FIRST HALL OF THE CIVIL COURT

THE HON. MR. JUSTICE MARK SIMIANA, LL.D

Sworn Application Number 293/2020 MS

Yatong Yang

Vs.

1. **Notary Dr. Mario Bugeja**
2. **Notary Dr. Sandra Bugeja**

Today, the 21st day of November, 2024

Case Number: 4

The Court,

1. Having seen the sworn application filed by plaintiff on the 11th May 2020, by virtue of which, having premised as follows:

> Illi r-rikorrenti permezz ta' kuntratt ta' self u komprovendita in atti tal-intimata Nutar Dr. Sandra Bugeja kif pubblikat għan-nom tal-intimat Nutar Dr. Mario Bugeja datat 10 ta' April 2018 [**Dok. YY1**], xtrat u akkwistat l-appartament

bin-numru '1' li jifforma parti minn blokk bla isem u numru magħruf bħala Block B, Flat 1, 1st Floor, Triq Braille 9, Santa Venera;

Illi qabel il-pubblikazzjoni tal-istess kuntratt, l-esponenti rrikorriet għad-direzzjoni u pariri professjonali mingħand l-intimat Nutar Dr. Mario Bug eja rigwardanti l-ħlas tad-dazzju potenzjali u t-taxxa tal-bolla dovuta fuq il-kuntratt imsemmi. Illi oltre talbet il-parir professjonali u stħarrġet ukoll d-drittijiet tagħha li tikri il-proprjeta' suriferita, pariri li inċidew fuq id-deċiżjoni tagħha li tixtri l-fond suriferit.

Illi dakinhar tal-pubblikazzjoni tal-kuntratt in-Nutar Dr. Mario Bugeja kien indispost u l-kuntratt ġie ppublikat mill-intimata Nutar Dr. Sandra Buġeja, li dakinhar tal-akkadut kienet taħdem fl-istess ditta notarili miegħu;

Illi r-rikorrenti applikat għal self bankarju mingħand il-bank HSBC Bank Malta p.l.c. nhar is-27 t'Ottubru 2017, liema applikazzjoni ġiet milqugħa permezz ta' sanction letter [**Dok. YY2]** datata 14 ta' Diċembru 2017 li ntbgħatet lir-rikorrenti u li kienet neċessarja sabiex iseħħ il-pubblikazzjoni tal-kuntratt fuq imsemmi;

Illi permezz tal-kuntratt ta' self u komprovendita suriferit, il-bank HSBC Bank Malta p.l.c. ikkonċeda self ammontanti għal mija tlieta u ħamsin elf Ewro (**€153,000**) favur ir-rikorrenti illi, in garanzija tal-obbligi assunti minnha *inter alia* r-ripagament tas-self fl-istess att, ikkostitwiet ipoteka ġenerali u speċjali u privileġġ speċjali fuq il-fond mertu tal-kawża favur il-Bank;

Illi l-pariri u direzzjonijiet mogħtija mill-intimati, jew min minnhom, li jirrisalu għal qabel ma sar il-ħruġ u l-iffirmar tas-sanction letter bejn Ottubru u Diċembru tal-2017 u l-pubblikazzjoni tal-att relattiv fl-10 ta' April 2018, illum irriżultaw erronji. Illi n-Nutar intimat Dr. Mario Bugeja ta' l-pariri skorretti kif lamentati mir-rikorrenti f'dan ir-rikors, u kkonferma l-istess kemm verbalment kif ukoll bil-miktub (**Dok. YY3)** qabel l-iffirmar tal-konvenju;

Illi fil-jum tal-pubblikazzjoni tal-att relattiv, l-intimat Nutar Dr. Mario Bugeja kien ġie mill-ġdid mistoqsi dwar jekk il-proprjeta' mertu ta' dawn il-proċeduri setgħetx tiġi mikrija, għal liema mistoqsija l-istess Nutar Bugeja verbalment ikkonferma fl-affermattiv. Illi inoltre l-kondizzjonijiet li joħorġu mill-permess għall-akkwist ta' proprjeta' immobbli minn persuni mhux residenti ('AIP') ġew moqrija u mfissra lir-rikorrenti dakinhar stess tal-pubblikazzjoni min-Nutar intimata Dr. Sandra Bugeja, u kienu jinkontradiċu huma

wkoll il-kjarifiċi mogħtija lill-istess rikorrenti ftit taż-żmien qabel;

Illi n-Nutar intimata Dr. Sandra Bugeja assumiet ir-responsabbilita' professjonali ta' nutar meta għażlet li tipproċedi bil-pubblikazzjoni tal-att mertu ta' din il-kawża minkejja d-direzzjonijiet skorretti li n-Nutar Dr. Mario Bugeja ta' lill-istess rikorrenti, liema direzzjonijiet ivvizjaw l-kunsens finali tar-rikorrenti li tersaq u taddivjeni għall-iffirmar u pubblikazzjoni tal-att relattiv;

Illi dan kollu seħħ qabel ma ġew avvjati l-proċeduri bankarji u jevidenzja n-negliġenza grossolana tan-Nutara intimati, jew min minnhom, fl-espletament tad-doveri professjonali tagħhom;

