IN THE FIRST HALL OF THE CIVIL COURT

Hon. Mr. Justice Dr. Aaron M. Bugeja M.A. (Law), LL.D. (melit)

Today 28 November 2024

Application number 620/2019

Nicholas Charles Young (K.I. 0290696M)
Marthese Young (K.I.312984M)

vs.

Alexander Anastasi (K.I. 684749M)
Nadia Anastasi (K.I. 457856M).
Domenic Anastasi (K.I.582851M)
Maria Fatima Anastasi (K.I. 594952M)
Raymond Anastasi (K.I.734455M)
Sheryl Anastasi (K.I. 104703L)

The Court saw the following:

A. The application

1. Having seen the application presented on 21 June 2019 through which the applicants requested as follows:

> Therefore, subject to the declaration and statements of this Court, and for the reasons mentioned above, the respondents should answer why this Court should not:
>
> i) Declare and decide that the promise of sale agreement of the 12th October 2015, the temporary utile dominium for at least 44 years relating to the tenement number 2, forming part of block number 1, St. John Square, Valletta subject to all the stipulated terms and conditions

as drawn up by notary Justin Fenech, Document A, as duly extended between the parties, is enforceable in terms of law.

ii) Condemn the respondents to appear for the publication of the relative final deed in execution of the promise of sale agreement dated 12th October 2015, Document A, above referred as subject to all such terms and conditions as arising from the same agreement;

iii) appoint notary Dr Justin Fenech to publish the relative deed of sale on the day, time and place established by this Honourable Court;

iv) appoint deputy curators to represent any defaulting party on the said deed of sale;

v) Failing which to declare and decide that the respondents are responsible for the payment of damages incurred by the applicants including notarial expenses in the execution of the same promise of sale agreement as well as other expenses to incurred by them to be able to purchase the temporary emphyteutical concession in terms of the same promise of sale agreement of sale and the opportunity cost incurred by them failing such sale by reference to any other tenement of the same configuration and size within the same area, including loss of profits and other damages as will be proved during the hearing of the cause;

vi) To liquidate the damages suffered by the applicants as stated above, and if necessary by appointing any architect as the court deems fit;

vii) And to condemn the respondents to pay the damages so liquidated together with legal interest until the date of effective payment.

With the costs, including those of the official letter dated the 29th May 2019 and also with reference to the oath of the respondents.

2. Having seen the reply of Alexander Anastasi et presented on 23 July 2019, in which respondents opposed the requests.

3. Having seen that in the minutes of the sitting of the 9 January 2020, the applicant's Lawyer requested that an architect be appointed to give the valuation of the current market value for the tenement considering that the said property was to be granted by way a temporary emphythetical concession for 44 years, and the value of other properties of the same size and condition in the same area. For this purpose, the Court appointed architect Godwin Abela as technical expert.

4. Having seen that architect Godwin Abela filed his sworn technical report on the 18 February 2020 (fol 165).

5. Having seen that in the minutes of 18 February 2020, the Lawyer for the respondents pointed out that this report went beyond the Court approved terms of reference and thus requested the Court to remove

those parts of this report that went beyond the terms of reference assigned to the same technical expert.

6. On the 18 February 2020 the Court ordered the expert to submit a new report which was to be limited to the terms of reference decreed in the Court minutes of the sitting of the 9 January 2020. The Court ordered the removal of the expert's report and authorized the expert to present a new report. (fol. 165).

6. Having seen that in the minutes of the sitting of the 25 February 2021, Lawyer for respondents noted that in the meantime, respondents had acquired the legal title from the Lands Department and they were in a position to appear on the final contract of sale. Applicant's Lawyer reserved his position according to the law, and claimed that the contract was not entered into due to reasons the respondents were solely responsible for. Respondent's Counsel highlighted that at that stage the applicants were unwilling or unable to appear on the deed of sale and this in view of what they had just declared. Applicants Counsel countered by claiming that the claimants were ready to come to the final contract as long as all the conditions were met. (fol. 181).

7. Having seen the note of the respondents presented on 28 November 2022, with which they attached an agreement in terms of which the original promise of sale of the 12 October 2015 was rescinded (fol 268 *and it follows*).

