



CIVIL COURT (FIRST HALL)
MADAM JUSTICE
HON. AUDREY DEMICOLI LL.D.

Sworn Application Nr **690/2021/1**

DR MARISA VELLA (ID 397979M)
AS A SPECIAL MANDATORY OF
MICHAEL ANDREW WELLS AND LINDSAY SUZANNE WELLS

VS

IAN CLAGUE (ID 120417A)

Sitting held on Friday, 24th May 2024

The Court:

1. This is a final judgement regarding a request by the plaintiffs for this Court to order the rescission of the deed of sale dated 25th May 2020 published by Notary Andre Farrugia, by virtue of which the plaintiffs acquired from the defendant the property 276, 277 and 278 in St Ursola Street, Valletta, on the basis that the defendant breached the guarantees given by him in the same public deed.

Preliminaries

2. By virtue of a sworn application filed on the sixteenth (16th) of July 2021, **Dr Marisa Vella** (hereinafter referred to as *the plaintiff noe*), in her capacity as special mandatory of **Michael Andrew Wells and Lindsay Suzanne Wells** (hereinafter referred to as *the spouses Wells*) submitted and confirmed on oath:

- a. *The applicant nomine is instituting these proceedings on behalf of Michael Andrew Wells and Lindsay Suzanne Wells on the strength of a power of attorney hereto attached and marked as **Doc A**;*
- b. *By means of a public deed dated 25th May 2020 published in the acts of Notary Andre Farrugia, the applicants Michael Andrew Wells and Lindsay Suzanne Wells acquired from the respondent Ian Clague, the house bearing official numbers 276, 277 and 278 in Saint Ursola Street, Valletta (the “**Property**”), for the total price of €2,700,000, a true copy of the public deed is hereto attached and marked as **Doc B**;*
- c. *Amongst the terms and conditions in the same deed, the respondent guaranteed in the applicants’ favour that (i) the Property is built according to law; and that (ii) the Property is free from any litigation and claims by third parties. The relevant parts of the deed in fact read as follows:*

“iii. The Property is constructed in accordance to law and in accordance to all the necessary permits, including building and sanitary permits and in compliance with all the plans approved by the competent authorities.

...

v. *The Property is not subject to any pending or threatened legal disputes or to any claims made by third parties.*”

- d. *As will be proven during these proceedings, the Property is not built according to law, since the respondent built railings in the common wall in default of the provisions contained in Article 419(a) of Cap 16 of the Laws of Malta, pictures of the same railings are hereto annexed and marked as **Doc C**;*
- e. *Additionally, and as will be proven during these proceedings, the respondent Ian Clague was more than aware that there existed threatened litigation and claims made by third parties, namely Mr Bonello Bianco and/or the company J. Bianco Ltd (C 59737). From information made available to the applicants, J. Bianco Ltd is the owner of the property numbered 24 and 25 in Battery Street, Valletta, which is situated immediately behind the Property. These arguments and claims by the third party were made right around the time before the promise of sale between the applicants and the respondent was executed, which promise of sale was dated 16 December 2019, a copy of which is being annexed hereto and marked as **Doc D**. These claims kept on going without the applicant’s knowledge until the date of the final deed of sale. This is evident through letters exchanged between the parties and dated 30 May 2019, 28 October 2019 and 30 January 2020 respectively, in terms of which J. Bianco Ltd notified the respondent that, amongst other things, he had constructed structures in the common wall between the Property and the property belonging to J Bianco Ltd, and in default of the respondent removing these structures within the stipulated time period, legal action would be taken against the respondent. The latter replied to these letters by means of two letters dated 9 December 2019 and 21 February 2020, where, amongst other things, he refused the allegations made against him, since according to him, the wall belonged to him in its entirety, a copy of the five letters are being attached hereto and marked as **Doc E**;*

- f. *Whether or not the respondent was right, these claims should have been made known to the applicants. This notwithstanding, not only did he keep everything concealed, but he also made the guarantees stipulated above in the final deed of sale;*
- g. *These claims became known to the applicants when a notice was affixed to the Property in terms of which a development was being proposed. From investigations carried out by the applicants, it resulted that J. Bianco Ltd applied for works to be carried out on the said railings. It also resulted that a petition was lodged in terms of article 77 of Cap 504 of the laws of Malta and Article 80 of Cap 552 of the laws of Malta, wherein J. Bianco Ltd requested that the planning authority permits numbered PA 1488/15 and PA 751/20, pursuant to which the respondent had made works in the house which he subsequently sold to the plaintiffs and through which he obtained a permit to build the railings, are declared null. A copy of the petition is hereto annexed and marked as **Doc F**. The consequence of this petition is extremely serious to spouses Wells since this would entail that the house purchased and in which the respondent had made several works, would not be furnished with the necessary permits since the permits which regulate those works are being contested as being null;*
- h. *It therefore results that the guarantees given by the respondent in the public deed dated 25th May 2020 are untrue and the respondent concealed the fact that there were legal disputes and claims being made by third parties in relation to the Property;*
- i. *Therefore the applicants had no other choice other than to institute these proceedings;*
- j. *In light of the foregoing, there exist all the elements required for an action in terms of article 1390 of Cap 16 of the laws of Malta in the*

sense that the Property purchased by the applicants does not result as being in conformity with the guarantees stipulated in the public deed of sale and therefore is not of the promised quality; and

k. Consequently, the applicants are depositing their keys to the Property under the authority of this Honourable Court and are formally expressing their refusal of this Property;