Illi l-pariri debitament mogħtija mill-intimati, jew min minnhom, kienu jirrigwardaw fl-ewwel lok pariri erronji dwar it-taxxa tal-boll għax-xiri tal-proprjeta' suriferita li rriżultaw fi ħlas tad-dazzju addizzjonali ta' wieħed punt ħamsa fil-mija (1.5%) u fit-tieni lok direzzjoni żbaljata rigward l-permess għall-akkwist ta' proprjeta' immobbli minn persuni mhux residenti (AIP permit) li hi kienet ipprokurat ai termini tal-Kapitolu 246 tal-Liġijiet ta' Malta, konsegwenza ta' liema parir hi soffriet telf ta' dħul u introjtu mill-kiri li hi ġiet imċaħħda milli tgawdi tenut kont ukoll li l-istess permess ma kienx jippermitilha li tikri parti mill-proprjeta' suriferita jew l-proprjeta' sħiħa;

Illi riżultat tal-pariri erronji u skorretti mogħtija mill-intimati, jew min minnhom, ir-rikorrenti soffriet danni kkawżati minn spejjeż sostanzjali li ġew inkorsi minnha għar-raġunijiet suesposti;

Illi r-rikorrenti soffriet danni suesposti ammontanti tal-anqas għas-somma ta' seba' u tletin elf mitejn u ħamsin Ewro (€37,250) kaġun l-pariri u direzzjonijiet skorretti u erronji tal-intimati, jew min minnhom, debitament mogħtijin lilha qabel l-pubblikazzjoni tal-att mertu ta' din il-kawża;

Illi l-pariri professjonali erronji tal-intimati, jew min minnhom, saru bi preġudizzju serju u gravi tad-drittijiet tal-attriċi stante li sgwidaw lill-attriċi u wassluha sabiex taddivjeni għall-pubblikazzjoni tal-att finali ta' komprovendita kontra dak li kienet qed tifhem bil-konsegwenza li soffriet d-danni suriferiti;

Illi l-aġir tan-nutara intimati, jew min minnhom, jikkostitwixxi imperizja, negliġenza u nuqqas ta' ħila u

> diliġenza fit-twettiq tal-funzjonijiet tagħhom bi ksur tad-disposizzjonijiet tal-Att dwar il-Professjoni Nutarili li jirrendu lill-intimati, jew min minnhom, responsabbli għall-kumpens tad-danni li soffriet l-attriċi fis-somma ta' €37,250 u/jew somma oħra verjuri;
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> Illi minkejja li l-intimati, jew min minnhom, ġew interpellati permezz ta' ittra ufficjali tad-9 ta' Diċembru 2019 [**Dok. YY4**] u ta' ittra bonarja datata l-4 ta' Frar 2020 [**Dok. YY5]** sabiex jagħmlu tajjeb għad-danni kkawżati u jersqu għall-likwidazzjoni tal-ħlas tad-danni inkorsi mir-rikorrenti, huma baqgħu inadempjenti;
>
> Illi għalhekk kellha ssir il-preżenti kawża;

the plaintiff requested that this Court make the following declarations and orders:

> 1. Tiddikjara li n-Nutara intimati, jew min minnhom, aġixxew b'imperizja, negliġenza u nuqqas ta' ħila u diliġenza fit-twettiq tal-funzjonijiet tagħhom bi ksur tal-liġi notarili u dan billi taw pariri, direzzjonijiet u kjarifiċi professjonali skorretti u erronji lir-rikorrenti;
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> 2. Tiddikjara konsegwentement li l-pariri mogħtija mill-istess intimat/i, jew min minnhom, kkawżaw danni lir-rikorrenti;
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> 3. Tillikwida d-danni subiti mir-rikorrenti fl-ammont ta' €37,250 jew somma oħra verjuri, okkorendo bin-nomina ta' periti nominandi għal dan il-fini;
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> 4. Tikkundanna lill-intimat/i, jew min minnhom, iħallsu s-somma hekk likwidata fi żmien qasir u perentorju;
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> Bl-ispejjeż, inkluż tal-ittra uffiċjali numru 4826/2019 u bl-imgħaxijiet mid-9 ta' Diċembru 2019, data tal-imsemmija ittra uffiċjali, kontra l-intimati, jew min minnhom, li huma minn issa nġunti in subizzjoni.

2. Having seen the sworn reply filed by the defendants on the 19th June 2020[1], by virtue of which they raised the following pleas:

> 1. Illi l-azzjoni attriċi hija nulla, irrita u inammissibbli stante li l-kawżali kif dedotti m'humiex univoci;

[1] Fol.44.