8. Having also seen the further sworn reply of the respondents filed on the 6 March 2023, wherein they raised a further plea stating that once the original promise of sale agreement was rescinded, the merits of the case were hence exhausted and therefore the plaintiff's action lacked any further legal basis (fol 275).

9. Having seen the applicant's note of submissions presented on the 12 February 2024.

10. Having seen the note of submissions of the respondents presented on 5 April 2024.

11. Having seen all the witnesses' testimony transcripts, documents and the other records of these proceedings.

12. Having seen that in the minutes of 16 May 2024, the case was adjourned for judgment.

B. FACTS OF THE CASE

13. A promise of sale agreement was signed between the parties on the 12th October 2015, Doc A fol 6, for the acquisition of tenement number 2, Block 1, St John Square, Valletta as subject to a temporary emphyteusis of at least forty four years in line with all the terms and conditions stipulated therein. Extensions to this promise of sale agreement had to be made as seen from the documents exhibited Doc B to Doc F. These were registered with the Commissioner of Inland Revenue as shown in Doc D and F. The applicants filed an official letter against respondents on the 29th May 2019, which is exhibited in Dok G.

14. The property in question belonged to the Lands Authority. According to Legal Notice 400/2015 in order for the respondents to be able to transfer this emphyteutical concession they had to obtain the consent of the Commissioner of Lands. On the 9th December 2015 the respondents filed their application with the then Lands Department for them to be considered on the basis of the provisions of the Legal Notice 400/2015. However during the operative period of the promise of sale agreement and its extentions, the respondents did not manage to obtain this consent on account of the fact that on the 13th April 2018 the Lands Authority had in the meantime changed its existing policy by introducing another policy whereby no consent was to be given for any transfer of the emphyteutical grant by the approved emphyteutae to third parties prior to the expiration of ten years from the date of the concession.

15. The respondents' application (for the granting of the emphyteutical concession) was approved by the Lands Authority on the 3rd November 2017. Yet respondents were called by the Lands Authority to appear on the deed of emphyteusis on the 25th July 2019 by a letter dated 16th July 2019. However, the respondents did not appear for the signing of the deed on the date set, and asked for a postponement of the date for the signature of the same.

16. In the meantime, on the 7th May 2020 the Lands Authority once again changed its policy and lifted its refusal to grant its consent to emphyteutae to be able to transfer their concession to third parties

prior to the expiration of ten years from the date of the concession. Subsequent to this change, the respondents were once again called to sign the deed of emphyteusis, something that they did on the 30th November 2020. Consequently the respondents also filed a request to be able to transfer their title to third parties, which consent was given to them by the Board of the Lands Authority on the 9th July 2021.

17. However, these developments took place well after the expiry of the promise of sale agreement and after that the applicants had already filed the present proceedings.

18. During those periods, the Covid-19 pandemic broke out and APS Bank decided not to extend its commitments to grant two loans to Cotswold Limited, a limited liability company in which the applicants were both majority shareholders of. The sanction letter that was issued to that Company on the 26 April 2018 was revoked by APS Bank by means of a letter of the 21 January 2021.

19. The applicants claim that the final deed of sale could not be executed due to the conduct and shortcomings of the respondents, because they did not conclude previously when they did not conclude the emphyteutical deed and obtain the consent of the Lands Authority when they had originally obtained the approval of the Lands Authority.

20. After an exchange of correspondence between the parties, on the 18th October 2022 the parties entered into a contract of rescission (page 268-269) whereby they agreed to rescind the promise of sale agreement 12th October 2015.

21. The applicants however still claim that they suffered damages as a result of the fact that the promise of sale of 12 October 2015 was allowed to expire, and the final deed of sale was not entered into as agreed between the parties under the conditions laid down, due to the fault of the respondents who did not enter into the relative emphyteutical deed when there was the approval on the part of the Lands Authority. Therefore, applicants insist on their claim for damages against respondents.

A. THE REASONS ON WHICH THE JUDGMENT IS BASED

13. The applicants' case is two pronged:

(a) The request for the specific performance of the promise of sale agreement of the 12th October 2015 and
(b) **in default** ("fin-nuqqas") to find the defendants responsible for damages due to the fact that they failed to appear on the final deed of sale. The plaintiffs requested all the damages that they incurred, including opportunity cost and loss of profits.

