Court Of Appeal

Judges

THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR. JUSTICE ROBERT G MANGION
THE HON. MR JUSTICE GRAZIO MERCIECA

Sitting of Tuesday, 8th April 2025

Number: 3
Application Number: 846/2014/2 MH

In-Sight Limited (C 80061)

v.

Juheng Chen and his wife Yujun Ying

1. This is a judgment following an appeal lodged by Plaintiff company In-Sight Limited (C 80061) both from (i) a decree delivered by the First Hall Civil Court on the 7th of May 2021, wherein the First Court ordered the sworn declarations tendered as evidence by Jian Ye and Haiying Li, be expunged; and (ii) from the judgment of the same Court of the 3rd February 2023, whereby Plaintiff Company's claims for payment of

commission on the contracts of sale of property and damages suffered were rejected in their entirety.

Introduction:

2. By means of a sworn application dated 29th September 2014, Plaintiff Company explained that it operates an international real estate agency under the name 'Property Line International' ('the Agency') which has offices in China amongst other countries, and offers various services related to real estate, including the promotion of sale of property in Malta, Latvia, Cyprus, Portugal, Greece and Spain, to the Chinese market. On the 20th of March 2012, applicant company concluded a commission agreement with respondent Juheng Chen who resided in Malta. By virtue of said agreement, the parties regulated the sharing of commission due from sales of property in Malta, Latvia and Cyprus concluded with the involvement of respondent.

3. It was subsequently agreed that respondent would render his services as a property negotiator as well as a translator for applicant company in Latvia and Cyprus, in respect of those clients that the Agency would have identified directly itself, such that respondent would receive from applicant company commission as agreed. Subsequently, applicant company learnt that the contracts of sale of various properties forming

part of the complex 'Aphrodite Hills' in Cyprus, to the Chinese clients who were introduced by Dai Lingyun to respondent Juheng Chen as translator and property negotiator of the Agency in Cyprus, were concluded without applicant company having been informed by said respondent of the relative transactions and without applicant company having received payment of the commission due to it on these sales in accordance with the agreement in force between the parties. Respondent falsely presented himself as the partner of the Agency, and conducted unbeknownst to applicant company, all the negotiations that led to the conclusion of the contracts of sale of the properties in Cyprus to the relative purchasers.

4. In light of the above, Plaintiff Company requested the Court to:

> *"1. Declare and decide that applicant company is entitled to payment of commission on the contracts of sale of property concluded between Lanitis Developments Limited and Jian Ye and Haiying Li, Lanitis Developments Limited and Weiguo Peng and Dongmei Li, Lanitis Developments Limited and Lan Mu, and Lanitis Developments Limited and Liang Xue and Wenjian Wu;*
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> *2. Declare and decide that the respondent Juheng Chen as property negotiator and translator for and on behalf of applicant company, made false representations to the prejudice of applicant company, when he 6 presented himself to third parties as the applicant's partner, and that he misappropriated commission due to same applicant company on sale of property subject of the contracts concluded between Lanitis Developments Limited and Jian Ye and Haiying Li, La-nitis Developments Limited and Weiguo Peng and Dongmei Li, Lanitis Developments Limited and Lan Mu, and Lanitis Developments Limited and Liang Xue and Wenjian Wu;*
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> *3. Declare that as a result of these actions by respondent, applicant company suffered damages;*

4. Liquidate the damages suffered by applicant company as a result of respondents' actions

5. Order respondents to pay unto applicant company that sum liquidated by way of damages."

5. By means of a joint sworn reply filed on the 27th of October 2014, Defendants replied that Plaintiff Company's claims are unfounded both in fact and in law. Respondents categorically deny that Dai Lingyun introduced Chinese clients to Respondent Chen in his capacity "as translator and property negotiator of the Agency in Cyprus" as alleged. In fact Dai Lingyun specifically requested that the Claimant Company/Claimant Company's Agency be not involved in this transaction since Dai Lingyun had fallen out with Claimant Company's Agency following a dispute regarding the payment of a service fee allegedly due to the said Agency by a certain Mr Yang who had been introduced to the Claimant's Agency by Mr Dai. They added that Claimant Company did not enjoy any exclusivity in respect of sale of properties in the Aphrodite Hills Development and consequently Respondent Chen and Lanitis Development Limited were free to enter into an agreement as they did. Respondent Chen affirmed that he never claimed to have been a partner of the said Agency as this was not necessary.