3. The plaintiffs therefore requested this Court to:

- i. Decide and declare that the defendant breached the guarantees above-mentioned when he declared that (i) the Property is built according to law and/or (ii) that the Property is not subject to any active or threatened litigation or any claims against the same;*
- ii. Consequently, declare that the Property sold to the applicants was not in terms of the stipulated quality as agreed in the deed of sale above-mentioned;*
- iii. Rescind the deed of sale dated 25 May 2020 published by Notary Andre Farrugia to which the plaintiffs and defendants are a party;*
- iv. Appoint a Notary Public to publish the relative notarial act of rescission of the deed of sale and give instructions on the time, date and place of publication of the relative notarial act and nominate curators to appear on such act in default of the defendant's appearance on the same;*
- v. Declare that the defendant is responsible for damages, including but not limited to a refund of the purchase price of the Property, notarial and legal fees and other expenses which the plaintiffs incurred and are still incurring as a result of the foregoing, even if necessary through the appointment of an expert;*

- vi. Liquidate the amount due by the defendant for damages suffered; and*
- vii. Order the defendant to pay the damages liquidated;*

With costs and interest until date of effective payment;

4. Having seen the sworn application filed by the plaintiff noe on the sixteenth (16th) July 2021, by virtue of a decree dated eleventh (11th) August 2021, the Court ordered that the defendant be served with the relative documentation, and granted the defendant a term of twenty (20) days during which he had to file a sworn reply. The first sitting was scheduled for Tuesday, fifth (5th) October 2021;
5. By virtue of a sworn reply dated fourteenth (14th) September 2021, the defendant pleaded that the claims of the plaintiffs are manifestly unfounded in fact and at law, and that they ought to be rejected with costs against them, for the following reasons:
 - i. That the property subject of the deed dated twenty-fifth (25th) September 2020 was at the time of the publication of the deed built according to law and all the necessary permits, including building and sanitary permits and in compliance with all the plans approved by the competent authorities;*
 - ii. That the railings that are referred to in the fourth premise of the sworn application were built on a wall which, at the time, pertained exclusively to the defendant, and now belongs to the plaintiffs. The installation of these railings was further sanctioned through planning permit PA 751/2020;*
 - iii. That the property subject of the deed dated twenty-fifth (25th) September 2020 was not at the time of the publication of the deed*

subject of any pending or threatened legal disputes or claims against it;

- iv. That Michael Andrew Wells and Lindsay Suzanne Wells could have been aware, before the publication of the deed, that the owners of the neighbouring properties had requested the issue of a planning permit. The defendant never guaranteed that third parties would not obtain planning permits for their own properties;*
- v. That the request made for the revocation of planning permits PA 1488/15 and PA 751/20 by third parties was never mentioned before or by the date of the publication of the deed, that is, the 25th September 2020. This request was a new request, made subsequent to the publication of the said deed, that is, on the 28th December 2020. The defendant was only made aware that the request for the revocation of the permits had been made from the documents that were annexed to the sworn application and never before. This even if it seems that Michael Andrew Wells and Lindsay Suzanne Wells, or their architects were aware of this request at least as at the 21st February 2021, and this as appears from the watermark on Document F attached to the sworn application, this was never brought to the attention of the respondent;*
- vi. That consequently the respondent did deliver on the warranties he had provided to the plaintiffs on the deed dated 25th September 2020 and consequently no breach can be found of the guarantees he had provided;*
- vii. That the property was sold in accordance with the quality promised;*
- viii. That the property was delivered to the plaintiffs on the publication of the said deed and the plaintiffs have retained it for just under a year. In view of this they are no longer in a position to reject the thing and demand damages. Consequently there is no valid reasons at law why*

this Court should order the rescission of the deed dated 25th September 2020 in the acts of Notary Andre Farrugia;

- ix. That, in effect, this entire case is a mere fabrication intended solely to obfuscate the fact that Michael Andrew Wells and Lindsay Suzanne Wells are disappointed that planning permits were obtained for development on a neighbouring tenement that could limit their views of the Grand Harbour, that is PA/04226/20. The defendant had no control over the issue of such permits, yet the plaintiffs are, through these proceedings, trying to create fumus boni juris, for reasons known only to them, to try to get out of a transaction that in their eyes went sour for reasons that are in no way attributable to the respondent. These proceedings, as well as the accompanying garnishee order, are only manifestly abusive and at no point, prior to the issue of the neighbour's planning permit, was the respondent, ever even made aware that a dispute had been raised by them, after the publication of the final deed of sale;*

- x. That no damages have been caused to the plaintiffs and consequently there are no damages to be liquidated or that the respondent should be condemned to pay;*

- xi. That the plaintiffs' actions, namely the filing of a garnishee order through which deposits have been made in the Registry of this Court, have caused substantial damages to the respondent who is in terms of Article 396 of Chapter 12 of the Laws of Malta setting up a counter-claim against the plaintiffs;*

- xii. Saving any further pleas that may be raised according to law;*

With costs against the plaintiff;