14. The respondents opposed these requests claiming that:

(a) the application was null given that a request for specific performance of the promise of sale agreement and claim damages in case of default could not be propounded in one and the same action. These requests were alternatives and could not co-exist in the same suit.
(b) Respondents did not appear on the final deed of sale due to the fact that Government changed its policy, making it impossible for respondents to adhere to the obligations entered into on the promise of sale agreement;
(c) The respondents were neither negligent nor blameworthy of the causes that led to the default and consequently they could not be held responsible for damages allegedly sustained by the applicants. The change in Government policy did not depend on them but rather it was a third-party decision for which they were not to blame. The respondents did not warrant that they were going to obtain the consent of the Lands Authority, but rather committed themselves to try to obtain this consent. The repeated extensions of the promise of sale agreement of sale bore witness to this.
(d) In any event, the respondents were willing to sign the deed of emphyteusis from the Lands Authority as well as to transfer their title to the said property to the applicants. While they could not do so prior to the institution of these proceedings due to reasons beyond their will, as soon as the Land's Authority changed its policies in May 2020, they were ready to enter in the emphyteutical deed as well as apply for the Lands Authority's consent for the transfer of this title to the applicants. It was the applicants who were not willing to come forward to the final contract.

(e) During the course of these proceedings, the respondents raised a further plea claiming that once that the parties had signed the deed of rescission of the promise of sale agreement, this agreement was no longer binding between the parties, and consequently the plaintiffs' action was rendered devoid of legal basis given that its merits where thereby exhausted.

15. The promise of sale agreement signed on the 12th October 2015 stated:

> The transfer is to be made for the hereunder mentioned price and subject to the following terms and conditions:
>
> 1. In consideration of the price of five hundred thousand euro (€500,000) which sum is to be paid on final deed of sale.
> 2. The vendors shall, on the final deed of sale, warrant the peaceful possession and real enjoyment of the property, according to law as well as the valid title to the Property, and for this purpose shall constitute on the final deed of sale a general hypothec on all their property present and future, in favour of the purchasers who shall accept.
> 3. The vendors shall on final deed of sale warrant and guarantee in favour of the purchasers who shall accept that the property is to be transferred to the purchasers:
>
> a.as free from expropriation, requisition order/notices, free from third party rights, save those inherent from its position and mentioned in this deed;
> b.as free and unencumbered from any other ground rent than that mentioned in this deed and or any pious burden;
> c.as free from any real and/or personal rights and/or servitudes in favour of third parties save those inherent in its position and mentioned in this deed;
> d.as free from any hypothecs, privileges and charges or cautions and free from any debts; and
> e. with immediate free and vacant possession in favour of the purchasers on the final deed of sale.
>
> 4. The Purchasers shall have the option to withdraw from the agreement without forfeiture, penalty or any liability if:
>
> a.a sanction letter approving their application for a bank loan to assist them with the purchase of the Property is not issued. This clause will remain valid up to eight (8) weeks from the signing of this promise of sale agreement;
> b.the vendors' title to the property is proven not to be in order;
> c. for any reason whatsoever, the vendors are not able to transfer the utile dominium of the property to the purchasers under the terms and conditions mentioned above;
>
> 5. The parties recognise that the current title held by vendors is one of location (rent) and it is therefore agreed that the vendors are responsible to:
>
> a.Apply for the Government scheme (LN400/15) through which such location (rent) may be converted into temporary emphyteusis and sign the final deed for such transfer. All costs related to such transfer shall be borne

by the Vendors. The parties agree that the Vendors are to apply for such scheme after Purchasers attain a sanction letter from the Bank.

b. Obtain the written consent of the Commissioner of Land in order to transfer the emphyteutical concession governing the property to the Purchasers. Purchasers are to pay one year's ground rent payable to Government as laudemium.

6. Following the signing of the final deed, vendors are to provide all documentation required in order to allow purchasers to transfer the water and electricity meters in their name, vendors are also to provide all trading licences related to the property in question.
7. On final deed of sale, purchasers agree to abide by the conditions of LN 400/15, a copy of which is being attached to this agreement and marked Dokument D.

