CIVIL COURT – FIRST HALL

THE HON. MADAME JUSTICE MIRIAM HAYMAN

Sworn Application Number: 177/2021 MH

Today, 1st June 2022

Carol Anne Bingham (Australian Passport Number PE0408883) duly represented by Douglas Salt (I.D. No. 355970M) in his capacity as special mandatary

vs

John Edwin Seddon (I.D. No. 0147580A)

The Court:

Having seen **the sworn application of plaintiff of the 26th February 2021** by virtue of which she stated and requested -

Respectfully submits and in his aforementioned capacity of special attorney as duly authorized Douglas Salt holder of identity card number 355970 confirms under oath;

1. *Whereas on the 3rd of September 2020 parties entered into a promise of sale, published in the records of Notary Ian Castaldi Paris, whereby defendant bound himself to purchase and acquire from the plaintiff who*

in turn bound herself to transfer and sell the the temporary utile dominju remaining from a period of one hundred and fifty years which commenced on the 19th of May 1964 in relation with the apartment internally numbered thirteen thousand one hundred and one and situated on the tenth (10th) floor level calculated from the Marina side of the block of residential apartments and penthouses, unnumbered but referred to as block thirteen (13) accessible from an unnamed access road in Portomaso Development which abuts onto Church Street, St. Julian's as well as the parking space internally numbered two thousand and sixty nine (2069) situated on the level known as level minus two (-2) of the garage complex unnamed and without number also accessible from an unnamed access road which abuts onto Church Street, in Portomaso Development St. Julian's, where the said garage has its common entrance, for the price of seven hundred and sixty Euro (€760,000), which two properties are respectively subject to the annual and temporary ground rent as better described in the said convenium and subject to the other conditions mentioned in the said promise of sale which is hereby being attached and marked as Doc A;

2. *Whereas the defendant failed to appear on publication of the said deed without any valid reason at law and in terms of the said promise of sale despite also being called upon to do so by means of the official letter number 362/2021 dated the 28th of January 2021;*

The Respondent is therefore to state why this Honourable Court, subject to any necessary declarations, should not deliver judgment and decide this claim by;

1. *Declaring that the Respondent failed to honour his contractual obligations in terms of the convenium dated the 3rd of September 2020 for reasons including his failure to appear on the publication of the final deed;*

2. *Condemning and ordering the defendant, within a period of time to be established by this Court to appear for the signing and publication of the public deed in question on the basis of the conditions of the above mentioned promise of sale;*

3. *Appointing a Notary to publish the said deed;*

4. *Appointing deputy curators to appear on behalf of the defendant in the event the said defendant fails to appear on the deed of publication;*

5. *Fixing a date, time and place for the publication of the above mentioned deed; as above declared and for the reasons above mentioned.*

With all judicial costs including those pertaining to the judicial letter dated the 28th of January 2021 and those of the Garnishee Order filed concurrently with this sworn application together with legal interest accruable from the date of the lapse of the above mentioned promise of sale, against the Respondent, who is summoned in subpoena.

Having seen the list of witnesses and the documents annexed to the sworn application.

Having seen **the sworn reply of defendant of the 13th April 2021**[1] by virtue of which the following pleas were raised -

John Seddon holder of identity card number 0147580A respectfully declares and under oath confirms:

That the pleas of the applicants are unfounded in fact and at law and should be rejected together with costs to be borne by the palintiff, for the hereunder reasons:

1.That it was not possible for the final deed of sale to be signed and published by the date agreed upon in the promise of sale since the Vendor did not have the required permits according to law of the said property subject of the promise of sale agreement and of such proceedings;

[1] Fol 15 et seq

2. That the promise of sale agreement dated 3rd of September of the year 2020, notably article 8 subsection (b) held that: the property being transferred is in full accordance with an approved development or building permit and that it conforms fully with all approved plans and drawings and with the conditions on the permit. It is evident that due to structural changes made, not in accordance with the approved plans, and which changes required the approval of the relevant Authorities, the property subject to the promise of sale was not in accordance with the law by the date of expiration of the promise of sale agreement, 31st of January of the year 2021;