6. By means of a judgment delivered on the 3rd of February 2023 the First Hall Civil Court decided the case as follows:

> *"Simply put plaintiff failed to convince the Court that the four sales concluded concerned clients it sourced and referred to defendant. Thus on the basis of the agreements it had with defendant it cannot claim any right of commission therefrom.*
>
> *Concludes that on considering all the above premised finds that it cannot uphold all Plaintiff's claims and rejects all with costs."*

7. By means of an application dated 27th February 2023, appellant company lodged an appeal requesting the revocation of the decree dated 7th May 2021 as delivered by the First Hall Civil Court ordering the removal of the affidavits of Jian Ye and Haiying Li from the acts of the proceedings, and remit the acts of the case to the First Hall for a decision on the merits with due consideration to such affidavits; or should such grievance be rejected, reform the judgment of the First Honourable Court of the 3rd of February 2023, by upholding plaintiff company's demands and rejecting Defendant's pleas.

8. By means of a reply dated 17th May 2023, Defendants contended that both grievances raised by appellant company are unfounded both at fact and at law, and that the requests made in the appeal application are to be dismissed in their entirety, while the judgment delivered by the first court is to be confirmed in its entirety.

9. After a comprehensive review of all the case documents, the Court has concluded that an oral hearing for this appeal was unnecessary. As a result, the Court will promptly hand down judgment in accordance with

Article 152(5) of the Code of Organization and Civil Procedure.

10. Appellant company put forward two grievances namely; (i) that the First Court was incorrect in its interpretation of the law with respect to the removal of the affidavits tendered by two witnesses produced by plaintiff company; (ii) and was incorrect in its evaluation of the evidence tendered.

11. By means of the ***first grievance***, appellant company contends that the First Court's decision ordering the removal of the two affidavits tendered by Jian YE and Haiying Li from the acts of the proceedings was based on a series of facts namely:

(i) that in the note dated 3rd November 2014, plaintiff company had failed to indicate that said witnesses were going to give evidence by means of an affidavit;

(ii) Plaintiff company did not manage to ensure the presence of the said witnesses in a sitting for their cross-examination, since following a decree dated 29th October 2014, the first court had stated that affidavits of witnesses residing abroad would only be allowed on the condition that said witnesses would be available for cross-examination;

(iii) Plaintiff company did not invoke a priori article 622A of the Chapter 12 of the Laws of Malta and was thus deemed to be

have renounced to such a procedural requisite;

(iv) The right to a fair hearing, which also includes the right to cross-examine witnesses.

12. Appellant company argues that there exists no procedural requisite to indicate which witnesses will be testifying viva vice and which witnesses will be testifying by means of an affidavit. Appellant also contends that plaintiffs are not legally bound to produce any witness for cross-examination and that the decree issued by the first court does not obliterate other procedural rules or norms. It adds that rules of procedure are deemed to be public policy and cannot be renounced to by any party. It has also been constantly held that procedural rules are to be observed to the minutest detail and cannot be derogated from not even by the consent of both parties. Appellant company also underscored that in this situation the fundamental rights and freedoms alluded to by the First Court do not come into play.

13. Defendants on the other hand, argue that this first grievance is effectively based on the presupposition that the twenty-day period mentioned in Article 622A(2) of Chapter 12, is a non-derogable statutory period imposed by law, and as such held that respondents should not have been allowed to cross-examine the witnesses in question due to not filing the required application requesting to cross-examine them within

such twenty-day period as provided in sub-article 3 of the same provisions.

14. Respondents state that appellant company's characterisation of the timeframe imposed in article 622A(2) is inherently flawed, since the wording of the provision itself provides that cross-examination may be allowed by the Court at its discretion even in instances where no application is filed. Respondents contend that there were certainly more than enough valid reasons justifying the first court's decision to allow respondents to cross examine the witnesses in question, particularly:

(i) In a decree dated 2nd October 2014, appellant company was ordered to declare which witnesses from its witness list would be tendering evidence in the form of an affidavit- said witnesses were omitted from said list as indicated in the note submitted by appellant company dated 3rd November 2014;

(ii) In a subsequent decree, and notwithstanding said omission, plaintiff company was allowed to produce affidavits of said witnesses, on the condition that said witnesses would attend a sitting for cross-examination purposes;

(iii) Plaintiff company on the 20th of May 2015, had declared that it had only one witness left to produce, Dai Lingyun. This was also confirmed at a later date by means of a note filed by plaintiff

company;

(iv) On the 14th of July 2015, filed a note containing evidence for the aforementioned Dai Lingyn to refer to in his testimony.