16. In their final written submissions, the applicants claimed that while the request for the specific performance of the above-mentioned promise of sale agreement was withdrawn, they retained firm and valid the claim for damages resulting from the respondents' defaulting actions.

17. This Court found no document supporting the applicants' claim that the request for specific performance of the promise of sale agreement was withdrawn by them. However during the course of these proceedings it became amply clear that the applicants were not interested in the specific performance anymore. Rather, they were more willing to limit their action to the determination of the damages allegedly suffered by them in consequence of the failure of the respondents to execute the terms of the promise of sale agreement.

18. In their sworn application the plaintiffs requested specific performance of the promise of sale agreement **or** damages resulting from default in the same action.

19. The focus of this case lay on the factual and legal status prevailing between the parties during the operative period of the promise of sale agreement. At that given moment in time, the plaintiffs made their decision to sue the respondents for specific performance of the promise of sale agreement. Their claim for damages was lodged as an alternative to specific performance – should specific performance not be possible, qualified by "fin-nuqqas tiddikjara u tiddeciedi, illi l-intimati huma responsabbli ghall-hlas tad-danni inkorsi mir-rikorrenti...."

20. Therefore at the moment of filing of the sworn application, the primary request was the specific performance of the promise of sale agreement and not the claim for damages. At the moment in time it had already resulted to the parties that it was not possible for the respondents to adhere to all the conditions mentioned in the preliminary agreement, namely condition number 5(b), given that the Lands Authority's Board of Governers had changed their policies relating to the transfer to third parties of temporary emphyteutical concessions over government property. The last extension of the preliminary agreement was signed on the 7th May 2018 when this policy had already been adopted by the Lands Authority less than a month before.

21. Even if at that stage plaintiffs might not have been aware of this change in policy, when they filed the sworn application, they still requested the Court to order the respondents to appear on the deed of sale on the basis of the terms mentioned in the promise of sale agreement, and, only in case of default, then condemn the respondents for damages suffered.

22. This plaintiffs' line of action implied that the defendants were, for reasons not justified at Law, not willing to appear on the deed of sale on the terms of the promise of sale agreement. It also implied that all the terms of the promise of sale agreement could have been executed before and on the date of expiry of this promise of sale agreement, only for the defendants to fail to adhere to the same and fail to appear on the deed of sale without an valid reason at law. It also implied the willingness of the plaintiffs to acquire that property, not only at the moment in time when the sworn application was filed, but also at a later stage. Otherwise it would not have made legal sense for them to file an action for specific performance of the promise of sale agreement - and keep that action in existence - even when it became evident that the respondents were in position to enter into the deed of sale, as was being requested by the plaintiffs themselves in their primary request.

23. Given this principal line of legal action, and once that the opportunity for the transfer of the title to the property manifested itself in July 2021 - and in line with the legal reasoning behind this lawsuit - the plaintiffs were expected to take the prevailing opportunity to purchase this same property : especially once that the basic factual requirements underlying the merits of their legal request were now realised and could be satisfied. But as resulted from an email of the

26th July 2021, exhibited Doc SA5[1] together with the affidavit of the respondent Sheryl Anastasi, the applicants' Counsel informed the respondents' Counsel that:

> My clients as you have well been informed, are now not in a position to conclude the final deed of purchase of the temporary emphteutical concession, due to the pandemic and due to the banks not wanting to refinance such a loan on account of the abounding circumstances.

24. This email of the 26th July 2021, was sent following the hearing of 25th February 2021 (page 181 and 182), wherein the Counsel for the respondents held that they were in a position to appear on the final deed of sale. It resulted that the respondents received the authorisation from the Lands Authority to transfer the emphyteutical concession to third parties on the 9th July 2021.

25. It was shown by plaintiffs that on the 21st January 2021 a letter was sent to Cotswald Limited by APS Bank Limited informing them that the Bank was cancelling the bank loan sanction letter for a loan of €508,000. However, it also transpired that these facilities were going to be granted to a limited liability company in which the plaintiffs had shareholding interest, and not to the plaintiffs personally. Furthermore, the undertaking to subject their right to purchase the property to them obtaining a bank loan was expressly limited to a peremptory time limit which by then had expired.