3. That therefore, it was the applicant who did not adhere to the obligations stipulated in the promise of sale agreement, they could not sell that which was promised in the said promise of sale agreement by the date of expiration agreed upon in the promise of sale agreement and therefore have forfeited any right to enforce the said promise of sale agreement;

4. That these proceedings are abusive and vexatious meant only to put pressure on the defendant, forcing him to purchase notwithstanding the above, so much so that a garnishee order was filed;

5. Without prejudice to any other pleas.

Having seen the list of witnesses and the documents annexed to the sworn reply.

Having seen its decree of the 5th July 2021[2] by virtue of which the Court ordered that the proceedings continue in the English language.

Having seen all the evidence brought forward by the parties.

Having heard the oral submissions made by the lawyers of the parties.

Having seen that the case was adjourned for judgement for today.

[2] Fol 60

Having seen all the other acts of the case.

Considered:

The parties in this case had signed a promise of sale agreement on the 3rd September 2020 by virtue of which plaintiff had bound herself to transfer and sell whereas defendant had bound himself to buy and acquire –

- the temporary utile dominium remaining from a period of 150 years commencing on the 19th May 1964 in relation with an apartment internally numbered 13,101 in Block 13 forming part of the Portomaso Development, St Julians; and

- the parking space internally numbered 2069 within the same development

both properties being respectively subject to an annual and temporary ground rent as described in the agreement, all for the price of €760,000.

Plaintiff filed this court case alleging that defendant had failed to honour his contractual obligations in terms of the above-mentioned promise of sale and is also requesting the Court to order defendant to appear for the signing and publication of the relative deed of sale.

On the other hand defendants rejected plaintiff's claims as unfounded in fact and at law. He is claiming that the final deed of sale could not be signed because it was plaintiff who did not honour her contractual obligations in terms of the said promise of sale, namely because by the expiry date of the promise of sale the said property lacked the required permits according to law.

Article 1357 (1) and (2) of the Civil Code states as follows -

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

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

With regard to the facts of the case, both parties gave an account - more of less similar - of the events leading up to the signature of the promise of sale in question. The promise of sale in question had a very short duration of circa 4 months and **the final deed of sale had to be signed by not later than the 31st January 2021** (clause 17 of the agreement).

From the evidence it transpires that soon after the signing of the promise of sale agreement, preparations commenced to gear up for the signing of the final deed including a handing over of the duties relative to the maintenance of the apartment etc, the correction by plaintiff of a typographical error in plaintiff's deed of acquisition and the replacement of the airconditioning system of the apartment in terms of article 13 of the agreement.

In his affidavit defendant stressed that the expiry date of the promise of sale was very important to him because he required certainty of ownership and of occupancy before releasing himself from his present rented accomodation at

Hilltop Gardens. Moreover he stated that for him it was paramount that any property he owns is entirely free of any irregularities and encumbrances.

The Court notes that the bone of contention in this case revolves around the obligation undertaken by plaintiff in **clause 8 (b) of the promise of sale agreement** which states that -

"The vendor warrants and guarantee:

(.....)

(b) That the property being transferred is in full accordance with an approved developement or building permit and that it conforms fully with all the approved plans and drawings and with the conditions on the permit;"

To this effect defendant instructed his architect Henry Attard to establish whether the property in question and relevant permits were in order. Following an inspection of the property by both architect Attard and Engineer Johan Aloisio it transpired that there were some irregularities which required sanctioning by the Planning Authority.

