COURT OF MAGISTRATES (MALTA)

DR. RACHEL MONTEBELLO B.A. LL.D.

MAGISTRATE

Application Number : 22/2021 RM

Graham Borg

(ID 377082M)

-Vs-

Grant Keith Bowden

(ID. 140924A)

Today, 24th May 2023

The Court,

Having seen the Application filed by Graham Borg in the Registry of this Court on the 28th January 2021 where he requested that defedant Grant Keith Bowden is declared to be his debtor in the sum of thirteen thousand five hundred Euro (€13,500) with costs, or such other sum that the Court may determine, and condemned to pay this sum unto him or otherwise authorise plaintiff to retain such sum.

The parties had verbally agreed that plantiff would carry out works in the tenement with number 27, in Triq iz-Zurrieq, Qrendi, which was subject to a separate promise of sale agreement where defendant had undertaken to purchase said property. For this purpose the parties agreed on a list of finishes.

However defendant repeatedly changed the terms of agreement, impeded the works and created difficulties which prevented the works from being carried out as agreed. Moreover, he created a pretext in order to avoid purchasing the property and is now expecting to be reimbursed all the monies he had paid on account of the contract of works (this form the object of court proceedings instituted by same defendant Application Number 773/20 RGM) including the amounts that were paid by defendant for works that were carried out exclusively and specifically for his own exigencies and in accordance with his own wishes, despite the fact that he did not purchase the property after all. Plaintiff is of the view that he is not bound to refund to defendant the price of the latter works, as will result during the hearing of these proceedings. Plantiff has also carried out an exercise to determine which works the cost of which is not refundable to defendant, and these have been quantified in the sum of thirteen thousand five hundred Euro (€13,500), which amount is already in the possession of plaintiff and plantiff requests that this credit is canonised in his favour.

Having seen defendant's Reply filed on the 28th September 2021 where the following pleas were raised:-

1. Preliminarily, the action is time-barred in terms of Article 2148 of Chapter 16 of the Laws of Malta;

2. That without prejudice to the aforesaid and on the merits, plaintiff's demands are nothing more than a frivolous counter-claim to defendant qua plaintiff in the Sworn Application Number 773/20 RGM and no amount is due to plaintiff in these proceedings; on the contrary plaintiff himself is defendant's debtor in the sum of ninety nine thousand eight hundred and fifty one Euro and fifty two

cents (€99,851.52) excluding interest and costs as would result during the hearing of this cause and of the aforementioned Sworn Application;

3. Saving additional pleas as may be permitted according to Law.

Having seen the order given during the hearing of the 12th January 2022 for the proceedings to be conducted in the English language;

Having seen that the parties declared that it is not necessary for the acts of the proceedings already brought in the Maltese language to be translated into English[1];

Having seen and heard all the evidence and testimony brought by the parties;

Having seen the partial judgement delivered on the 16th April 2022 whereby defendant's plea of prescription was rejected with costs;

Having seen that by means of a note filed on the 3rd of May, 2023, plaintiff reduced the amount being claimed in the Application, from the sum originally claimed of €13,500 to the sum of €13,350.

Having seen the note of submissions filed by plaintiff on the 27th of April 2023;

Having seen all the acts of the proceedings;

Having seen that the case was adjourned for today for delivery of judgement in the event that no impediment is raised and having seen that indeed no circumstances exist as would impede delivery of judgement today;

Having considered;

Plaintiff's claim in this lawsuit is for the payment of the value of additional works that he carried out upon defendant's instructions in a property in Qrendi that was the subject of a promise of sale agreement entered between the parties.

From an examination of the testimony of the parties and the evidence adduced by each of them, it is established that the parties had entered into a promise of sale agreement on the 16th January 2017 for the sale unto defendant of plaintiff's property in Qrendi. The property had to be constructed and then transferred to defendant in shell form, by not later than the 30th March 2017 for the price of €480,000. Simultaneously with the promise of sale agreement, the parties also entered into a contract of works whereby plaintiff undertook to execute by not later than the 30th December 2017 - the original time-limit for the publication of the deed of sale of the property - a list of works ("Qrendi Finishes") for an additional consideration of €60,000, exclusive of value added tax. This sum was to be paid in full by the purchaser and in advance upon the completion of the construction of the property in shell form, at which point the property had to be acquired by purchaser, defendant. The parties also signed a set of plans that were attached to the contract of works.

The sale did not materialise and the validity of the promise of sale agreement, which had been extended until the 28th March 2018, lapsed after a dispute arose between the parties regarding the works contracted to plaintiff under the contract of works.