26. Beyond this, it also transpired that on the 2nd June 2021 the plaintiffs had entered into a leasehold with third parties in relation to another property in Valletta, with the plaintiff Young claiming to have financed this deal through own funds, and this despite the hardships that the pandemic that was ongoing at the time brought with it to various business communities.

27. During the sitting of 27th January 2022 when asked whether he was still interested in acquiring the title to the property merits of this case, the applicant Young answered in the negative.[2] This position was then confirmed by the signature of the deed of rescission of the promise of sale agreement dated 18th October 2002 which stated:

[1] Fol 263.
[2] Fol 208.

> Wheras by virtue of a promise of sale agreement signed in the presence of Notary Justin Fenech dated the 12th of October of the year 2015, the vendor agreed to sell, convey and transfer in favour of the purchasers, who accepted and undertook to purchase and acquire the temporary utile dominium of the shop, for a period of not less than forty four years, externally numbered two (2) forming part of Block 1 in St John's square Valletta, *tale quale* subject to any latent defects, in its present state and condition, with all its rights and appurtances.
>
> Whereas the said promise of sale agreement was registered with the Commissioner for Inland Revenue with promise of sale number PS two zero one five one zero eight seven zero (PS201510870)
>
> Wheras both the purchasers and the Vendors have informed me, the Undersigned Notary, that they would like to rescind the said Promise of Sale Agreement.
>
> Now therefore, the parties have appeared on this private agreement to rescind the agreement signed between them dated the 12th of October of the year two thousand and fifteen (2015).

28. Clearly, at that juncture the plaintiffs were no longer interested in the property in question. Despite this, it was only during their final written submissions that the plaintiffs moved on the assumption that the request for specific performance of the promise of sale was withdrawn. However no official document was filed in the records of these proceedings showing the willingness of plaintiffs to change the course of their case.

29. The line of action of the plaintiffs in this case implied that the terms of the promise of sale agreement could have been lawfully executed during the operative period of the promise of sale agreement or the extensions had it not been for the faulty behaviour of the defaulting promisee. However respondents' evidence showed that the plaintiffs knew about the difficulties faced by defendants in obtaining the Lands Authority's written consent in order for them to be able to transfer the emphyteutical concession to the plaintiffs: had they entered into the temporary emphyteutical concession the first time they were asked to by the Lands Authority.

30. The plaintiffs blame the respondents for this, claiming that the respondents did not conclude the emphyteutical grant with the Lands Authority once that the Authority gave them their first appointment to sign the deed of emphyteusis. Plaintiffs' submissions indicate that they were aware of the facts as they unfolded during the pendency of the promise of sale agreement and

the extensions, only to attribute the failure of the signature of the deed of sale on respondents' fault. Despite this knowledge, the plaintiffs still proceeded to sue the respondents for specific performance of the promise of sale agreement and only to claim damages in case of default. Plaintiffs still insisted that their claim for damages was founded in fact and at law, despite this knowledge and despite the signature of the deed of rescission of the preliminary agreement. They argued that the claim for damages could lawfully subsist independently of their first request for specific performance and irrespective of the deed of rescission.

31. On the otherhand, the respondents claim that the deed of rescission of the 18 October 2022 brought about the rescission of the promise of sale and the consequent *status quo ante* between the parties. This resulted in lack of further legal basis for this action both in relation to the specific performance request as well as the applicant's claim for damages. They added that when applicants chose to sign the deed of rescission of the promise of sale agreement, they put themselves in a situation as if they had not followed the procedure dictated by Article 1357 of the Civil Code. Furthermore, respondents also argued that when the promise of sale was rescinded, the same promise of sale agreement lost its legal effects so that the applicants lost their right to request enforcement of the promise of sale as well as the right to claim damages.

32. Article 1357(2) of the Civil Code reads as follows:

> 1. A promise to sell a thing for a fixed price, or for a price to be fixed by one or more persons as stated in the foregoing articles, shall not be equivalent to a sale; but if accepted, it should create an obligation on the part of the promisor to carry out the sale or, if the sale can no longer be carried out, to make good the damages to the promisee.
>
> 2.The effect of Such promise shall cease on the lapse of the time agreed between the parties for the purpose or, failing any such agreement, on the lapse of three months from the day on which the sale could be carried out, unless the promisee calls upon the promisor by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application, for the carrying out of the promise is filed within 30 days from the expiration of the period aforesaid.

