Said's husband whilst Roger Said, his cousin in England had died, in the meantime. Subsequently, he contacted Notary Malcolm Mangion to draw up a deed of correction without the necessity of any searches.

However, it resulted that two powers of attorney were needed, specifically that of Gabrielle Said and that of Roger Said the testamentary executor who had passed away. He said that he remained in contact with relatives in the U.K. and Dr. Mark Attard Montaldo had sent a letter on his behalf with the amount of €250 to cover the expenses for these powers of attorney. Subsequently, when the powers of attorney expired and when Dr. Philip Bianchi retired, he proceeded with this cause to request a correction of the deed of sale. However he had not received any communication from them since the date of delivery of the registered letter sent to them.



**Notary Malcolm Mangion** (fol 122-123)<sup>2</sup> gave evidence and confirmed that he had published the deed of 2005. The preparation for the contract had been submitted up by Dr. Philip Bianchi and by plaintiff, Dudley Ward himself. He explained that the Dr Bianchi's clients sold and transferred to plaintiff the undivided portions they had in Malta. Then, two years later Roger Dudley Ward asked him for the correction of the contract that had to be signed by him and all his cousins. He had the draft ready to be signed, but eventually it was not signed.

#### **Legal Considerations:**

In this case, defendants are in default as they did not file a reply within the time limit stipulated by law. It is consistently maintained by our courts that such a default is to be interpreted as a contestation of the claim and not as an admission thereof.

(*Vide* for ex. **Charles Saliba vs Salvu Borg** - Appell 27-6-1997; **Ruth Apap vs Noel Apap** – PA. FDP 30-6-1995; **Emanuel Spiteri et vs Benedetta Meilak noe**. PA AF 15-1-2014; **Raymond Gauci pro et noe vs Christopher Galea**, P.A., decided on the 26<sup>th</sup> April 2001; and **Ronald Micallef et vs Subway Malta Limited**, P.A. decided on the 6<sup>th</sup> March 2001).

Consequently plaintiff must discharge his burden of proof in order to sustain his claims according to law.

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<sup>2</sup> Sitting of the 2nd May, 2019.

## **Considerations arising from the Proofs**

Plaintiff's claim is directed towards a court order for the correction of a deed of sale , duly signed and notarised, as he deems that certain properties were erroneously omitted from the deed. He consequently requests that this Court orders a correction of the deed to provide for the inclusion of the undivided shares held by vendors in these properties, notwithstanding that the vendors have not explicitly consented thereto, and without an adjustment (increase) of the price thereof.

The Court examined the deed, Dok A, wherein it was declared that Dr Philip Bianchi, as duly authorised to act on behalf of Roger Michael Said, and Valerie Jane Shillito, as Vendors, sold and transferred to plaintiff, as purchaser, a portion equivalent to one half (1/2) undivided share of various properties and real rights.

It is evident that such a deed of correction would require the signatures of all parties to the original deed. It results that the deed of correction was indeed drawn up but it was never been signed by all parties. The plaintiff himself confirmed that there were two powers of attorney that were required and not received, particularly that of Gabrielle Said and Roger Said, the testamentary executor.

In his note of submissions presented, plaintiff refers to the powers of attorney on page 9 and 10, but those powers of attorney refer to Valerie Jane Shillito, and Sarah Said and

not to the persons whose names are indicated in the prepared draft for the correction of contract exhibited as Dok C, that is, Mary Gabrielle Said and Mark Joseph Belderbos, as Solicitor and Executor.

Again, in his note of submissions, plaintiff refers also to the document exhibited at page 74, which was a letter dated 4th August 2015 in which Valerie Shillito and Sarah Said stated that they agree that plaintiff owns all the property they had in common and had also agreed to the correction of the deed of sale.

But, there again, this letter, which was not confirmed or authenticated according to law, only represents the adherence of the two signatories on the letter, and plaintiff did not obtain consent from the other two signatories that were necessary, as mentioned above.

Consequently that which plaintiff asserted in his submissions, namely that defendants did not object to his request, does not apply to all vendors and in particular, to the defendants in these proceedings. In fact, it has already been stated that not all powers of attorney or signatures were procured, and hence, the final deed remained a draft.

The Court reviewed the deed of correction wherein it is premised that "*However there were assets listed in the Pullicino Deed<sup>3</sup> which were meant to be included in the Buyout but unfortunately were omitted ... In actual fact it*

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<sup>3</sup> The deed of sale Dok A.

*was always the intent of both parties to sell and transfer the assets from Valerie Jane Schillito and the late Roger Michael Said unto Purchaser and this in one single transaction ... The Purchaser already owned and still retains a one third (1/3) share of said assets and was intent on purchasing the Vendors' one third (1/3) share of said assets."* The deed goes to list "the remaining land at Benghajsa, in Birzebbugia, kerrejja in Valletta and rights over Ta' Atocia Land in Hamrun," which should have been included in the original sale for the original agreed price and that any and all shares of this property pertaining to Vendors should have been sold unto Purchaser.