> 2. Ili subordinarjament u mingħajr preġudizzju għall-eċċezzjoni preċedenti, għal dak li hemm allegat fil-konfront tal-intimata n-Nutar Dr Sandra Bugeja, dan hu preskritt bid-dekors ta' sentejn, skond l-artikolu 2153 tal-Kodici Ċivili stante illi l-att relattiv sar fl- 10 ta' April 1998 u l-kawza giet ipprezentata fl-14 ta' Mejju 2020;
>
> 3. Illi subordinarjament u mingħajr preġudizzju għas-suespost, l-intimata in-Nutar Dr Sandra Bugeja m'hijiex il-legittimu kontradittur f'din il-kawża u għalhekk għandha tigi lliberata mill-osservanza tal-ġudizzju;
>
> 4. Illi l-intimata n-Nutar Dr Sandra Bugeja fl-ebda ħin jew waqt ma ġiet mitluba tagħti parir jew direzzjoni lill-attriċi u għalhekk ma tistax tassumi responsabbilita' ta' parir jew direzzjoni li qatt ma ntalab minnha u qatt ma tagħat lill-istess attrici;
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> 5. Illi minghajr pregudizju ghas-suespost it-talbiet attriċi fil-konfront tal-intimata n-Nutar Dr Sandra Bugeja huma infondati fi fatt u fi dritt u jridu jiġu respinti;
>
> 6. Illi għal dak li jirrigwarda l-intimat in-Nutar Dr. Mario Bugeja jiġi eċċepit illi t-talbiet attriċi fil-konfront tiegħu huma wkoll infondati fil-fatt u fid-dritt u għandhom jiġu respinti;
>
> 7. Ili f'kull każ l-attrici għandha tipprova d-danni allegatament subiti;

3. Having seen the decree delivered on the 4th February 2021[2], by virtue of which this Court ordered that these proceedings be conducted and heard in the English language, upon plaintiff's request;

4. Having seen the testimony and documents collected during the hearing of this case, together with the acts of the proceedings in their entirety;

5. Having seen and heard the submissions made in writing and orally by the parties;

6. Having seen that the case was adjourned for delivery of judgment today;

Considers:

[2] Fol.75.

7. That this is a claim for damages which plaintiff alleges were caused to her by the defendants' negligence in the performance of their professional duties.

8. The facts of the case may be summarised as follows.

9. The plaintiff, who has been living in Malta since 2008, formed an intention to acquire an immovable property in Malta[3]. She testified that prior to proceeding with the purchase of such property, she engaged defendant Dr. Mario Bugeja (hereafter «the first defendant»), a notary public, to obtain his advice on the duty on documents which she would have been expected to pay upon acquiring a property in Malta, and on the possibility of renting this property to third persons. Plaintiff testified that the first defendant confirmed to her, on several occasions, that she would be entitled to rent out the property to third parties[4]. On cross-examination, it transpired that the first defendant had also been engaged by the plaintiff in connection with the publication of her deed of personal separation, which occurred during roughly the same period of time[5].

10. The plaintiff exhibited an exchange of e-mails with the first defendant, by means of which he advised her in writing that she would be legally entitled to rent immovable property purchased by her if she did not acquire such property to be used as her sole residence and consequently paid duty at the rate of five per centum[6].

11. On the strength of this advice, the plaintiff testified that she proceeded to enter into a promise of sale agreement to acquire the flat internally numbered one and forming part of the block known by the letter "B" and which in turn forms part of the larger building complex known by the name "Villino Ħal-Caprat" in Braille Street, Santa Venera. The promise of sale agreement was signed on the 23rd October 2017[7]. The first defendant, in his testimony, pointed out that the plaintiff had entered into an informal agreement with the vendor prior to the promise of sale agreement and prior to the exchange of emails exhibited by the plaintiff, by means of which plaintiff had paid the sum of one

[3] Fol.50.
[4] Fol.50.
[5] Fol.97.
[6] Fol.12.
[7] Fol.116.

thousand Euro to the vendor in order for the property to be reserved for her until she concluded her personal separation and would be able to enter into a formal promise of sale agreement[8]. The first defendant also testified that, notwithstanding his advice in writing prior to the promise of sale agreement, on the day in which the promise of sale agreement was signed he recalled informing plaintiff that duty was payable by her at the rate of five per centum[9].

12. The plaintiff consequently applied to HSBC Bank Malta plc for the provision of a loan to finance the purchase of the abovementioned property. Her application was approved by the bank by means of a sanction letter dated 14th December 2017[10]. This sanction letter indicates that the purpose of the loan shall be «*to end finance purchase and completion of future residence*». Fiha jingħad ukoll: «*Should you decide to rent the property (in whole or in part) while the Loan is still outstanding, interest at commercial rate will be charged for the whole period that the property is rented. In such instances, prior notice is to be given to the Bank (Mortgage Business Services) after obtaining due authorisation from HSBC Bank Malta p.l.c.*». The evidence in fact shows that the loan sought and obtained by the plaintiff was a loan to acquire residential property, and not a loan to acquire property for the purpose of leasing it[11].

13. On the day scheduled for the publication of the deed of purchase, the first defendant was unavailable, and the deed was published by defendant Dr. Sandra Bugeja (hereafter «the second defendant»), another notary public who practised her profession within the same notarial firm. The first defendant testified that the second defendant's involvement in the case was limited to the publication of the deed which the second defendant carried out in his stead[12]. The deed, containing both the loan from the bank to the plaintiff and the sale of the property, was published on the 10th April 2018[13]. By virtue of the said deed, the said bank lent plaintiff the sum of €153,000[14], and the plaintiff, in order to guarantee her obligation of paying this loan, granted the bank both general and special hypothecs as well as a special privilege on the property purchased.