(v) Appellant company had promised that it would be bringing both Jian YE and Haiying Li to Malta for cross-examination, only to inform the Court months later that it was not successful in tracing the said witnesses. It was only then that it resorted to Article 622(2) of Chapter 12 of the Laws of Malta.

15. Moreover, and without prejudice to the above, respondents also underscored that as highlighted in their application dated 13th January 2021, the said affidavits are not valid at law, as they are not complaint with the essential formalities requested at law for their validity. Defendants remark that from a detailed review of the said documents a number of deficiencies clearly emerge: (i) they do not seem to be confirmed on oath, both in their original version and the translated version; (ii) on the original version, there seems to be no witness to signature; (iii) nor have the affidavits been duly authenticated or apostilled as is required by Article 622A(1) of Chapter 12.

Considerations of this Court:

16. Article 622A of Chapter 12 of the Laws of Malta stipulates:

> *" (1) Notwithstanding the provisions of articles 613 to 622,where the evidence of a witness residing outside Malta is required,and such person has made an affidavit about facts within his knowledge before an authority or other person who is by the law of the country where the witness resides empowered to administer oaths, or before a consular officer of Malta serving in the country where the witness resides, such affidavit duly authenticated may be produced in evidence before a court in Malta; and the provisions of articles 623, 624 and 625 shall apply to such affidavits*
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> *(2) The affidavit so obtained shall be served on the opposite party or parties, and any party to the proceedings desiring to cross-examine such a witness shall apply to the court for the examination of such witness by letters of request not later than twenty days from the service of the affidavit; and the provisions of this Code relative to letters of request shall apply with such modifications and adaptations as may be necessary.*
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> *(3) If no application is made as aforesaid no cross-examination of the witness shall be allowed unless the court for a good reason otherwise directs; and the affidavit shall be taken into consideration notwithstanding the absence of cross-examination.*
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> *(4) Notwithstanding the foregoing provisions of this article, if the parties agree, and the court deems it proper so to act, the court may make such other provisions concerning the conduct of the cross-examination as may be appropriate according to circumstances."*

17. Article 622A as above-cited not only regulates the tendering of evidence via affidavit of a witness residing outside Malta but also regulates how the cross-examination of such witness is to be conducted. As a preliminary observation, this Court notes that the First Court's comment in relation to issues purporting to fundamental human rights which could come into play in situations such as the one under examination, is merely a remark made in passing and shall thus be treated by this Court as such.

18. By means of this first grievance, appellant company argues that the

First Court ought to have taken the affidavits expunged into consideration, and this in light of defendants' lack of adherence to the disposition of Article 622A(2), wherein defendants' failed to file the apposite application within the twenty day period and this for no valid reason at law.

19. Although Article 622(A)(2) and to a certain extent sub-article 3 appear at first glance to be somewhat non-derogable, it becomes immediately clear that the legislator conferred the court with a significant latitude in this respect. Sub article 3 goes on to stipulate that where no application is made, ***the court may for a good reason direct otherwise***. Thus, the general rule contained in Article 622(A)(2) and (3), purports that the non filing of the apposite application, would preclude the opposite party from cross-examining said witness, whilst said affidavit would nonetheless be taken into consideration by the Court and this notwithstanding the absence of cross-examination. However, this presupposition may be derogated from if good reason is shown.

20. This Court as diversely presided explained that:

> *"Illi f'materja li tirrigwarda l-għoti tax-xhieda bil-mezż ta' affidavit, illiġi tirregola l-mod kif jitressaq l-imsemmi affidavit u ħwejjeġ oħrajn marbuta man-notifika tiegħu u mal-kontro-eżami relattiv fl-artikoli 21(3), 157 u 173(2)(b) tal-Kapitolu 12 tal-Liġijiet ta' Malta. B'żieda ma' dan, l-artikolu 622A tal-istess Kodiċi jipprovdi espressament dwar affidavit bixxhieda ta' persuna li ma tkunx tinsab f'Malta;*