Consequently the deed of correction was to add on properties to those listed in the deed of sale and for the same price as these, according to plaintiff, had been erroneously omitted from what is termed in the correcting act, the deed of 'buyout.'

The Court also examined the deed of sale (Dok A) for evidence which would support plaintiff's claim that the parties intended to sell all their shares in the estate, indeed that it was to be a 'buyout, '. If this were so, this Court would be prepared to uphold his requests as the intention favouring a buyout by plaintiff could be inferred from the parties' intent as manifested on the original deed.

However nowhere in the deed of sale is it premised that the vendors were selling all their shares in all the properties held in common with plaintiff. On the contrary,

each property is specifically listed with the particular share *in vendita*. There is no stipulation which can be interpreted as a reference to such an intention, or even a catch all phrase, not unknown in similar contracts - namely that the vendors wish to divest themselves of all their holdings in the properties acquired by them from a particular inheritance.

Our courts consistently apply the legal maxim *contra scriptum testimonium, non scriptum testimonium non fertur*. This is encapsulated in article **1002 of the Maltese Civil Code** which states:

*"Where, by giving to the words of an agreement the meaning attached to them by usage at the time of the agreement, the terms of such agreement are clear, there shall be no room for interpretation."*

(See for ex **A.M. Developments Ltd. et. vs Pauline Micallef**, - P.A.– 28 ta' Ottubru 2013; **Brincat vs Saliba**, - App Civ. - 14th November 1983; **Grech vs Ciantar**, - Comm. Ct - 21st May, 1979; **Conrad Gatt et. v George Xuereb et.** - PA (JRM) - 14th February,2017; **General Cleaners Co. Ltd. vs L-Avukat Generali et.** - P.A. - 29th November,2001; **Gatt vs Cuschieri noe** - App. Civ. - 6th June,1955 (**Kollez. Vol: XXXIX..i.221**); **Formosa vs Camilleri et** - P.A. - 9th June,1964 - **Kollez. Vol: XLVIII.ii.1022**).

However our Courts have admitted exceptions to this rule where, in essence the consent of the parties *ad unum* is excluded due to a substantial defect in the conditions essential to the validity of the contract or in certain restricted instances or where it is manifest that the contract does not truly express the intentions of the parties.

In **Amante Caruana vs Saveria Bonnici** (P.A. PS 31.1.2003) , the Court listed the exceptions to the said principle which were admissible in law and in doctrine as follows:

- i) when the agreement was vitiated by fraud or any condition essential to the validity of the agreement;.
- ii) where the agreement was simulated;
- iii) where the agreement does not clearly express the intentions of the parties;
- iv) when a matter accessory or incidental to the contract arises which is irreconcilable with the original agreement;
- v) where contemporaneously with the written agreement the parties also concluded a verbal agreement which is deemed to add on an essential condition to the original agreement.

**The Court makes reference to the judgment in its Maltese text which should be deemed to be the authoritative text.**

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The Court makes reference to the judgment in its Maltese text as the authoritative reference.

Plaintiff has sought to convince the court that the original agreement was to be a buyout of all properties which were held in common between the contracting parties.

However , in the considered opinion of this court, plaintiff has failed to produce sufficient evidence to this effect. It may be likely that such was the agreement, given also that the other vendors reside abroad. But this is only conjecture, and faced with a written , notarised, public deed, this court demands more, in view of the solemnity of the contract form.

Indeed, the Court deems it rather questionable that Dr Philip Bianchi, the original administrator and mandatory, was not produced to give evidence. He was, according to



Notary Mangion, the person who had prepared the deed of sale for publication by the Notary and would have been a relevant and material witness to the parties' intentions at the time of the deed and discussions/correspondence. Failing written and authenticated confirmation of the parties' original intentions, his evidence, if such would have sustained plaintiff's claim, would have been a key element required for the success of plaintiff's case.

Consequently, this court cannot deduce from the evidence, that plaintiff has proved his claim, to the degree required by law, that there was indeed a common intention, a consensus, on the part of the original parties to the deed of sale, to divest themselves of all their holdings held in common with plaintiff. Likewise, plaintiff has not produced sufficient proof that the current owners, including Mary Gabrielle Said, had agreed to the corrections proposed to be made, which would involve the addition of new properties for the already established price.

### **III. CONCLUSION**

In view of the foregoing the Court hereby rejects plaintiff's claims as being unfounded in fact and in law.

**Judicial Costs are to be borne by plaintiff.**

**Read.**

**Onor. Madam Justice Lorraine Schembri Orland  
LL.D., M.Jur.(Eur.Law), Dip.Trib.Eccles.Melit.  
16<sup>th</sup> July 2019**

**Josette Demicoli  
Deputy Registrar  
16<sup>th</sup> July 2019**