- 6. The defendant also filed a counter-claim dated fourteenth (14th) September 2021, which is not being reproduced here due to the fact that it will not be

dealt with in this particular judgement as it has already been definitively decided upon;

7. By virtue of a judgement delivered on thirteenth (13th) January 2023, this Court:
 - a. upheld the plea raised by the defendant in the eighth (8th) paragraph of his sworn reply and rejected the requests made by the spouses Wells on the basis that the plaintiffs had forfeited their right to file an action for rescission of contract and seek damages in terms of Article 1390 of Ch 16 of the Laws of Malta; and
 - b. rejected the counter-claim filed by the defendant;
8. Subsequently, by virtue of an application filed on the ninth (9th) February 2023, the spouses Wells appealed from the part of the judgement delivered by this Court by virtue of which the eighth (8th) plea raised by the defendant was upheld. The defendant, however, did not file an appeal from the judgement delivered by this Court regarding the counter-claim;
9. By virtue of a judgement delivered on the nineteenth (19th) October 2023, the Court of Appeal (Superior Jurisdiction) upheld the appeal filed by the spouses Wells, and therefore:
 - a. Confirmed the judgement delivered by this Court insofar as Ian Clague's counter-claim was rejected;
 - b. Varied the same judgement by revoking it insofar as it upheld Ian Clague's eighth plea and ordered that the acts of the case be remitted to this Court in order for the case to be decided on its merits;

- c. Ordered that the costs of this case, both those concerning the judgement of the 13th January 2023 and those relating to the appeal, were to be borne by the defendant;
10. The case was recalled before this Court by virtue of a decree dated twenty-seventh (27th) October 2023, and a sitting was scheduled for the seventh (7th) December 2023. During this sitting, the parties agreed that they had no objection to this Court as presiding to continue hearing and deciding the case, even though this Court had decided the counter-claim of the defendant, which matter was now final.

The Court

11. Having seen the sworn application, sworn reply and the acts of the case in their entirety;
12. Having taken cognisance of the judgement of the Court of Appeal (Superior Jurisdiction) delivered on the nineteenth (19th) October 2023;
13. Having seen that the parties did not object to this Court as presiding to continue hearing the case;
14. Having seen the note filed by the plaintiff and by virtue of which the spouses Wells exhibited: (a) a copy of the decision issued by the Planning Authority in the form of minutes of the Planning Authority meeting held on 23 February 2023 (**Document MV1** a fol 917 *et seq* of the case file); (b) a copy of the appeal application filed by the defendant before the Environment and Planning Review Tribunal (**Document MV2** a fol 933 *et seq* of the case file); (c) copies of minutes of proceedings in the records of the appeal application mentioned in (b) (**Document MV3** a fol 946-947 of the case file); (d) a copy of the application filed by the defendant in the acts

of the schedule of deposit bearing number 1341/2021 pursuant to which the defendant requested the withdrawal of the keys to the property subject to the proceedings in question (**Document MV4** a fol 948 *et seq* of the case file); (e) the reply filed by the plaintiff noe in connection with the aforementioned application (**Document MV5** a fol 951-952 of the case file) and (f) the decree issued by this Court as otherwise presided regarding the defendant's application marked *Doc MV4* (**Document MV6** a fol 953 of the case file);

15. Having seen the note of submissions filed by the plaintiff noe on the third (3rd) April 2024 (a fol 956 *et seq* of the case file);

16. Having seen that the defendant did not file a note of submissions within the term granted to him by this Court to do so;

17. Having seen that the case was adjourned for final judgement to be delivered today;

18. Considers as follows:

Legal Considerations made by the Court

19. The Court primarily reiterates that since no appeal was filed from the decision given by this Court regarding the counter-claim, the matter is now *res judicata*, and will therefore not be considered by this Court in this judgement. Rather, this judgement will delve solely on the merits of the case brought by the plaintiff noe, that is: (a) whether the guarantees given by the defendant in the deed of sale by virtue of which the property was purchased were breached by the defendant, and (b) whether the sale should be rescinded;

20. Furthermore, the Court also reiterates that the fact that the spouses Wells did not forfeit their right to file an action for the rescission of the contract of sale by holding on to their property until July 2021 is also a matter which has been definitely decided by the Court of Appeal (Superior Jurisdiction). This Court will therefore set off with its examination of the merits from the premise that the spouses Wells acted within their rights in instituting this action;

21. The spouses Wells are basing their claims on Article 1390 of Ch 16 of the Laws of Malta which states:

1390. If the thing which the seller offers to deliver is not of the quality promised, or is not according to the sample on which the sale was made, the buyer may elect either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon a valuation by experts.

22. It was held in **Negte. Eugenio Diacono vs Giuseppe Galea**¹ that:

Che qui si suppone in prima luogo che il venditore abbia esplicitamente promesso una qualita' e che il compratore abbia avuto specialmente in mira questa qualita'. Si suppone in secondo luogo che il compratore non abbia ancora ricevuto la cosa e non l'abbia trattenuta; giacche' se egli riceve la cosa e la trattiene senza alcun reclamo, si presume che egli sia soddisfatto della sua qualita'. Che se la cosa sia stata gia' consegnata al compratore senza che nulla indichi che egli l'abbia approvata, la mancanza della qualita' che ne avesse determinato il

¹ Commercial Court, 7th December 1901

consenso darebbe luogo all'azione di nullita' del contratto fondato sull' errore.