As a result, application number RG/02042/20 was submitted with the Planning Authority on behalf of plaintiff on the **14th December 2020** for the *"Regularisation of Development Inside Development Zone (which may include CTB concession)"*

With just a month and a half left before the expiry of the promise of sale agreement the correspondence between the parties shifted to the issue of what was the way forward considering that time was pressing. The Court notes that –

i. Defendant began to stress the importance of having the outstanding issues sorted out in time. On the **23rd December 2020** he wrote an email to Nick Portelli, the property sales consultant of Frank Salt Real Estate agency who was liaising between the parties in connection with the property deal. He stated as follows[3] -

"As there will soon be only one month left to complete the purchase I trust that the outstanding issues will be addressed with the utmost urgency.

I am sure you are engaging every effort in this regard.

(.....)

When do the architects plan to complete all outstanding issues? Have you yet a 'timeline' for completion?"

ii. In another email on the **28th December 2020**[4] defendant stated that he is *"concerned about the progress of the outstanding issues"* and the fact that the timeline as indicated to him would extend beyond the 31st January. In a reply the following day[5], Nick Portelli among other things told him that if he wished *"to wait until the regularisation process has been fully aproved then unfortunately it will take time, the planning authority have quite a backlog and we would be at their mercy.";*

[3] Fol 151
[4] Fol 154
[5] Fol 156

iii. On the **11th January 2021**, Nick Portelli requested notary Castaldi Paris to prepare an extension draft of the promise of sale till end of June 2021 so that in the meantime the Planning Authority regularisation process would be completed[6];

iv. Defendant testified in his affidavit that he had advised plaintiff that he was not prepared to extend the validity of the promise of sale agreement beyong the agreed date of the 31st January 2021. He reiterated that for him, *"the property is either regularised in terms of law or not regularised in terms of law. There is no grey area[7]"* ;

v. It transpires that **by the 19th January 2021 all parties involved were made aware that defendant was not going to accept an extension of the promise of sale agreement beyond the 31st January 2021**. In fact, on that day notary Castaldi Paris sent an email to defendant and his lawyer copying plaintiff and the estate agency representatives asking them about the way forward and what had been decided. In a reply by the director of the estate agency about about two hours later (copied also to plaintiff) he stated that –

"*There is a regularisation in progress, and **we asked purchaser to extend which he has refused to do***[8]*."*

In that same email the said director said that he was doing his utmost to push the regularisation through and that in the meantime he had proposed to defendant's lawyer an extension of two months instead of till June as originally proposed. He had not yet received feedback about this proposal from defendant or his lawyer;

[6] Fol 153
[7] Affidavit at fol 165
[8] Fol 89

vi. On the 21st January 2021 Nick Portelli wrote to defendant requesting him to consider extending the promise of sale by 4 weeks in order for the regularisation process to be completed[9]. It does not transpire that defendant replied to that email;

vii. On the 28th January 2021 plaintiff filed a judicial letter calling upon defendant to appear for the signing and publication of the contract of sale in connection with the said property[10];

viii. Notary Castaldi Paris confirmed on oath that no extension agreement of the promise of sale was signed by the parties[11];

ix. As declared on oath by architect Henry Attard, until the 31st January 2021, the application for the regularisation of the development in question was still pending at the Planning Authority and so the premises in question were not yet covered by the relative permits according to law[12];

x. The decision about the regularisation of the premises by the Planning Authority was dated 17th February 2021 and published on the 3rd March 2021[13];

xi. On the 18th February 2021 Nick Portelli sent an email to defendant requesting him to set an appointment with the notary to sign the final deed of sale;

xii. Defendant did not comply to that request;

xiii. The present court case was filed on the 26th February 2021.

The Court refers to the following jurisprudence the principles of which are deemd relevant for the circumstances of the case.

[9] Fol 158
[10] Fol 14
[11] Fol 167
[12] Fol 26
[13] Fol 27 et

In the case **Martin Frederick Searle et vs Jonathan Wayne Marks et decided on the 13th March 2018** the Court stated as follows -

"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 wieħed għandu motiv ġust biex jirrisilixxi minn dik il-promessa, ma tistax il-parti l-oħra, bir-rimozzjoni ta' dak il-motiv wara li jkun għada ż-żmien tal-promessa, tobbligah jeżewgwiha".