[8] Fol.150.
[9] Fol.150.
[10] Fol.16.
[11] Rfr. to the testimony of Lorraine Attard, at fol.86.
[12] Fol.151.
[13] Fol.6.
[14] Rfr. to the testimony of Lorraine Attard, at fol.77.

14. Plaintiff claims that the advice provided to her by the first defendant was incorrect. In order to proceed with the purchase of the property, plaintiff was obliged to seek to obtain a special permit from the local authorities in terms of article 6 of the Immovable Property (Acquisition by Non-Residents) Act[15], dubbed an AIP permit. This permit was apparently issued one day prior to the appointment for the publication of the deed. Plaintiff claims that first defendant did not read or explain the content of this permit to her, and she was made aware of such content only on the day of the deed through the second defendant. Plaintiff further claims that the content of this permit was contrary to the advice provided to her by the first defendant, and contacted the first defendant at that point. The plaintiff testified that the first defendant admitted, on the phone, having made a mistake when advising her that she would be legally entitled to rent the immovable property[16]. In her sworn application, the plaintiff premised that despite her indications to the second defendant that her decision to purchase the property was based on incorrect advice, the second defendant proceeded nevertheless with the publication of the deed. In her testimony, plaintiff explained that she felt constrained to proceed with the purchase of the property for the following reasons: «- *it was my necessary need to have a place to live in as I had already discontinued the rental agreement at the time; - If I chose not to sign the contract, all the deposits/expenses made would have become irrecoverable; - In the meantime in order to find another property, it would have been necessary of me to look for another place to rent. To enjoy the same living condition as with my current apartment, the market price is not less than €1200/month in value, which means twice the loan repayment I have to contribute per month due to his mistake*»[17].

15. Plaintiff also testified that the defendants failed to include in the deed of purchase the declaration required in accordance with articles 7(2) of the Immovable Property (Acquisition by Non-Residents) Act.

16. The first defendant, on the other hand, testified that he had informed the plaintiff of the conditions of the AIP permit and had told her on multiple occasions that she was not

[15] Chapter 246 of the Laws of Malta.
[16] Fol.50.
[17] Fol.50-51.

entitled to rent the property to third parties[18]. The testimony of the second defendant with reference to the events occurring during the publication of the deed is to the effect that plaintiff's only reaction was when she was informed that she was obliged to pay duty on documents at the rate of 5%, instead of 3.5%[19]. The second defendant stated that the plaintiff did not want to pay the duty on the day of the deed in order to obtain further confirmation of the applicable rate of duty payable by her. This confirmation was provided by the second defendant after the deed, after which the plaintiff paid the relative amount to the second defendant who then proceeded to register and enroll the deed[20].

17. It transpires from the evidence that plaintiff applied for the AIP permit on the 30th October 2017[21], and in her application, she expressly indicated that the purpose of the acquisition of the property was to be used as «residence for self and family»[22]. Plaintiff expressly confirmed making this indication on the application during her cross-examination[23], and also confirmed that the application was filled out by herself and not by the defendants[24]. The application was approved on the 1st February 2018, and the AIP permit was issued on the 6th February 2018[25]. The evidence also shows that at the time of the application, had the plaintiff indicated that the purpose of the acquisition of the property was to lease it out to third parties, the permit would not have been granted[26]. The AIP permit expressly provided as a condition that «*The immovable property is solely used as a residence by the applicant and his/her/their family/ies and for no other purpose*»[27]. The first defendant was informed of the issue of the permit on the 6th February 2018[28] and the permit was paid and collected by him[29].

18. The defendants stated in their testimony that when the plaintiff was presented with the bill for their services, she only raised a complaint with regard to the delay in the

[18] Fol.160-161.
[19] This is also confirmed by the testimony of Francis Spiteri, at fol.229.
[20] Fol.193.
[21] Rfr. to the testimony of Bernard Bonnici, at fol.178.
[22] Fol.113.
[23] Fol.99.
[24] Fol.104.
[25] Rfr. to the testimony of Bernard Bonnici, at fol.178.
[26] Rfr. to the testimony of Bernard Bonnici, at fol.181.
[27] Fol.186.
[28] Rfr. to the testimony of Bernard Bonnici, at fol.227.
[29] Rfr. to the testimony of Bernard Bonnici, at fol.232, as well as the document exhibited at fol.233.

publication of the deed[30], which delay the defendants attributed to the bank providing the loan to the plaintiff[31] as well as to the plaintiff herself[32].

19. Since plaintiff held that the above actions caused her damages consisting of the payment of additional duty on documents as well as loss of rental income from the property purchased by her, she called upon the first defendant to come forward for the liquidation and payment of such damages by virtue of a judicial letter bearing the progressive number 4826/2019, filed on the 9th December 2019[33], which was served on the first defendant on the 14th December 2019. When the defendants rejected her claims, the plaintiff proceeded with this suit.

Considers:

20. That the defendants have raised a plea in connection with the nullity and inadmissibility of plaintiff's action, as well as in connection with the prescriptive period contemplated under article 2153 of the Civil Code. These are pleas that, in terms of article 730 of the Code of Organization and Civil Procedure ought to be decided under separate heads of the same judgment.