23. The Court of Appeal (Inferior Jurisdiction) explained in **Natasha Grech vs G.I. Trading Limited**²:

Premess dan, hu accettat illi meta l-bejgh ma jkunx skond dak imwieghed ossija l-oggett mixtri ma jkunx konformi għall-ftehim appattwit jew għax ukoll difformi għall-kampjun, il-kompratur jista' jitlob ir-rizoluzzjoni tal-kuntratt avolja jkun rceva l-oggett tal-bejgh. Dan huwa hekk "in quanto che la cosa per cui consentiva risultò essere tutt'altra che quella dedotta in contratto ... una cosa diversa da quella che era contemplata nel contrattare, e per cioe` non si concederebbe una azione redibitoria ma quella di nullita`, avente per base la cosa pattuita nel consenso del compratore". ("Commerciante Michele Grima -vs- Negoziante Arturo von Kohen", Qorti tal-Kummerc, 28 ta' Frar, 1884. Ara wkoll fejn si tratta ta' bejgh mhux konformi għall-kampjun is-sentenza fl-ismijiet "Joseph Hanauer nomine -vs- Giovanni Maria Debono", Appell Kummercjali, 11 ta' Ottubru, 1915);

24. On similar lines, but in further detail, the Court of Appeal (Superior Jurisdiction) elaborated in **John u Agnes konjugi Borg vs Welcome Auto Dealer Limited et**³:

17. Meqjusa l-ilmenti tal-appellanti hekk kif imnizzla fit-tieni u t-tielet aggravji, din il-Qorti titlaq biex tgħid li għall-finijiet tal-Artikolu 1390 tal-Kap. 16 tal-Ligjijiet ta' Malta,

² Civil Appeal Nr 24/2009, Hon Mr Justice P Sciberras, 18th June 2010

³ Appl Nr 305/16/1, Court of Appeal (Superior Jurisdiction), 31st May 2023

huwa mifhum li l-frazi “kwalità miftiehma” tirreferi għal: (i) “kwalità jew kwalitajiet li huma essenzjali għall-użu tal-ħaġa”; jew inkella (ii) kwalità jew kwalitajiet “li jiffurmaw l-oġġett ta’ xi impenn kontrattwali speċifiku”. F’każ li tonqos xi waħda minn dawn il-kwalitajiet, ix-xerrej huwa mogħni bl-għażla li “jaġixxi għar-riżoluzzjoni jew għar-riduzzjoni tal-prezz”. (ara s-sentenzi fil-kawzi fl-ismijiet **Joseph Debono u martu Rita v. Uskin Ltd**, Appell Inferjuri tat-28 ta’ Marzu 2008; **Medcomms Limited v. Peter Muscat Scerri**, Appell Superjuri tal-31 ta’ Jannar 2014; u **World Marketing Services Limited v. Lift Services Limited et.**, Appell Superjuri tas-26 ta’ Jannar 2022);

18. Minn dan isegwi li sabiex jiġi meqjus sewwa jekk ix-xerrej għandux tassew il-jedd li jitlob il-ħall tal-bejgħ fuq is-saħħa tal-Artikolu 1390 tal-Kap. 16, il-Qorti għandha: (i) l-ewwel u qabel kollox titlaq billi tistħarreg jekk kienx hemm xi kwalitajiet partikolari li l-kontraenti qablu dwarhom, u dan dejjem fir-rigward tal-ħaġa mixtrija; u (ii) tistħarreg x’kien l-iskop li għalih ix-xerrej xtara l-ħaġa, biex b’hekk tqis jekk il-ħaġa mixtrija għandhiex daww il-kwalitajiet essenzjali sabiex ix-xerrej ikun jista’ jużaha bil-mod ta’ kif xtaq;

A. The Guarantees given by the Defendant

25. The parties in this case agreed to a series of terms and conditions in the preliminary agreement and in the final deed of sale, which terms and conditions would form the basis of the sale. In fact, in the **Preliminary**

Agreement dated 16th December 2019⁴, which was extended on the 14th April 2020 and, consequently, on the 7th August 2020⁵, the parties agreed as follows:

6. On the notarial deed of sale the Vendor shall declare and guarantee in favour of the Purchasers that and consequently this agreement is subject in favour of the Purchasers that,

[...]

iii. the Property is constructed in accordance to law and in accordance to all the necessary permits, including building and sanitary permits, and in compliance with all the plans approved by the competent authorities. The Vendor shall obtain the necessary development and sanitary permits covering the Property as presently utilised by not later than the final deed of transfer;

[...]

v. the Property is not subject to any pending or threatened legal disputes or to any claims made by third parties;

26. Subsequently, on the **Final Deed of Sale** dated 25th February 2020⁶ by virtue of which the spouses Wells acquired from the defendant the property forming the subject of this case, the parties agreed:

⁴ **Doc AF1** a fol 214 *et seq* of the case file

⁵ **Doc AF2** a fol 216-217 of the case file

⁶ **Doc AF3** a fol 218 *et seq* of the case file

4. *The Vendor declares and guarantees in favour of the Purchasers that and consequently this deed is subject in favour of the Purchasers that:*

[...]

iii. the Property is constructed in accordance to law and in accordance to all the necessary permits, including building and sanitary permits and in compliance with all the plans approved by the competent authorities.