> *Illi xieraq jingħad li l-artikolu 622A japplika biss meta x-xhud barrani ma jkunx jinsab f'Malta u jgħodd biss għall-każ ta' affidavit li ma jkunx magħmul f'Malta. Dak l-artikolu jirregola wkoll kif għandu jsir il-kontro-eżami tax-xhud li jkun għamel l-affidvit;*
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> *Illi filwaqt li l-liġi tqis li l-kontro-eżami ta' xhud li jkun xehed b'affidavit huwa jedd tal-parti l-oħra fil-kawża, ma ssemmi xejn x'jiġri meta dak il-kontro-eżami ma jkunx jista' jsir. Il-liġi tindika l-proċedura tal-ittri rogatorji f'każ li x-xhud ma jkunx jinsab f'Malta, għalkemm wieħed m'għandux jaħseb li sistemi oħrajn aktar aġġornati ta' kif tinġabar ix-xhieda ma humiex eskluży wkoll."*[1]

21. After a careful examination of the acts of the proceedings, it is apparent to this Court that despite the fact that Plaintiff Company had indicated both Jian Ye and Haiying Li as witnesses in the list of witnesses annexed to the sworn application, failed however, to indicate that these witnesses shall be testifying by means of an affidavit in the note dated 23rd October 2014, at fol 30 of the acts following an order of the First Hall Civil Court as then presided of the 2nd of October 2014 (vide fol 19). Subsequently by means of a decree dated 29th October 2014, erroneously dated 29th October 2004 (vide fol 43) on the said decree, the Court as then presided provided that any witnesses residing abroad, and who choose to testify by means of an affidavit, may do so provided that they attend a sitting for the purposes of cross-examination.

22. During the sitting of the 21st of December 2015 (vide fol 279), Dr Karl Briffa, counsel to defendants informed the Court that he would

[1] Vide **Simon Bezzina et vs Le Beau Chaps Limited et** decided by the Court of Appeal in its Superior Jurisdiction on the 12th of July 2019.

require to cross-examine the witnesses in question. The Court notes that prior to the filing of the said affidavits, Plaintiff Company did not seek the Court's authorisation to file them, and this irrespective of the fact that (i) Plaintiff Company during the sitting of the 20th of May 2015, had declared that it only had one more witness to produce, namely Dai Lingyun; and (ii) that neither of the witnesses were indicated in the notes submitted by Plaintiff Company. No objections were at the time raised by counsel to defendants and nor were any objections raised by counsel to Plaintiff Company.

23. This Court also noted that subsequently:

i. During the next sitting, that held on the 11th of January 2016, Dr Louis Bianchi for Plaintiff Company, informed the Court that he is experiencing difficulty in locating the witnesses indicated by Dr Briffa in the last sitting. In fact the case was adjourned for the 17th of February 2016 for further information regarding the whereabouts of the said witnesses.

ii. During the sitting of the 17th of February 2016, Dr Bianchi informed the Court that in the event that the witnesses required are traced, the Court will be informed of this by means of a note.

iii. On the 4th of April 2016, Dr Bianchi informed the Court that two of the witnesses are being traced in Cyprus, while the third witness has been traced in China and requires a final adjournment to definitely trace the

three witnesses.

iv. During the sitting of the 4th of May 2016, Dr Louis Bianchi informed the Court that the witnesses residing in Cyprus could not be traced.

24. This Court notes that it was only during this sitting that counsel to plaintiff made reference to Article 622A of Chapter 12 of the Laws of Malta, that is, after five consecutive sittings were adjourned for this purpose, namely the tracing of the relative witnesses by Plaintiff Company. This issue was practically ignored for a good number of years. In fact, it was only during the sitting of the 13th of January 2021 (*vide fol 662 et seq),* that is four years later, that Counsel to defence reiterated the need to cross-examine Jian Ye and Haiyang-Li and this regardless of the objection raised by counsel to plaintiff with reference to Article 622A of Chapter 12 of the Laws of Malta.

25. In fact, the Court observes that an application was filed *seduta stante* by counsel to defendant, requesting the removal of the said affidavits or the presence of these witnesses for cross-examination. In a reply to this application, Plaintiff Company reiterated that defendant lost their right to cross-examine the relative witnesses as per Article 622 A of Chapter 12.