21. That with regards to the plea that plaintiff's action is null and inadmissible, the Court observes that the defendants are basing their contention on the premise that the plaintiff's causes of action are not univocal – in the defendants' own words «*il-kawżali kif dedotti m'humiex univoċi*». In their note of submissions, the defendants make no reference to this plea.

22. That it has been held that the cause of the action is the juridical fact upon which the plaintiff bases his action: «*... la causa e' il fatto giuridico che stabilisce il fondamento del diritto*»[34] (see also the decision ***Giuseppe Bugeja Bonnici vs. Dottor Andrea Pullicino ne u ieħor***, First Hall, 21st May 1935)[35]. In the present case, plaintiff's cause

[30] Fol.240.
[31] Fol.194.
[32] Rfr. to the testimony of the first defendant, at fol.236-237.
[33] Fol.23.
[34] ***Laurent***, Principii di Diritto Civile, Vol.XX, §63.
[35] Kollezz. Vol.XXIX.ii.510.

of action against both defendants is the same and identical. Plaintiff holds that the defendants carried out their professional duties in her regard with negligence and to a lesser degree of diligence than that to which they were obliged. This Court sees no conflict or equivocation with regard to the *causa petendi* brought forward by the plaintiff.

23. Accordingly the first plea is rejected.

Considers:

24. That the defendants raise the plea of prescription insofar as the claim concerns the second defendant. The prescription raised is that contemplated under article 2153 of the Civil Code, which provides thus:

> Actions for damages not arising from a criminal offence are barred by the lapse of two years.

25. It has been consistently held through the jurisprudence of these Courts that the applicable prescriptive periods for claims of damages are divided in three categories, depending on the nature and origin of the claim: «*Għall-fini tad-determinazzjoni ta' liema perijodu preskrittiv huwa applikabbli, wieħed għandu jħares lejn in-natura ta' l-azzjoni esperita. Il-liġi u l-ġurisprudenza jiddistingwu tlett xorta ta' danni, jiġifieri dawk derivanti minn delitt veru u proprju [fejn il-preskrizzjoni hija dik ta' l-azzjoni kriminali], dawk derivanti minn ħtija akwiljana [fejn il-preskrizzjoni hija dik ta' sentejn] u dawk derivanti minn inadempjenza kontrattwali [fejn il-preskrizzjoni hija dik ta' ħames snin]*»[36].

26. With regard to the distinction between *culpa ex contractu* and *culpa ex delictu vel quasi delictu* it has been held that: «*Ir-responsabbilità għad-danni tirriżulta mir-rabta ġuridika jew nuqqas tagħha, u dana skond il-każ, li hemm bejn il-partijiet kontendenti. Torrente jagħti eżempju ċar sabiex ikun jista' jagħraf id-distinzjoni bejn rabta kontrattwali li tagħti lok għar-responsabbilita' contrattuale u n-nuqqas ta' rabta kontrattwali li tagħti lok għar-responsabbilita' extra contrattuale. Id-distinzjoni bejn*

[36] ***Perit Arkitett Joseph Barbara et vs. Segretarju tal-War Damage Commission***, First Hall, 15th October 2003.

dawn iż-żewġ sitwazzjonijiet hija proprio l-eżistenza o meno tar-rabta obbligatorja antecedenti għall-att jew ommissjoni li ta lok għad-dannu li l-attur jallega li ġie lilu kkawżat. Il-ħtija meta tiġi kkunsidrata fl-entita' tagħha, hija waħda; u taħt dan l-aspett ma hemmx distinzjoni bejn kolpa kontrattwali u dik komunement imsejħa aquiliana, li titnissel minn delitt jew kważi delitt. Id-differenza bejniethom tinsab fil-kawża u fil-grad. In kwantu għall-kawża, il-ħtija kontrattwali tippresupponi obbligazzjoni pre-eżistenti li magħha hija marbuta; mentri l-ħtija aquiliana tippresupponi fatt li minnu titnissel ex nunc. In kwantu għall-grad id-differenza hija riposta fl-estensjoni tar-responsabbilita' fis-sens illi fil-kolpa kontrattwali wieħed jista' jirrispondi ta' ħtija ħafifa skond il-każ, mentri fil-kolpa aquiliana r-responsabbilita' testendi ruħha b'mod li dwarha ma hemmx grad. L-eżistenza o meno ta' din ir-rabta obbligatorja, oltre li tiddetermina n-natura ta' l-azzjoni għad-danni tiddetermina wkoll it-terminu entro liema din l-istess azzjoni għandha tiġi istitwita»[37].