[...]

v. The Property is not subject to any pending or threatened legal disputes or to any claims made by third parties.

A.1. Guarantee that the Property was built in conformity with Building Permits

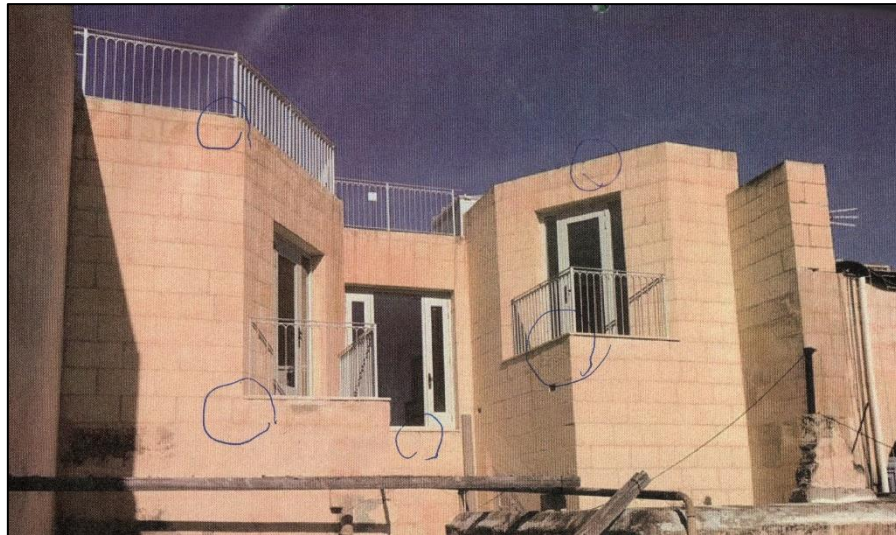
27. From the evidence submitted, it transpires that the spouses Wells were aware that there were parts of the building which were not in conformity with the building permits. In fact **Lindsay Wells** explains in her affidavit⁷:

I recall that AP had noted that the Property we had seen was not in conformity with the building permit that Ian Clague had obtained from the Planning Authority. We therefore discussed the matter with Ian Clague and his partner, Brigitte, who had also shown us around the Property, and agreed that during the term of the preliminary agreement, Ian would seek to rectify the

⁷ A fol 188 of the case file

situation and put forward a minor amendment application so that the changes would be approved.

One aspect (perhaps the most disputed) of the building that was not in conformity with building permits, were precisely the railings shown in the photo hereunder⁸:



Application Nr **PA/00751/20** was filed on 23 January 2020⁹ by the defendant “*To sanction changes to approved permit PA 1488/15 following renovation works, including minor internal alterations.*” This application was meant to sanction, *inter alia*, the railings shown above. The application was definitively approved on 17th June 2020;

28. It would therefore seem that by the time the deed of sale was signed on the 25th September 2020, the building was in line with the relative permits, following the Planning Authority’s approval of the sanctioning, and, in fact, it is upon this premise that the defendant raises his first two pleas in the sworn reply; however, the Court has found that this was not the case. The Court notes that the railings included in Application Nr PA/00751/20 to sanction are only the railings on the roof of the property in question (*opramorta*), and not the railings on the lower level. This is in fact evident

⁸ Photo attached to the sworn application, a fol 31 of the case file

⁹ **Doc CJD2a** fol 232 *et seq* of the case file

from the plans attached to the same application (a fol 560 of the case file), where the only railings indicated are those at roof level, and from the Case Officer Report for the relative Application, wherein it is stated that, *“Proposal is for the sanctioning of structural changes to the roof of the uppermost level, as well as the installation of railings above, at a setback from the main façade and behind.”*¹⁰ The Court also notes that the fact that not all railings were sanctioned, and that some railings were still in place without a relative permit on the 25th September 2020, is precisely the reason why the permit for Application Nr PA/00751/20 was revoked in terms of Article 80(1)(b) Ch 552 of the Laws of Malta. In fact, the relative notes¹¹ state,

[...] In the subsequent application PA 751/20, the only railings that were marked for sanctioning and ultimately approved, were wrought iron safety railings at roof level (opramorta), as submitted in section AA in min. 5h.

Furthermore, from the representation submitted at min. 42a it is made clear that the plans submitted in PA 751 20, in particular section AA in minute 5h, are incorrect.

Therefore, this means that the plans that were relayed to third parties and available to the public are incorrect and thus, this qualifies under Article 80(1)(b) of Chapter 552 of the Laws of Malta. [...]

In addition, the minutes from the Planning Commission Meeting held on 23rd February 2023¹² regarding the request for revocation of the permit issued pursuant to Application Nr 00751/20 indicate that,

¹⁰ A fol 569a of the case file

¹¹ **Dok MV1** a fol 917 of the case file

¹² A fol 923 *et seq* of the case file

The Planning Authority has based its assessment to the request to invoke Article 80 on planning grounds. PA 751/20 was an application to sanction and the submitted plans did not reflect the actual situation on site since the railings were actually on site before a decision was taken on the sanctioning application. Thus, the Planning Authority approved a sanctioning application when there were further illegalities on site which were not shown on the approved plans.