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 każ, wieħed irid iħares lejn l-eżegwibilita' o meno tal-konvenju fil-mument li kellu jsir il-kuntratt, u cioe', sad-data tal-għeluq tiegħu. Hekk, per eżempju, permessi tal-bini li joħorġu wara li jiskadi l-konvenju jew xogħolijiet ta' tiswija fil-fond li wkoll isiru wara dik id-data, ma jrendux konvenju li ma setax isir fid-data tal-iskadenza tiegħu, esegwibbli (ara ***Galea v. Calleja*** *deċiża minn din il-Qorti fil-25 ta' Mejju, 2001 u Vella v. Farrugia deċiża wkoll minn din il-Qorti fid-9 ta' Ottubru, 2001, fejn intqal; li bdil ta' ċirkostanzi wara li l-posizzjoni tkun kristallizata fil-mument ta' skadenza tal-konvenju, ma jbiddel xejn mis-sitwazzjoni tal-każ)".*

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."

In the case **Joseph Zammit et vs Avukat Dr. Harry Vassallo noe et decided on the 24 th Ġunju 2020** the Court stated that -

"L-atturi jargumentaw illi fi kwalunkwe każ, il-pendenzi kollha fuq il-kuntratt ġew riżolti sat-18 ta' Awwissu 2011. Madanakollu, sa dakinhar il-konvenju kien laħaq skada, u nonostante li l-atturi kienu żammew il-konvenju 'ħaj' billi għamlu l-ewwel proċedura li titlob il-liġi, u ċioè ppreżentaw l-ittra uffiċjali interpellatorja kontra l-kompraturi, huwa stabbilit fil-ġurisprudenza li dak li jiswa hu li l-kompraturi kellhom raġuni valida sabiex ma jersqux għall-att finali ta' bejgħ dakinhar illi skada l-konvenju, u dak li ġara wara huwa irrelevanti u ma jistax jintuża bħala argument favur it-teżi tagħhom li l-kompraturi ma resqux għall-kuntratt mingħajr raġuni tajba.

Fil-każ fl-ismijiet ***Dr Christian Farrugia noe vs Highrise Co. Limited****, tal-20 ta' Mejju 2010, din il-Qorti diversament presjeduta qalet hekk:*

"biex jista' jingħad li parti kellha raġuni tajba biex ma tersaqx għall-kuntratt, ir-raġuni tajba li żżommha milli tagħmel dak il-pass trid tkun għadha teżisti saż-żmien meta l-kuntratt "ma jkun jista' iżjed isir". Jekk ir-raġuni titneħħa minħabba xi żvilupp li jseħħ wara (per eżempju, jekk il-bejjiegħ iseħħlu jikseb permess tal-bini wara li jagħlaq il-konvenju li għall-ħruġ tiegħu dak il-konvenju kien suġġett), ma jkunx jista' jingħad li x-xerrej ma kellux raġuni tajba biex ma jersaqx għall-kuntratt."

(……)

Kwistjoni simili ġiet trattata fil-kawża fl-ismijiet ***Steve Cachia et vs Nicholas Cutajar et****, deċiża minn din il-Qorti diversament presjeduta fil-21 ta' Ġunju 2002. Dik il-Qorti qalet hekk meta kienet qed titratta l-effetti tal-artikolu 1357 tal-Kodici Ċivili:*

"Dawn id-disposizzjonijiet qeghdin hemm sabiex jistabilixxu procedura kif parti ghall-konvenju tista tissalvagwardja d-drittijiet tagħha naxxenti mill-istess konvenju fil-każ li l-parti l-oħra tkun qed tirrifjuta li tersaq għall-att definittiv ta' bejgħ kif obbilgat ruħha li tagħmel fil-konvenju. Parti waħda f'konvenju ma tistax tuża dawn id-disposizzjonijiet biex ittawwal l-effetti tal-konvenju in vista tal-fatt li l-istess parti ma tistax tersaq għall-att definittiv minħabba xi nuqqas tagħha stess."