33. In the judgment in **Maria Bianchi and Others vs. JM Developments Limited and Others** decided by the First Hall of the

Civil Court on 28 March 2003 and confirmed by the Court of Appeal on 26 May 2006 it was stated:

> Jidher għalhekk li una volta li jiġi ppreżentat l-att ġudizzjarju qabel ma jiskadi t-terminu tal-konvenju, dan l-att ġudizzjarju jestendi l-effetti tal-konvenju għal perjodu ta' xahar sakemm jew l-aċċettant jagħżel li jersaq għall-kuntratt entro dak ix-xahar, jew altrimenti sakemm tiġi preżentata l-azzjoni fejn jintalab li l-aċċettant iwettaq il-wegħda li jkun għamel permezz tal-konvenju..[3]

34. In the civil appeal proceedings **Carmel Chircop and Others vs. John Vella and** others decided on the 5th October, 2001, it was held that there were two requirements that had to be fulfilled for a promise of sale agreement not to lapse and be kept in force. If the formalities required in Article 1357(2) of the Civil Code were not observed, the promise of sale lost its effectiveness. In the event that the promise of sale expired without the parties executing the promise, or any one of them taking judicial measures required by law to enforce the reciprocal rights and obligations set out in the promise of sale, the promise of sale would lapse and the parties returned to the position as they were prior to entering the promise of sale agreement; in other words, revert to the *status quo ante*.[4] This brought about the consequence that each party had to reimburse any benefit it might have obtained under the promise of sale. The party to whom part of the price would have been paid retained no right to retain the sum paid to them on account of the price, lest the requirements of Article 1357 of the Civil Code were met.[5]

35. In this case the plaintiffs proceeded in terms of 1357(2) of the Civil Code when they filed the official letter to the respondents within the time limit agreed given that this official letter was filed on the 29th May 2019 Doc G fol 25. Furthermore, they proceeded with their judicial action within the time limit laid down by law: requesting specific performance of the promise of sale agreement and, in default, the damages they pretended to have suffered. However, on the 18th October 2022: during the course of these same

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[3] See **Carmelo Byers and Others vs Paul Caruana et** decided by the First Hall Civil Court on 7th April 2011; **Del negro vs Grech** decided by the First Hall Civil Court on 10th January 1994.

[4] See also **Brownrigg vs. Camilleri,** Civil Appeal decided on the 22nd February 1990, **Rockap Devlopment Limited vs. Premier Leasing & Investments Co. Limited** First Hall of the Civil Court on 18th November 2016; **Edward Portelli and Others vs. Hector Cassola** decided by the First Hall of the Civil Court on 30th April 2004; **Chain Services Limited vs. Leo Micallef et** decided by the First Hall Civil Court on the 11th June 2012.

[5] See to that effect **Christine Cassar Torregiani vs. Dr. Godfrey Gauci Maestre**, Civil Appeal dated 25th May 2007; **Francis Scicluna vs. J.M. Construction Limited** (114/2006) decided on 15 December 2015; **Vella noe vs. Abela noe** Civil Appeal of the 14th January 2002 Vol. LXXXVI.ii.165.

proceedings, the same plaintiffs agreed to rescind the promise of sale agreement, without any condition relating to the fact that there were these ongoing proceedings seeking specific performance or damages, and without any reservation of their rights stemming from the same proceedings as based on the failed promise of sale agreement.

36. This deed of rescission is neither an equivalent, nor a substitute to a note of cessation, withdrawal or variation of a judicial request or claim. Despite this, in essence it is incompatible with the plaintiff's claim for the specific performance of the promise of sale agreement given that the rescission of the promise of sale agreement brought to an end the obligations arising out of that promise of sale agreement – rescission being one of the mode of extinction of obligations.

37. The basic legal consequence of this deed of rescission was that it restored the parties to the condition in which they were before entering into the promise of sale agreement. This directly affected the first claim of the plaintiffs and the legal basis of their action.