Thus, the DMD is recommending the revocation of PA 0751/20 and revoke PA 0751/20 in order to be reprocessed, on the basis of the fact that there is the submission of incorrect information, declaration or plan which does not reflect the situation on site. Regulation 17 of SL 552.13 clearly indicates that in sanctioning applications, all illegalities on site are to be shown on plans.

[...]

02155. Mr Martin Camilleri noted that after reviewing the case, it is evident that the railings were not indicated on plan. Furthermore, he also noted that there was no approval for any openings on the terrace. The plans only showed windows however it seems that doors were opened. The Enforcement Directorate have also confirmed the situation on site as that shown in the representation submitted during the processing of this application. Thus, it results that there were illegalities on site which were not shown on plans approved in the sanctioning application, and it follows that in accordance with SL 552.13 one cannot consider a sanctioning

application unless the plans clearly indicate the situation on site. In view of this, Mr Camilleri declared that he is in agreement with the DMDs recommendation.

29. Whilst it is true that the request for revocation of permit issued pursuant to Application Nr 00751/20 was submitted after the deed of sale was signed by the parties, and therefore after the spouses Wells had purchased the property, as indicated in the plea raised by the defendant in the fifth (5th) paragraph of his sworn reply, the fact still remains that certain aspects of the property were still not covered by a building permit at the point in time when the deed of sale was signed. This contrary to that which had been guaranteed by the defendant on the final deed of sale, that is, that the property was built according to law, in accordance with all building permits and in compliance with plans approved by the competent authorities;

30. **Lindsay Wells**, in her affidavit¹³, specifically states that,

We would only acquire the Property if it was going to be covered by the relevant planning authority permits. [...] After we obtained confirmation that the permit [i.e. PA 00751/20] was issued, we passed on this information to AP for their verification and just a few days later we entered into the final deed of sale and acquired the Property.

It is therefore very evident that the spouses Wells would not have signed the final deed of sale if they had known that there were still aspects of the property which were not covered by a building permit, so much so that, as seen above, this was a condition that was not only stipulated in the final deed of sale but also in the preliminary agreement that preceded it;

¹³ A fol 188 *et seq* of the case file

31. This notwithstanding, even if, for argument's sake, it were not so imperative for the purchasers to have all structures covered by a building permit, jurisprudence has clearly stated that the fact that structures are not covered by a building permit constitutes a violation by the vendor of his obligation to deliver the object of the quality promised. For instance, in **Gennaro Rosario u Marianna konjugi De Luca vs Perit Arkitett David Psaila et**¹⁴, this Court as otherwise presided stated:

*Illi l-Qorti tqis li huwa stabilit li meta bini mibjugħ ma jkunx imtella' bi qbil mal-permessi tal-bini maħruġa dwaru, dan il-fatt igib miegħu ksur kemm tal-obbligu tal-bejjiegħ li jggarantixxi t-tgawdija bi kwieta tal-ħaġa mibjugħa lix-xerrej [App Civ 7.7.2006 fil-kawza fl-ismijiet **Iannace et vs J & T Co Ltd**], u kif ukoll ksur tal-obbligu tal-bejjiegħ li jikkunsinna ħaġa tal-kwalita' miftehma [App Inf PS 9.1.2009 fil-kawza fl-lismijiet **Karl Francica vs Luke Piscopo**], jekk mhux saħansitra raġuni ta' qerq min-naħa tal-bejjiegħ [P.A. JA 10.10.2005 fil-kawa fl-ismijiet **Alfred Pisani et vs Joseph Mifsud et** (mhix appellate)]. In-nuqqas ta' qbil bejn bini mibni u l-permessi maħruġa mill-awtoritajiet kompetenti jnissel qagħda ta' inadempiment tal-kuntratt li għib magħha jedd għad-danni favur ix-xerrej, ukoll jekk ix-xerrej ma jressaqx azzjoni taħt l-artikolu 1390 tal-Kodiċi Ċivili [App Civ 27.3.2003 fil-kawza fl-ismijiet **Josephine sive Josette Caruana vs Emanuel Vella et**], jew fejn azzjoni taħt l-artikolu msemmi ma tkunx tista' ssir [App Civ 1.2.2008 fil-kawza fl-ismijiet **Joseph Mallia Bonello vs Paul Camilleri et**];*

¹⁴ Appl Nr 1646/2001/1, Civil Court (First Hall), Hon Mr Justice J R Micallef, 14th February 2013 (not appealed). See also Appl Nr 1379/2002, **Renata Zawisla et vs V. Debono & Sons Company Limited**, Civil Court (First Hall), Hon Mr Justice J Azzopardi, 24th October 2005 (not appealed)

32. All this considered, **the Court therefore finds that the defendant did not deliver on the warranty given by him in clause 4(iii) of the deed of sale, as the property was not constructed in accordance with all the necessary building permits.** This to the extent that even the application which was meant to sanction a number of illegalities was eventually revoked, such that the plaintiffs presently find themselves in the situation they sought to avoid from the moment they signed the preliminary agreement.