Finalment, kif qalet il-Qorti tal-Appell fil-kawża ***William Gatt vs Realco Development Ltd****, deċiża fit-23 ta' Ottubru 2011, fejn hemm raġuni valida l-kompratur mhux tenut jersaq għall-kuntratt. Il-konvenju qiegħed hemm għal verifiki u meta l-kompratur għandu mottiv validu jista' ma jersaqx għall-kuntratt anki jekk wara li jiskadi l-konvenju l-ostakolu jitneħħa. Dan in omaġġ fost l-oħrajn għall-prinċipju tal-buona fede. Intqal ukoll li:*

"Hu ormai paċifiku fil-gurisprudenza meta wieħed ghandu motiv ġust biex jirreselixxi minn dik il-promessa ma tistax il-parti l-oħra, bir-rimozzjoni ta' dak il-motiv wara li jkun skada ż-żmien tal-promessa, tobbligah jeżegwiha." (Volum XLVIII.i.336)."

(.....)

*Il-kompratur għandu dritt mhux biss għall-garanzija tajba imma għat-trasferiment ta' titolu tajjeb ta' proprjetà fil-mument tal-kuntratt tal-akkwist biex huwa jkun jista' jimxi b'moħħu mistrieħ u, in difett ta' dan, meta jiskadi ż-żmien l-effetti kollha tal-iskrittura jispiċċaw u kull parti takkwista dik il-libertà li kellha qabel (**Rebecca Aquilina ma' Ġużeppi Aquilina vs Emanuela Baldacchino,** deċiża fil-Prim'Awla fit-28 ta' Ġunju 1968)."*

In the present case the Court emphasizes the fact that in the preliminary agreement of the 3rd September 2020 both parties had bound themselves with several obligations towards each other; obligations which had to be respected and which had to be fulfilled by the date agreed upon between them, that is, the **31st January 2021.**

Plaintiff Bingham insists that the irregularities in the premises were minor. In actual fact, although it is true that they do not appear to be major irregularities, they were still significant enough to require approval *by the Planning Authoirity*. The Court moreover points out that whilst from an architectural point of view they could have presented no particular difficulty for the sanctioning process by the relevant authority, from a legal point of view the situation is quite different.

For the purposes of the law, what matters is that in the promise of sale in question, specifically in clause 8, plaintiff had clearly and unequivocally warranted and guaranteed that the property being transferred was in full compliance with an approved development or building permit and that it conformed fully with all approved plans and drawings and with the conditions on the permit. A guarantee which, as transpired through evidence, plaintiff was not able to honour by the 31st January 2021 because the sanctioning of the irregularities found in the premises were still pending before that Planning Authority. This in no way can impinge on defendant's rights.

So at that stage, in the light of the principles resulting from jurisprudence, plaintiff had no right to insist that the parties proceed with the sale or that they actually extend the promise of sale for a period of time. Defendant was going to pay a significant sum for the purchase of the property, and he had every right to insist that he wanted to have everything in order by the 31st January 2021. Once this could not happen for reasons beyond his control, it was legitimate for him to refuse to appear to sign the final deed on the property in question. The fact that ultimately the sanctioning of the development was published a few weeks later does not change the legal repercussions already explained.

It is therefore deemed that plaintiff's claims are unjustified in fact and at law and will hence be rejected. For the same reasons, the pleas of defendant will be upheld.

For all the above reasons the Court decides the case as follows –

1. It rejects all claims of plaintiff;

2. It upholds all defendant's pleas;

3. Costs are to be borne by plaintiff.

Hon. Dr. Miriam Hayman LL.D.
Judge

Victor Deguara
Deputy Registrar