27. It is this Court's understanding that the basis of the plaintiff's claim is contractual. The plaintiff holds that the defendants were engaged by her to provide professional services and that they failed to carry out these services with the required level of diligence. This basis appears to be in conformity with the prevalent legal doctrine and jurisprudence on the nature of the legal responsibility of the notary public. Several authors writing in the context of other civil law systems similar to the system prevailing in Malta have expounded on the theory that the notary public's responsibility towards the parties engaging his services directly is *ex contractu*. On the other hand, the nature of the notary public's responsibility towards third parties who are indirectly affected by the acts carried out in furtherance of his or her profession is *ex delictu vel quasi delictu*:

> Sembra, invece, più corretto ritenere che la responsabilità derivante dall'esercizio della funzione pubblica notarile non dipende dall'intrinsica natura dell'attività in concreto espletata, dalla quale casualmente discende l'evento dannoso, ossia dal fatto che si tratti, ad esempio, di esercizio della potestà certificante ovvero di attività di adeguamento o di consulenza, ma dalla circostanza che il soggetto danneggiato sia il richiedente la prestazione, o, comunque, una delle parti intervenienti all'atto giuridico documentato dal notario ovvero un terzo.

[37] ***Av. Dr. Louis Cassar Pullicino noe vs. Angelo Xuereb pro et noe***, First Hall, 3rd July 2003.

> Di ciò appare consapevole anche la Suprema Corte, la quale ha sancito che la responsabilità del notaio è sempre contrattuale nei confronti delle parti e, invece, è extracontrattuale nei confronti dei terzi, che non sono i destinatari dell'atto, i quali dalla mancata rispondenza intrinsica o finalistica dell'atto con la sua formalità estrinseca o apparente abbiano risentito un concreto danno, sempre che, come è ovvio, tale danno si ricolleghi, in funzione di un nesso causale al comportamento colposo, o *a fortiori* doloso, del notaio. In particolare, secondo tale indirizzo la responsabilità del notaio per colpa nell'adempimento delle sue funzioni ha natura esclusivamente contrattuale nei confronti delle parti (clienti); ha invece natura extracontrattuale nei confronti dei terzi, la cui sfera giuridica sia lesa dal comportamento tenuto dal notaio nello svolgimento della sua attività[38]

28. This view is one which has also been held by our Courts in various decisions. In the case ***Carmel Galea et vs. Nutar Pubbliku Dott. Pierre Falzon*** (Appeal Superior, 9th October 2009) it was held that: «*Il-funzjoni pubblika tan-nutar pubbliku ġġib magħha responsabbilitajiet li jaqgħu taħt l-isfera pubblika rregolati mill-Kapitolu 55 tal-Liġijiet ta' Malta. Jekk nutar pubbliku ma josservax il-forma li biha huwa għandu jirrediġi l-atti notarili kif ukoll il-proċeduri preskritti, allura jkun qed jivvjola dan l-Att, fil-kapaċità tiegħu ta' uffiċjal pubbliku. Tali responsabbilità normalment titqies bħala waħda extra-kuntrattwali. Min-naħa l-oħra, in-Nutar Pubbliku għandu wkoll responsabbilità kuntrattwali, fil-kapaċità tiegħu bħala libero professionista, u dan a bażi tal-mandat mogħti lilu mill-partijiet*». It is in view of these two functions of the notary public that the local Courts have held that the relative responsibility is based on quasi-delict where the claimant is a beneficiary under a faulty will published by the notary and thus subject to the prescriptive period provided in article 2153 of the Civil Code (viz. ***Rita Agius vs. Nutar Joseph Vassallo Agius***, Appeal Superior, 20th July 2020), and to hold that such responsibility is, on the other hand, contractual where the claim is made by the party to the deed published by the notary (viz. ***Dr. Stephen Muscat nomine vs. Nicholas Grima et***, Appeal Superior, 28th April 2021).

29. Back to the present case, the Court has no difficulty whatsoever to arrive at the conclusion that the basis of the responsibility attributed by plaintiff to the defendants is

[38] ***Vito Tenore,*** Il Notaio e le sue quattro responsabilità (Giuffrè, 2016), pgs.374-375. The same view is held by ***Luca Siliquini Cinelli***, La responsabilità civile del Notaio (Wolters Kluwer, 2011), pgs.44-54.

inherently contractual in nature. The lack of diligence which plaintiff imputes to the defendants is in connection with the provision of legal advice requested by her, and is therefore completely independent from the other functions which the notary public is expected to carry out by virtue of the public nature of that office.

30. Accordingly, the prescriptive period pleaded by the defendants is not applicable to the plaintiff's action, and the plea of prescription is therefore being rejected.

Considers:

31. That the second defendant also pleads that she is not to be considered as the proper defendant in this suit.

32. That the Court observes that it has been held that every party who is cited as defendant in any suit must have the interest to contradict the plaintiff's demands, which interest consists of «*la utilita' finale della opposizione contro quella domanda*»[39]. The same cited author further explains that «*... il convenuto deve essere il contradditore legittimo alla domanda dell'attore; cioè colui dal quale, volontariamente o non, proviene l'impedimento ossia "lo stato di violazione" del diritto dell'attore...*»[40]. In the decision ***Frankie Refalo noe vs. Jason Azzopardi et*** (Appeal Superior, 5th October 2001) it was held that: «*Biex jiġi stabbilit jekk parti in kawża kienetx jew le leġittimu kontradittriċi tal-parti l-oħra, l-Qorti trid bilfors tivverifika prima facie jekk il-persuna ċitata fil-ġudizzju, kienetx materjalment parti fin-negozju li, skond l-attur, ħoloq ir-relazzjoni ġuridika li minnha twieldet l-azzjoni fit-termini proposti*».