A.2. Guarantee that the Property was not subject to claims made by Third Parties

33. The Court could stop here and declare in favour of the plaintiffs; however, since the second guarantee allegedly breached is so closely linked to the first, the Court will move on to examine whether the second guarantee was breached as well, for the sake of completeness;

34. The plaintiff noe alleges that the defendant did not delivery on the warranty that the property was not subject to any pending or threatened legal disputes or to any claims made by third parties (clause 4(v));

35. The defendant pleads that the property was not the subject of any pending or threatened legal disputes or claims at the time of the publication of the deed. He elaborates further in his testimony, stating that any issues that had been raised by Joseph Bonello Bianco, a third party whose property lies adjacent to the property acquired by the spouses Wells, had been resolved by the time the final deed of sale was signed¹⁵;

36. **Joseph Bonello Bianco** was summoned by the plaintiff noe to testify, and in his testimony¹⁶ he confirmed that the first issue with Mr Clague arose in

¹⁵ A fol 278 of the case file

¹⁶ A fol 161 *et seq* of the case file

2016 / 2017, and that issues with Mr Clague recurred. He mentioned an issue with the ceiling of his property, water leaking in the building, and obstruction of the use of a window in his property. The major issue, however, was the one relating to the afore-mentioned railings, which Bonello Bianco claims were erected on a dividing wall of which he has sole ownership. These issues were the subject of a series of letters exchanged between Bonello Bianco and the defendant in 2019 and early 2020, wherein Bonello Bianco persistently threatened to take legal action and hold the defendant responsible for damages sustained in Bonello Bianco's property, including structural damages, due to the defendant being in default. Asked specifically whether, on his part, the issues had been resolved as claimed by the defendant, Bonello Bianco answers in the negative and states,

Hsara fis-saqaf, ghandi saqaf forma ta' arkata emm kien ghamilli l-hsara fih ghax pretenda li tahtu huwa tieghu ukoll, filfatt konna ntqajna l-ufficju tal-avukat tieghi imma l-avukat tieghu kien qalli sippost (sic) tahtu huwa tieghu ...

[...]

Issa kull ma kien ghamel, jiena lili ma rrangali xejn, ghax filfatt ghadu bil-gebel imwaqqa' u bl-arkata mwaqqa', nofsha gebel, hemm il-katusa ghadha ghaddejja ukoll gol-bir tieghi u filfatt l-ahhar illegalitajiet li hemm, hemm fuq il-bejt, qabad ghamel il-hadid fid-divizorju tal-bejt u ma mexiex mal-permess tal-planning.

37. Therefore it transpires that not only were the issues not resolved by the time the deed of sale was signed, but they have not even been resolved to date. In fact, it was Bonello Bianco who filed a request to have permit for Application Nr 00751/20 revoked in terms of Article 80 of Ch 552 of the

Laws of Malta, after he had filed an application – and successfully obtained a permit – for the raising of the dividing wall upon which the railings were erected by the defendant to 7 courses above the higher roof for privacy (Application Nr PA 04226/20). Whether or not the defendant received the notification of Application Nr PA 04226/20 (exhibited as **Doc AD1** a fol 181 of the case file), is debated, as MaltaPost tracking information as interpreted by a MaltaPost representative¹⁷ suggests that the defendant did not receive this notification, but that it was returned to Bonello Bianco as unclaimed. Bonello Bianco refutes this, stating that the notification was never returned. This notwithstanding, however, even if for argument's sake it were to be considered that the notification never reached the defendant, Bonello Bianco made it evident that he was claiming ownership of the dividing wall over and over again, to the extent that the Court finds it very difficult to believe that the defendant was thoroughly convinced that all issues with Bonello Bianco had been resolved by the time the final deed of sale was signed. In fact, Bonello Bianco objected specifically to the sanctioning of the railings, registering himself in Application Nr PA 00715/20 as a registered objector on 17th February 2020¹⁸. Even if Bonello Bianco's objection was overlooked by the Planning Authority, and the permit to sanction issued anyway, the fact that, in February 2020, Bonello Bianco was advancing such a claim, in itself, was evidence of the fact that the issues with the defendant had not been resolved. If they had been resolved, it is the opinion of the Court that he would not have filed an objection to the sanctioning as he effectively did;

38. Furthermore, **Lindsay Wells** and **Michael Wells**, in their respective affidavits¹⁹, state that during the meeting held on the 2nd December 2020, that is, only a couple of months after the final deed was signed,

¹⁷ A fol 663 of the case file

¹⁸ Letter of objection is exhibited a fol 566 of the case file

¹⁹ A fol 188 *et seq* and 205 *et seq* of the case file, respectively

Mr Bonello and his team informed our team that there had been a long-standing dispute with Mr Clague in relation to the Property which dated back to early 2019, even prior to us signing the Preliminary Agreement.

Perit Charlene Jo Darmanin confirms this, stating that during this meeting:

Dr [Michael] Grech and JBL informed us that there had been long standing disputes over the Property and that these claims had been raised by JBL early in 2019. JBL maintained that the balcony railings in the Property were illegally affixed to the wall given that the wall was co-owned by both Parties and that in terms of the Civil Code, no railings could be affixed to a common wall. Additionally, Clague had installed some ducts to a well situated in the Property and the neighbouring tenement which he and JBL owned in common. This was done without JBL's consent and JBL asked Clague to remove this. Dr Grech informed us that the correspondence was on-going [...]