26. The First Court addressed this manner by means of a decree

dated 7th May 2021 and made the following observations:

> *"In the light of all the above the Court observes that although plaintiff company had indicated Jian YE and Haiying Li as witnesses, it never declared that it had the intention of producing their evidence by affidavit meaning that it led both the Court and counter party to understand that they would be summoned to give their evidence viva voce in open Court.*
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> *Moreover, even with regard to the evidence which plaintiff company had declared that it was going to produce via affidavit, the Court was very clear in its decree of the 29th October 2014 that, if any of plaintiff's witnesses resided abroad, then an affidavit would be allowed on condition that they declare that they will be attending a sitting for purposes of cross-examination. Otherwise other arrangements would have to be made.*
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> *As a matter of fact, plaintiff Company did not produce Jian YE and Haiying Li to give evidence in person but eventually produced their sworn declarations in Court, even after it had already declared who its last witness was going to be; a move which raised no objection by counter party.*
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> *Then when in December 2015, defendants' lawyer made a formal request in Court to cross-examine them, despite the fact that the twenty day period mentioned in article 622A of Chapter 12 had already elapsed, not only did plaintiff company not invoke the provisions of the said article but it even bound itself to trace the witnesses in question so that they could be brought to court to answer questions in cross-examination.*
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> *Thus, by its own actions, plaintiff company is deemed to have renounced to the effects of that article. In any case the Court underlines the fact that although article 622A was not strictly adhered to by defendants, the Court for good reasons allowed the cross-examination to take place, provided the witnesses in question are found. In fact it adjourned the case more than once for this purpose without any objection being entered, so that in the meantime plaintiff company traces these witnesses as it had bound itself to do.*
>
> *…. Thus, plaintiff's arguments on the basis of article 622A are unfounded on all fronts. Besides it is to be noted that plaintiff company is basing itself on article 622A only now when it declared that Jian YE and Haiying Li could not be traced. As a result it is not even deemed necessary for the Court to enter into the issue of the validity or otherwise of the said sworn declarations in terms of the formalities listed in article 622A.*
>
> *The above considerations leads the Court to the conclusion that defendants' first request in the application of the 13th of January 2021 is justified. Once the evidence of these two witnesses had been produced, defendants had every right to ask them questions in cross-examination.*

Plaintiff company had been promising to trace and produce Jian Ye and Haiying Li to give evidence in cross-examination since December 2015 and once to date it did not provide their whereabouts to the Court there is a valid and justifiable reason for the removal of their respective sworn declaration from the acts of the case. Such an assertion is more emphatic in the context of the right of fair hearing guaranteed in terms of article 39 of the Constitution of Malta and article 6(1) of the European Convention on Human Rights and Fundamental Liberties which protect among other things, precisely the right to cross-examine witnesses."

27. This Court as diversely presided has held that:

"Illi fil-każ ***fejn ix-xhud iqiegħed lilu nnifsu f'qagħda fejn ma jkunx jista' jinstab biex isirlu l-kontro-eżami****,* ***jew fejn jinħalqu ċirkostanzi li jżommu milli jsirlu l-kontro-eżami, tqum il-kwestjoni tal-ħarsien li l-Qorti trid tagħti lil kull parti f'kawża biex jingħatalha smigħ xieraq****. Hawnhekk, il-kwestjoni mhijiex daqstant waħda marbuta mas-siwi tal-affidavit li jkun daqskemm mal-użu ta' dak is-sistema ta' tressiq ta' prova bla ma jagħti l-opportunità li dik ix-xhieda tkun mgħarbla kif imiss mill-parti li hija interessata li tixtieq tattakkaha;*

Illi l-Qorti tagħraf bejn nuqqas li jsir kontro-eżami minħabba tnikkir mill-parti li tkun irriżervatu (bħal fil-każ ta' xhud li jilħaq imut żmien wara li jkun tressaq l-affidavit tiegħu) u nuqqas li jsir il-kontro-eżami meta l- parti li tkun għamlitu ma tkunx tista' tinstab *jew ma jkunx jista' jitħaddem l-ebda metodu aċċettat mil-liġi biex isir il-kontro-eżami." (Emphasis of the Court).*