38. This argument has to be read also in the light of the respondents' first preliminary plea claiming that applicants could not sue for specific performance and claim damages for default in the same action, given that these two claims - in one and the same legal action - were incompatibile one with the other.

39. While acknowledging that in certain circumstances such claims could be incompatible, this is generally not so due to the principle of comprehensive judicial relief. The Court must examine the specific wording used by the plaintiff and the specific circumstances of the case. The plaintiffs could articulate their claim for damages while stating that specific performance was only sought if it was determined that respondents could still fulfill their obligations under the promise of sale agreement. But this was not the case here.

40. Furthermore, the turn of events showed that this line of action in this case could not be sustained, as when it became clear to plaintiffs that respondents were in a position to adhere to the terms of the preliminary agreement, it was the plaintiffs themselves who decided not to enter into the deed. Over and above this, contrary to their primary request in this legal action, they even signed a deed

of rescission of the promise of sale agreement, without reserving their rights to claim damages stemming from that same agreement.

41. **Articles 1209 and 1210 of Chapter 16 of the Laws of Malta** provide as follows:

> 1209. (1) The rescission of a contract shall, unless the law provides otherwise operate so as to restore the parties to the condition in which they were before the contract.
> (2) Each party shall be bound to restore to the other anything received or obtained in consequence or by virtue of the contract.
> (3) With regard to fruits collected or the interest received up to the date of the demand for rescission, the court may, having regard to the circumstances of the case, direct a set-off of such fruits or interest.
> (4) Where the contract is rescinded on the ground of fraud or violence, the party guilty of such fraud or violence shall also be bound to restore to the other party the fruits which might have been collected, and which through his fault or negligence, have not been so collected.
>
> 1210 (1) Rescission shall operate also against third parties in possession.
> (2) It annuls any right or burden which may have been granted or imposed over or on the thing which, in consequence of the rescission is to be restored.

42. In the Civil Appeal **Raymond Caruana and Others vs. Conrad Pace** (207/15) decided on 27 April 2023, it was held that :

> Skont l-artikolu 1145(g) tal-Kodiċi Ċivili rexissjoni hija waħda mill-għamliet maħsuba fil-liġi dwar kif jistgħu jintemmu l-obbligazzjonijiet. Jekk isseħħ ir-rexissjoni, il-partijiet jerġgħu jitqiegħdu fl-istat li fih kienu qabel il-ftehim (Artikolu 1209(1) tal-Kodiċi Ċivili, b'dan li kull parti tkun trid trodd lura lill-oħra kull ma tkun daħlet b'effett tal-kuntratt jew bis-saħħa tiegħu, (Artikolu 1209(2) tal-Kodiċi Ċivili).

43. The rescission of the promise of sale agreement therefore brought to a definitive end the promise of sale agreement thus rendering any judicial request for the specific performance of the agreement redundant.

44. The fact that the deed of rescission brought the parties to the *status quo ante,* meant that the agreement forming the whole basis of the plaintiffs' claim was wilfully rescinded, and given that no reservation was made by reference to the legal consequences stemming therefrom namely the alleged damages suffered by them, this also brought about the cessation of its consequences.

45. Despite this, in point 11 of their submissions, applicants stressed that the legal basis for their claim for damages was due to the faulty conduct of the respondents who failed to conclude the emphyteutical concession with the Lands Authority when they were willing to grant this concession and therefore were not able to deliver what they agreed to due to their own fault. But the claim of the plaintiffs was based on the "nuqqas ta' eżekuzzjoni tal-konvenju li welled l-azzjoni għad-danni". So the plaintiffs could not deny that this alleged shortcoming was based on the terms of the promise of sale agreement that they agreed to rescind. Their claim for damages stemmed from this promise of sale agreement and the consequences of non-execution did not have any independent or autonomous existence.

46. But even if, *gratia argomenti*, this claim of the plaintiffs could withstand the legal effects of the deed of rescission, an analysis of the facts of this case as they evolved, showed that the respondents could not be held responsible for the fact that they could not honour the obligations stemming from clause 5(b) of the preliminary agreement.