A claim of ownership of a common wall is not a claim that can be easily asserted and confirmed. It generally requires recourse to a Court of Law, or some form of settlement or agreement between the affected parties. This, however, was not the case in the case in question, and the defendant is basing his plea that all issues had been resolved solely on the fact that his last letter to Bonello Bianco had remained unanswered. This, in the opinion of the Court, does not suffice to prove that the defendant was convinced that the property was not subject to any pending or threatened legal dispute or claims made by third parties. The fact itself that Bonello Bianco objected to the sanctioning before the signing of the final deed of

sale constituted, in the Court's judgement, a red flag, which the defendant was fully aware of and should have brought to the attention of the plaintiffs.

39. To add insult to injury, the defendant did not even deign admit to the fact that there had been issues with Bonello Bianco in the past when confronted by Michael Wells. In his affidavit, **Michael Wells** states that on the 29th September 2020, *"I specifically asked Ian Clague if there was any bad blood between him and the neighbor."* to which the defendant *"didn't give the slightest indication of the fact that there was a dispute between them which had been ongoing since before we even signed the preliminary agreement to purchase the Property in 2019."*²⁰ The Court believes that this is proof of how adamant the defendant was to keep the spouses Wells in the dark, to the extent that he was not even willing to come clean about matters as they were after the final deed of sale had been signed;

40. In conclusion, the Court is of the opinion that the evidence brought forward strongly supports the plaintiff noe's claim that the defendant was fully aware that the property was subject, at the very least, to claims by Bonello Bianco, and therefore the defendant did not delivery on the warranty given by him in clause 4(v) of the final deed of sale;

41. Thus, **the Court finds in favour of the plaintiff noe insofar as the first four requests are concerned, and will proceed to uphold the same.**

B. Liquidation of Damages

42. The plaintiff noe is also requesting that the defendant be declared responsible for damages, including but not limited to a refund of the

²⁰ A fol 208 of the case file

purchase price of the Property, notarial and legal fees and other expenses incurred by the spouses Wells and are still incurring;

43. The Court sees no reason why the purchase price of the Property should not be refunded in terms of Article 1390 of Ch 16 of the Laws of Malta. After all, the Property was not used over the past three years as the keys were deposited in Court;

44. Secondly, as the plaintiff noe correctly stated in her first note of final submissions, the expenses incurred by spouses Wells as confirmed by **Notary Dr Andre Farrugia** in his affidavit²¹ were not contested. The Court believes that these expenses should also be refunded to spouses Wells as they were expenses incurred as accessory to the acquisition of the property. These expenses are €16,955.90 for the Notary's services, €9,992.04 for Public Registry and Land Registry fees, cost of searches and AIP Permit fees, and €135,000 in stamp duty;

45. Thus, the Court is liquidating damages as follows:

Refund of Purchase Price	€ 2,700,000
Notarial Services	€ 16,955.90
Public Registry Fees, Land Registry Fees, Cost of Searches & AIP Permit Fees	€ 9,992.04
Stamp Duty	€ 135,000
TOTAL	€ 2,861,947.94

46. The defendant will be ordered to pay damages as liquidated, as the Court is of the opinion that the defendant was fully aware that he was unable to deliver on the warranties as agreed in the final deed of sale, yet regardless

²¹ A fol 213 of the case file

proceeded to bind himself to deliver the same, to the detriment of the purchasers.

Decide

47. For these reasons, the Court:

- (i) **Upholds** the plaintiff nominee's first request, and declares that the defendant breached guarantees in the final deed of sale when he declared that (i) the Property is built according to law, and (ii) that the Property is not subject to any claims by third parties;
- (ii) **Upholds** the plaintiff nominee's second request, and declares that the Property sold to the spouses Wells was not in terms of the stipulated quality as agreed in the deed of sale;
- (iii) **Upholds** the plaintiff nominee's third request and rescinds the deed of sale dated 25th September 2020, published by Notary Andre Farrugia, to which the spouses Wells and the defendant are parties;
- (iv) **Upholds** the plaintiff nominee's fourth request and appoints Notary Dr Andre Farrugia to publish the relative notarial act of rescission of the deed of sale within three months from the date when this judgement becomes *res judicata*, and nominates Dr. Josette Grech to appear as curator on the act of rescission in default of the defendant's appearance on the same;
- (v) **Upholds** the plaintiff nominee's fifth request and declares that the defendant is responsible for damages incurred by the spouses Wells;

- (vi) **Upholds** the plaintiff nomine's sixth request and liquidates damages owed by the defendant to the spouses Wells in the amount of **two million, eight hundred and sixty-one thousand, nine hundred and forty-seven Euro and ninety-four cents (€ 2,861,947.94)**, as outlined in paragraph 45 of this judgement;
- (vii) **Upholds** the plaintiff nomine's seventh request and orders the defendant to pay damages as liquidated.

Costs of this case to be borne by defendant.

Read in open Court.

Hon Madam Justice Dr Audrey Demicoli LL.D.

Deputy Registrar