Plaintiff, Graham Borg, testified that defendant requested several variations to the original works that had been originally agreed on the contract of works, including the excavation of a basement for a price of €2,000, alterations to the swimming pool and the size of the bedrooms. Some of the alterations, such as changes to a staircase and the washroom, were requested after these had already been built according to the original plan specifications that had been agreed upon. Although the defendant did pay the fees and expenses for the approval of the altered plans, in the sum of €1,138 and the alterations were duly executed, these alterations disrupted the original project's time-line. He confirmed that in addition to the deposit on account of the

purchase price in the sum of €48,000 that was paid on the promise of sale agreement, he received a total sum of €52,000 from the defendant out of the €62,000 that was due for the contract of works and the additional excavation of the basement. These funds were applied to pay a number of suppliers for the supply and installation of several finishing works.

The parties agreed to extend the period of validity of the promise of sale agreement until the 28th March 2018 in view of the change in plans and the additional works ordered by the defendant. He agreed that the defendant had indicated a number of shortfalls in the works that were being carried out, but these shortfalls were duly rectified.

Plaintiff explained that he decided to discontinue the ongoing finishing works since there was a lack of interest and communication from defendant's end. He sent him a text message to inform him about this decision and proposed to meet up to discuss the remaining finishing works that still needed to be carried out and to agree on a price for these unfinished works which would then be deducted from the agreed sale price for the purchase of the property.

A dispute subsequently ensued between them where defendant wrongly claimed that plaintiff had denied access to him and his architect when they turned up to inspect the finishes on the 13th March 2018. Eventually, defendant's architect, Dirk Psaila, did inspect the property on the 26th March 2018. Plaintiff declared that he agrees with the report subsequently drawn up by Dirk Psaila in so far as it was certified that the property was constructed to shell form with all external apertures installed, and that some of the agreed finishes were incomplete. However, he claims that the damage identified by the architect as having been caused by water infiltration, was due to the fact that the property was not sealed as a result of the delay in the completion of the structure of the washroom in consequence of amendments requested by defendant, and his subsequent lack of communication.

Plaintiff stated that defendant failed to turn up for the appointment that was scheduled by Notary James Grech for the publication of the deed of sale on the 28th March 2018. He also engaged Perit Jonathan Grech in order to draw up a report highlighting the costs that were incurred as a result of additional works ordered by defendant which fell beyond the original agreed scope of the contract of works. Plaintiff states that the extra works consist of the following:-

a. Construction of full basement underlying the garage
b. Levelling the sunk area in the living room
c. Gypsum plastering of two rooms
d. Re-tiling of part of a room
e. Closing of damaged walls due to installation of AC units copper piping

A report drawn up by Perit Jonathan Grech and Perit Anthony Bezzina, which was presented to him on the 6th April 2018 ('E'), quantified the value of these extra works in the sum of €13,350.

Plaintiff explained that he offered to refund unto defendant the sum of €86,650 representing the total sum of €100,000 paid by him, less the value of the extra works (€13,350), however defendant never replied. Consequently, he deposited this sum in Court on the 16th May 2018 by virtue of a schedule of deposit number 916/18 and the defendant proceeded to withdraw the sum deposited in full.

Defendant's version of events is outlined in his Affidavit where, in short, he acknowledged that he ordered additional works consisting of the excavation of a basement of a value of €2,000 to be carried out in the property, over and above the works listed in the appendix to the contract of works and the agreed time-limit for the completion of the works was extended accordingly. He claimed that in addition to the deposit in the sum of €48,000 that was paid on the promise of sale agreement, between August 2017 and November 2017 he made an advance payment to the plaintiff in the total sum of €52,000 to the plaintiff representing the value of the

additional works and €50,000 of the total value of the works in the agreed price of €60,000, while he retained the outstanding balance of €10,000 until such time as the property was completed in shell form as agreed on the contract of works. He also paid the sum of €1,138 to the plaintiff by way of expenses due to the Planning Authority for a change to the approved plans.

Defendant claims to have paid out substantial amounts for the purchase of fixtures and fittings from Bilom Tiles & Decor as was required to finish the property to a high standard and he also purchased two safes which were installed in the property in October 2017. He claims to have also purchased €1,000 worth of tiles for the swimming pool, €950 for chrome electrical sockets, and also paid an additional €345 for the purchase from Bilom Tiles & Decor for required material,

He had some concerns about poor workmanship and the building methods and materials that were being used by plaintiff in the execution of the works and although some of these issues were addressed, most were never rectified, among which the lack of stability of a retaining wall in the entrance hall. His architect Dirk Psaila also identified the use of poor quality concrete, lack of steel bar reinforcements, incorrectly-built stairs, amongst other defects. Moreover, he had to engage a builder in order to rectify the defects in the construction of the swimming pool and he paid out the sum of €2,500 for such remedial works to be carried out.