47. First of all, it did not seem disputed that plaintiffs were informed by the respondents about the progress, or the lack of it, registered during the operative period of the promise of sale agreement. So much so that they agreed to more than one extension of the original term. This was clearly due to the fact that the respondents were not getting the results they hoped for and continued striving to obtain the written consent, first of the Commissioner for Lands, and subsequently of the Lands' Authority Board of Governors. However the turn of events did not allow this to happen during the operative period of the promise of sale agreement and subsequent extensions.

48. The evidence showed that the defendants could not adhere to the obligations assumed in condition 5(b) of the promise of sale agreement because of reasons independent of their will. And that this was also communicated to the plaintiffs nonetheless.

49. The obligations assumed by respondents, in particular clause 5(b) of the promise of sale agreement, could not be read in isolation, but rather in conjunction with the other conditions mentioned in this agreement as well as provisions of the Legal Notice 400/2015. There were conditions that were clearly within the power of the

respondents to undertake, implement and execute. But there were others which clearly fell beyond their powers.

50. When the respondents signed the preliminary agreement they could obtain the written consent of the Commissioner of Lands in order to transfer the emphyteutical concession governing the property to the plaintiffs given that Government policy at that time allowed this. At least there was no evidence showing otherwise. Even if respondents assumed responsibility to obtain this written consent – at a time when the grant of this consent was possible – on the otherhand they neither guaranteed that this consent was going to be granted nor could they warrant that such consent would be obtained. This consent did not depend simply on their efforts but rather lay on the exercise of a discretion exercisable by that Government entity. No matter how the respondents might have tried, the ultimate decision as to whether to grant that consent or not did not depend on them but on the relative Government entity involved. Indeed this was also reflected in the terms of the Legal Notice, of which the parties were surely aware given that this document was also attached to the promise of sale. However at that juncture there was no legal impediment or blanket policy decision prohibiting such consent.

51. While respondents followed the signature of the promise of sale agreement with the filing of the application in terms of Legal Notice 400 of 2015 on the 9th December 2015, by the time that their application was processed, the Lands Authority was set up. The Authority's policy decisions were now decided by a Board of Governors. The respondents' application was approved on the 3rd November 2017. The Lands Authority only requested them to appear on the deed of emphyteusis on the 25th July 2019 – that is more than a year after that the Lands Authority had, on the 13th April 2018, changed tack and introduced a blanket policy to refuse consent for emphyteutae to transfer their title to third parties prior to the expiry of ten years from the date of the concession.

52. In concrete terms this meant that even if the respondents had signed the deed of emphyteusis when they were called upon to do so by the Lands Authority on the 25th July 2019, they still would not have been in a position to fulfill condition 5(b) of the promise of sale agreement. Indeed given this new blanket policy introduced on the 13th April 2018, they could not obtain the written consent of the Commissioner of Lands for such transfer, not only because the

decision to grant this consent was transferred to the Board of Governors of the Lands Authority, but because with the adoption of this new blanket policy, the Lands Authority was not going to grant them this consent in any case – despite the fact that, on the day of the signature of the promise of sale, the granting of this consent was possible as there was no blanket prohibition. While it was true that the Legal Notice 400 of 2015 still gave Government the right not to grant this consent in specific cases, the same Legal Notice did not specify any blanket prohibition as the one that was made on the 13th April 2018 during the pendency of the promise of sale agreement.

53. The respondents were not in a position to adhere to the obligation assumed by them on the promise of sale agreement not because of reasons attributable to them but rather because of reasons independent of their will and control. Following the adoption of that policy, there was not much the respondents could do from their end. But once that the policy was changed, the evidence showed that the respondents followed on it not only by signing the emphyteutical deed but also through the filing of the application for the transfer of the emphyteutical concession to third parties.

54. Only that at that stage, the plaintiffs were not interested any longer in acquiring this property, despite their judicial action specifically and primarily based on this premise, later sealed by their signature on the deed of rescission without specifically reserving their rights to claim damages stemming from these proceedings.

55. The Court concludes that the arguments of respondents hold, and for the reasons mentioned above, it cannot therefore entertain the claims of the plaintiffs.

Decide

Consequently in view of the above, while the Court upholds the pleas raised by the respondents, it consequently dismisses the requests of the plaintiffs, with costs to be borne by plaintiffs.

Ft/Aaron M. Bugeja
Judge

Christianne Borg
Deputy Registrar