33. In other words, for a defendant to be deemed a "proper defendant" (or «*leġittimu kontradittur*» as is commonly referred to in Maltese legal parlance), the plaintiff's demands must be addressed towards that defendant in connection with a fact or series of facts which involve that defendant, irrespective of whether such demands are well-founded or not. For instance, in the decision ***Alfred Spiteri et vs. Awtorità dwar it-Trasport ta' Malta et*** (Appeal Superior, 30th May 2014) the judgment of first instance which had discharged one of the defendants as not being the "proper defendant" was

[39] ***Mortara***, loc cit.
[40] Op cit, §473.

revoked, after the Court of Appeal considered that in the writ by virtue of which the suit was commenced, the plaintiffs were demanding damages from that defendant on the basis of facts which they were attributing to him. Whether or not those facts correspond to the truth or constitute grounds for the demands made is an issue pertaining to the merits, but that defendant cannot be considered an "improper defendant" and cannot be discharged from the suit for that reason.

34. In the present case, the plaintiff is attributing certain facts to the second defendant and is, on the basis of those facts, claiming damages from her. This is sufficient to vest the second defendant with the necessary legal interest to respond and contradict the plaintiff's claims, and therefore it is undisputable that the second defendant is also a "proper defendant" to the suit.

35. The third plea raised by the defendants is therefore also unfounded.

Considers:

36. That having disposed of the defendants' preliminary pleas, the Court may now make its observations on the merits of the claim.

37. On the subject of a professional's civil responsibility, reference ought to be made to the analytical study made by the Court of Appeal in its decision ***Victor Savona pro et noe vs. Dr. Peter Asphar et*** (2nd April 1951)[41]. After ample reference to legal doctrine, that Court concluded that a professional (in the case cited the professional involved was a doctor) «*mhux tenut għad-danni riżultanti minn żball professjonali, ammenokke' dana l-iżball ma jkunx grossolan, u ammenokke' l-ħsara ma tistax tiġi lilu addebitata minħabba nuqqas ta' prudenza, diliġenza u attenzjoni ta' "bonus paterfamilias"*». This principle has been followed even in recent jurisprudence (see, for instance, ***Frankie Zerafa et vs. Olga Avramov et***, Appell Superjuri, 30th May 2008), and has also been applied to the profession of advocate (see ***Carmelo Calleja vs. Dottor Frank Xavier***

[41] Kollezz. Vol.XXXV.i.55.

Vassallo[42] u ***Carmelo Agius Fernandez et vs. Avukat Dr. Filippo Nicolò Buttigieg***[43]) as well as notary public (see ***Mary Xuereb noe vs. Nutar Emmanuele Agius***[44]).

38. Now the Court immediately finds that, insofar as the second defendant is concerned, the claims made by plaintiff cannot succeed. The second defendant's role was limited to the publication of the deed and other preparatory work which did not appear to involve the supply of advice to the plaintiff. The plaintiff's claim is essentially built on the premise that she was wrongly advised and therefore no responsibility can be attached to the defendant who provided no advice to her. The plaintiff's claim that the second defendant contracted such responsibility by proceeding with the publication of the deed is also unfounded at law, since it was the plaintiff who decided to proceed with the publication of the deed for the reasons explained in her sworn statement and to which this Court has already made reference earlier. These reasons cannot be attributed to any negligence or imprudence of the second defendant.

39. For these reasons, the Court will therefore be rejecting the plaintiff's claims against the second defendant.

40. With regard to the plaintiff's claims against the first defendant there is more to be said.

41. In the present case, the evidence shows that the first defendant had advised the plaintiff, in writing, that she would be able to lease the property she was to acquire if she paid duty at the rate of 5%. It was also shown that this advice was incorrect, since at the time the facts in issue occurred, the plaintiff could not acquire an immovable property for the purpose of leasing it. In the case ***Mary Xuereb noe vs. Nutar Emmanuele Agius*** (already cited) it was clearly held that: «*Min jagħti kunsill iħalli f'idejn il-konsiljat il-libertà u r-responsabbilità tad-deċiżjoni; imma min jipperswadi bniedem li jkun jafda fih biex jagħmel dak li jkun iddeċieda li għandu jsir, u dan jaċċetta minħabba fil-fiduċja li jkollu f'dik il-persuna, allura l-materja toħroġ mill-isfera tal-kunsill u tidħol fil-materja tal-parir; li, jekk jirriżulta żbaljat l-għaliex min jagħtieh ikun negliġenti, in*

[42] Appell Superjuri, 27th June 1960 – Kollezz. Vol.XLIV.i.194.
[43] Appell Superjuri, 6th October 1958 – Kollezz. Vol.XLII.i.436.
[44] Appell Superjuri, 23rd May 1960 – Kollezz. Vol.XLIV.i.161.

kwantu ma kellux bażi soda fuqhiex ipoġġieh, meta seta' u kien possibbli li jkollu, allura dak il-professjonista li hekk jagħmel huwa tenut għad-danni skond il-liġi komuni».