The defendant also stated that until the 26th March 2018, the property had not yet been constructed in shell form and when it was evident that vendor was not going to honour the promise of sale agreement and the contract of works, he removed the fixtures and fittings that he had purchased, from the property, but was unable to remove the safes. He claims that the vendor eventually completed the development using the additional material that he had purchased, including fixtures and fittings of a total value of €22,395 which he had been prevented from recovering from the property. He claims to be owed a total sum of €188,000 from the plaintiff, of which plaintiff paid the sum of €85,000, leaving a balance of €103,000.

Having considered;

The Court observes that from the manner in which the Application was drawn up, it is evident that plaintiff intended to file a counter claim in the suit filed by defendant (Application Number 773/20 RGM) – plaintiff uses terms such as "*intimat rikonvenzjonanti*", "*rikorrenti*" when he manifestly was referring to the defendant, "*rikorrent intimat*" and "*smigħ ta' din il-kontro-talba*". These erroneous references in the Application to the status of the parties in these proceedings is highly confusing and manifests of a lack of proper attention during the drafting process which could have easily been avoided.

The Court must also point out that although the defendant claims, by way of the second plea raised in his reply, that plaintiff is his debtor in the sum of €99,000, no counter-claim was filed by defendant in this suit, that would have enabled the Court to adjudicate payment of this sum should it be proven to be due to defendant.

Moreover, and in any event, defendant failed to clearly quantify the amounts allegedy due to him by plaintiff and it is unclear what the sum of €99,000 represents. For instance, while in his second plea he claims that plaintiff owes him the sum of €99,000, he then testified that he is owed a balance of €103,000. Defendant brought no evidence whatsoever in support of his claim that the said amount, or indeed any of the amounts mentioned in his testimony, is owed to him by plaintiff. For instance, while he alleged in his testimony that after the lapse of the promise of sale agreement, he was prevented by plaintiff from recovering from the property, many of the materials and fittings purchased by him, he failed to sustain this allegation with evidence of the said purchases and the price paid. Even his allegation that he paid for remedial works that were required to rectify defective works carried out by the plaintiff, was not supported by any evidence such as the testimony of the builder that he alleged to have engaged for the execution of such remedial work, or a receipt of the sum allegedly paid for such works.

Above all, defendant also failed to bring any evidence whatsover to rebut plaintiff's claim that he carried out additional works in the property, over and above those works that were originally agreed upon in the contract of works. The Court would observe that defendant even failed to challenge plantiff's claim that he carried out any extra works which fell outside the original list of finishing works as attached to the contract of works.

According to plaintiff, the extra works that he carried out in the property that was the subject of the promise of sale agreement, are the following:-

a. Excavation of basement underlying the garage
b. Levelling out the sunken area in the living room
c. Removal of the gypsum plastering in two rooms that was ordered by defendant, in order to again expose the original Maltese stone
d. Removal of tiles and re-tiling of part of a room with matching tiles after defendant had instructed placing of mismatching tiles
e. Closing of damaged walls due to installation of copper piping for AC units which were not included in the original contract of works.

As already established, defendant does not appear to have contested that these works were indeed carried out by plaintiff and or that they were ordered by him in addition to the works listed in the appendix "Qrendi Finishes" attached to the contract of works entered into on the 16th January 2017. He moreover failed to contest the value of the said works as quantified by Perit Jonathan Grech and Perit Anthony Bezzina in the report exhibited by plaintiff together with his affidavit ('E'). This report quantified the value of these extra works in the sum of €13,350 and certified that these works were in effect carried out as shown in the photos forming part of the said report.

However, the fact that defendant might not have specifically rebutted plaintiff's claim for the payment of the value of the additional works mentioned in his testimony, is not

to be taken as an admission of the claim or of the cause of the claim. Nor does the passive position taken by defendant in these proceedings necessarily mean that plaintiff is relieved from discharging the burden of proof incumbent upon him to prove his case on a balance of probabilities. Plaintiff remains bound to bring sufficient evidence to convince the Court on a balance of probabilities of his right to demand payment of the amount claimed in his Application and the Court shall not rubber-stamp plaintiff's claims simply because defendant might have failed to contest the claims or bring specific evidence in rebuttal of the claims. Indeed, his silence must be taken to mean a tacit rebuttal of all plaintiff's claims and the cause of his claims.

The Court must observe that plaintiff failed to exhibit the original report drawn up by the aforementioned architects and merely exhibited an informal photocopy of a report which was not authenticated, even by the testimony of the two architects or either or them. In the Court's view, plaintiff, who bases the essence of his claim on the value of such works as quantified and certified in the said report, failed to observe the best evidence rule set out in Article 559 of the Code of Organisation and Civil Procedure. In fact, it was not alleged and in any case, there is nothing that tends to show that plaintiff was precluded from producing the original report or proof of authentication of the copy of the said report. However, although this copy evidently does not constitute the best evidence that defendant company was required to bring, at no point did defendant object to the production of the photocopied report and or insist on the production of the original report and consequently, having been admitted in evidence, the Court affirms the probatory value of this copy and shall give it the weight that it may merit since its relevance to the facts at issue is evident.

Plaintiff confirmed in his testimony, which remained uncontested, that he carried out these works because they were specifically requested by defendant in order to tailor-make the property, which was intended to serve as his future home, to his likings. He therefore argues that the costs that he disbursed for the execution of these works, were incurred solely for defendant's benefit.

The Court observes that plaintiff acknowldges and accepts that he was bound to reimburse to defendant the total amount that he had received from him, that is the amount of €100,000. In fact, it is not disputed that defendant recovered from plaintiff the sum of €86,650, leaving a balance of €13,350 which plaintiff claims is due to him by defendant for the extra works carried out in the property. Works that the Court understands represent variations to the works as originally agreed upon in the contract of works and consist, generally speaking, in (i) the removal, on defendant's request, of works executed according to his original instructions, (ii) remedial works required as a result of works requested by defendant after the completion of the works as originally agreed upon or (iii) extra works.

The Court however, recalls that the property was not after all, sold to the defendant as agreed to in the promise of sale. It is undisputed that the term of validity of the promise of sale agreement lapsed irremediably and it has already been established that the plaintiff reimbursed unto defendant the monies that he had received from him as deposit on account of the sale price and by way of consideration for the works carried out, including an additional €2,000 for the excavation of the basement. **This means that plaintiff retained the ownership of the property and consequently derived the benefit of any works that were executed as well as the augmented value, if any, of the property, even if the cost of these works was incurred by plaintiff himself**.

This having been said, the Court does however agree that works which were carried out and then removed upon defendant's instructions were carried out superfluously and consequently, the removal works and the costs incurred to carry them out, could not be deemed to produce any benefit to the plaintiff as owner of the property. As already established, these costs were incurred by plaintiff and he is therefore entitled to expect that he is reimbursed by defendant. These considerations would apply to the costs for levelling out the sunken area in the living room (b) and the removal of the gypsum plastering that was ordered by defendant in two rooms, in order to again

expose the original Maltese stone (c). The report exhibited by plaintiff shows that the costs of these works amount to €850 and €1,800 respectively and the Court is of the view that these expenses in the total amount of €2,650 are due and must be paid to plaintiff.

However, as far as the remainder of the additional works carried out by plaintiff are concerned, that is the excavation of the basement underlying the garage, the removal of tiles and re-tiling of part of a room with matching tiles and the plastering of walls that were damaged due to installation of copper piping for AC units, the Court cannot agree with plaintiff that he is entitled to reimbursement of the costs he incurred to carry out these works. As already established, the works were carried out in plaintiff's own property, of which he retained ownership since this was not ultimately acquired by defendant. Therefore, it is plaintiff as owner of the property who derived the benefit of the value of the said works since these evidently acceded to the property.

This principle is reflected in the provisions of Article 570 of the Civil Code, which stipulate that where a third party has made on another person's land, constructions, plantations, or works with materials belonging to others, the owner of such materials shall not be entitled to recover them back, but he may demand to be indemnified by the third party who has made use of such materials, and even by the owner of the tenement to the extent of any amount which may be still due by such owner. Applying this principle to a case where the owner has made himself constructions or works with materials belonging to himself, even in the interest of a third party, in his own property, he naturally cannot expect to be indemnified by the third party.

In fact, defendant testified that subsequently to the lapse of the validity of the promise of sale agreement between the parties, he learnt that plaintiff sold the property to third parties for a higher price than that which had been agreed upon in the promise of sale agreement, which increase in price he attributed to the fact that plaintiff completed the development using the additional materials and fixtures that he had purchased for the property but which he was not reimbursed for. This allegation was not contested by

plaintiff who never made any mention in his testimony of the fate of the property following the expiration of the validity of the promise of sale agreement.