42. The first defendant however affirms that following this advice in writing, he had corrected the advice provided to the plaintiff and had on several occasions informed her that she could only acquire the property for the purpose of residing in it. The plaintiff contests this version of events.

43. The Court does not attach much weight to the fact that the plaintiff had applied and obtained a bank loan for the purchase of her residential property on terms which were preferential to her due to that particular purpose of the loan. The evidence shows that the bank could authorise the plaintiff to lease the property and subject the loan to different and less preferential conditions. Accordingly the conditions of the loan affect the plaintiff's relationship with the bank and are *res inter alias acta* with regard to the defendants. Plaintiff's explanation that she wanted to benefit from the advantageous conditions of a home loan until the time came when she was in a position to rent her property is a plausible explanation.

44. Plaintiff's version of events however became implausible when it transpired that she had applied for the issue of an AIP permit by means of an application in which she herself had declared that the property to be purchased was to be used as a residence for her and her family. This declaration was made by the plaintiff voluntarily and knowingly, and is incompatible with her testimony that she intended to acquire the property for the purpose of leasing it and was deprived of this possibility due to the bad advice provided by the defendants. It also transpired that the AIP permit would not have been issued had the plaintiff made a different declaration as to the intended use of this property, and the Court is therefore in a position to infer that the plaintiff made this declaration because she was aware that without it, the acquisition of the property would not be possible.

45. An evaluation of all the evidence tendered leads this Court to the conclusion that the plaintiff wanted to acquire this property due to the fact that she was about to conclude her personal separation from her husband. An examination of the deed of personal separation exhibited in the acts of these proceedings shows that the plaintiff was not

assigned any immovable property from the separation and that her former residence (i.e. the matrimonial home) was her husband's paraphernal property. This further strengthens this Court's conclusion that the plaintiff was constrained to acquire an immovable property for her own residential requirements. This conclusion is indirectly corraborated by the plaintiff herself who explained during her cross-examination that her intention was to reside in this property and lease spare bedrooms to different individuals. Therefore the plaintiff fully intended to acquire the property irrespective of the advice provided to her by the first defendant.

46. Further corraboration of this conclusion is the fact that during the publication of the deed, the plaintiff raised an objection to the fact that she was expected to pay duty at the rate of 5% instead of 3.5%. The fact that plaintiff expected to pay duty at the rate of 3.5% instead of 5% fortifies the Court's conclusion that the plaintiff, at the time of the deed itself, intended to purchase the property for residential purposes. Had the situation been otherwise, the plaintiff would not have been surprised to find that duty was to be paid at a higher rate, since the advice in writing provided by the first defendant clearly stated that the applicable rate of duty to acquire a property for non-residential purposes was 5%.

47. When the plaintiff received the defendants' bill of services, she complained as to the delay in the publication of the deed, and no reference was made to the fact that she had acquired a property subject to a limitation which deprived her of the purpose for which she purportedly wished to acquire it. The Court deems it unlikely that the plaintiff, who admittedly was aware of this condition in the AIP permit on the day of the deed, would not raise her objections at this time, and instead raise other completely unrelated objections.

48. The above considerations lead the Court to the conclusion that plaintiff was well-aware that she was acquiring a property for her own residential use. Plaintiff complained that she was left unaware of the content of the AIP permit until the day of the deed. The evidence in fact does show that this permit was collected and paid for the first defendant, and nothing indicates that the first defendant made any effort to ensure that the plaintiff was made aware of the content of this permit. However, the Court cannot ignore the fact that the condition which allegedly offended the plaintiff was essentially

a reflection of the declaration made by herself in the application, i.e. that she wanted to acquire the property for her and her family's residence. The Court cannot accept that the plaintiff was surprised on the day of the deed with a condition which essentially reflected her own declaration on the application.

49. The evidence shows that the plaintiff appeared to be aware of the limitations attached to the use of the property which she was to acquire. An awareness and cognizance which is manifest in her declaration on her application for the AIP permit and her expectation that she was to pay duty at the lesser rate. Had the plaintiff still been acting under the impression created by the first defendant's incorrect advice, she would have certainly indicated in her application for the AIP permit that she wanted to rent the property – since the first defendant's advice was that she could indeed rent such property, there was absolutely no reason for her to make a different declaration.

50. The only plausible reason which explains why the plaintiff declared that she wished to acquire the property as her residence is that the first defendant had in fact informed her that she could not acquire the property for another purpose.

51. Accordingly the Court finds that the first defendant cannot be considered to be responsible for causing damages to the plaintiff, since plaintiff had acted voluntarily and with full cognizance of cause.

52. For the above reasons, the Court is hereby deciding this case by:

(i) rejecting the defendants' first plea;

(ii) rejecting the defendants' second plea;

(iii) rejecting the defendants' third plea;

(iv) upholding the defendants' fourth, fifth and sixth pleas;

(v) rejecting all of the plaintiff's demands;

(vi) ordering that the costs of this case be borne as to three-fourths ($^3/_4$) by the plaintiff and as to the remaining one-fourth ($^1/_4$) by the defendants.

Hon. Mark Simiana, LL.D
Judge

Deputy Registrar