In any event however, it is obvious in the Court's view that the re-tiling of a part of a room with matching tiles is a benefit that was ultimately derived by plaintiff, especially when it is undisputed that the costs for the original tile-laying which was subsequently removed, were paid for by defendant. The same applies in respect of the basement underlying the garage in the property, which was excavated at defendant's request: this is obviously an improvement to plaintiff's own property which could have only increased its value to his sole benefit. It therefore follows that any expenses that he might have incurred in the execution of these works were so incurred in his own property and for his own benefit and the Court cannot agree that defendant is under a duty to pay or reimburse any part of such costs.

Moreover, it must be observed that plaintiff failed to explain how the costs of the works undertaken for the construction of the basement, were valued at €10,000 when the parties agreed in their respective testimony that the excavation of a basement underlying and occupying the same footprint as, the one-car garage, would be carried out at a price of €2,000, which was duly paid by defendant.

In fact plaintiff himself testified: "*In July 2017, I requested the sum of €62,000 consisting of €60,000 for the contract of works and €2,000 required for the extra work carried out to excavate the basement. At this point, I requested €2,000 from Mr Bowden for the basement alterations since we were in agreement* ..."

It is moreover unclear how the works relating to the construction of the basement were subsequently valued at €10,000 when it is evident that the parties had not only agreed on the price of the works, but plaintiff had also received payment of this price. The architects' report does not provide any detail as to how the value of €10,000 was computed, the works that were carried out on the basement or the state of the basement at the time of valuation. Also, as already pointed out, plaintiff also failed to

bring the architects to testify and confirm or explain the contents of their report. The Court does not find it amiss to point out that if the sum of €10,000 might represent the value of the finished basement, the defendant cannot be deemed to bear any liability for the payment of the finishes since it is undisputed that the obligation undertaken by the plaintiff in terms of the contract of works was to finish the property in shell form. Consequently, over and above the considerations already made regarding the accession of the construction of the basement to plaintiff's own property and own benefit, it must be stated that any works or finishes that may have been carried out on or in the basement over and above shell-form finish, could not have been requested by defendant and nor is he under any obligation to pay their value.

These considerations apply likewise to the repair of the walls that were damaged following the installation of airconditioning units and the insertion of copper piping through the walls. Such piping, not to mention the air-conditioning units themselves (had they happened to have been installed) and the subsequent plastering of the relative walls, could have only accrued to plaintiff's benefit: in fact, it does not result from the testimony of either of the parties that the air-conditioning units and the piping were removed or returned to the defendant when the works were discontinued. It is therefore legitimate to infer that plaintiff derived a benefit from these works and consequently failed to prove any obligation on the part of defendant to reimburse the value of these works.

The fact that defendant requested these additional works because he wanted custom-made alterations and finishings in the property he intended to purchase as his future home, as submitted by plaintiff in his Application, cannot change the fact that the works were executed in plaintiff's property and they accrued to his sole advantage. In the Court's view it is obvious that the specifications of all the finishing works agreed to in the contract of works, and not merely those identified by plaintiff for the purposes of this lawsuit, were stipulated in accordance with defendant's tastes and exigencies and therefore, the premise on which plaintiff accepted to refund unto defendant the cost of the works executed in terms of the contract of works ("*Qrendi*

finishes"), applies equally to the works in issue, such that plaintiff cannot be deemed to have a right to payment of the costs of the additional works requested by defendant, save for those which were carried out superfluously, as already established.

Therefore, the amount that has been satisfactorily proved to be due to plaintiff by way of value of additional works carried out on defendant's request, is that of €2,650.

The Court, for these reasons, while abstaining from taking further cognisance of the first plea raised in defendant's Reply and while acceding partially to the second plea, accedes only limitedly to plaintiff's request in the Application and condemns defendant GRANT KEITH BOWDEN to pay unto GRAHAM BORG the sum of two thousand six hundred and fifty Euro (€2,650) representing additional works carried out in the property at 27, Triq iż-Żurrieq, Qrendi as specified in the Application or, if plaintiff is already in possession of any funds pertaining to defendant, authorises plaintiff to retain therefrom the sum of two thousand six hundred and fifty Euro (€2,650).

The costs are to be borne equally by both parties.

DR RACHEL MONTEBELLO
MAGISTRATE.