28. After having taken cognisance of the derogation provided for in Article 622A(3), the considerations of the Court of Appeal as cited in the above- judgment and the fact that: (i) defendants were under the impression that the witnesses in question were originally intended to tender their testimony *viva voce*; (ii) that Plaintiff Company had prior to the filing of the affidavits in question declared that they had only one witness left to produce, only to later file these two affidavits; (iii) that Plaintiff Company did not seek the authorisation of the Court prior to the filing of the affidavits in question; (iv) that Plaintiff Company had

undertaken an obligation with the First Court to locate the said witnesses; (v) that a number of adjournments were given for this purpose; (vi) that Article 622A(2) was only invoked after Plaintiff Company declared that it could not locate the said witnesses, this Court cannot but concur with the considerations made by the First Court in its above-cited decree and its decision to expunge the said affidavits from the records of the proceedings.

29. It is manifestly clear to this Court that Plaintiff Company invoked the provisions of Article 622A of Chapter 12 of the Laws of Malta to cover its shortcomings, namely its failure to adhere to its obligation to locate the said witnesses, after having assured the Court and the opposite party on multiple occasions that it had located the relative witnesses and only needed a little more time to make the necessary arrangements for their presence during a court sitting. It is this Court's considered opinion, that had this not been the case, Plaintiff Company would have invoked this provision the very moment counsel to defendants manifested his interest in cross-examining the said witnesses. The invocation of said provision by Plaintiff Company at that stage, would necessarily have spurred the First Court to address it then. Instead, said provision was merely invoked to cover up Plaintiff Company's non-adherence to their obligation to the First Court.

30. Thus, and for the reasons elucidated above, the Court finds that it cannot uphold appellant company's first grievance.

31. By means of the ***second grievance***, Appellant Company contends that the First Court was incorrect in its evaluation of the evidence produced and hence was wrongly convinced that the four concluded sales concerned clients it had not sourced and referred to by defendants. It explains that it had engaged defendant as a property negotiator with the scope of attracting Chinese clients to purchase properties, amongst which was this massive complex in Cyprus, Aphrodite Hills. Appellant company had signed a commission agreement with Lanits Developments, the developer, which provided for the payment of commission for sales concluded through the intervention of appellant company. Four sales were in fact concluded and a commission amounting to €192,457.13 was due. Appellant Company contends that said commission was due to it, since in virtue of the agreement signed, defendant was merely acting on its behalf. Defendant on the other hand, affirms that he was acting in his own name and not as a property negotiator on behalf of Appellant Company.

32. In its appeal application, appellant company makes reference to a number of witnesses produced in first instance. Appellant Company affirms that given the complexity of the dealings involving the acquisition

of property by individuals to utilise said property as a basis for the attainment of permanent residency in the relative jurisdiction of the purchased property, as was amply evident throughout the course of the proceedings in first instance, the conclusion of such sales is very arduous, let alone only four days after a commission agreement is signed. According to appellant company it is thus obvious that negotiations with purchasers had commenced months before Defendant signed the commission agreement and not simply days before. This was done on the strength of lists of interested individuals provided by Appellant company.

33. Defendants on their part, contend that this grievance concerns the evaluation of evidence made at first instance and is merely a desperate and almost lazy attempt to have the judgment of the first hall overturned. Copious jurisprudence exists clarifying that a Court of Revision should generally not disturb the evaluation of evidence made by the First Court unless there are grave and sufficient reasons for doing so. Defendants also affirm that the First Court's judgment is properly motivated and based on sound reasoning. The First Hall, in its judgment correctly identified the crux of the case, and which of the diametrically opposing versions presented by the parties to believe. They add that the First Court noted several inconsistencies in the version presented by Applicant Company, the lack of proper evidence to support their claim, and glaring

presumptions which were not backed up by evidence, rendering respondent's version the more credible one.

34. Moreover, Defendants also point out that appellant company failed to even attempt to show this Court why and how the conclusions of the First Court were so mistaken. In fact, the arguments raised by Appellant Company under this grievance are merely a reproduction ad verbum of its note of submissions as presented at first instance. Thus it is fairly evident that Appellant Company has not been successful in convincing this Honourable Court that the First Court has erred in how it reached its conclusions.

Considerations of this Court

35. Before considering the merits of the appeal, the Court refers to the decree of the First Court of the 5th December 2014 wherein the name of defendant should read Yujun Ying and not Yunjung Ling. It appears that the judgment of the First Court did not reflect this correction, nor did the appeal application show the correct name. By virtue of article 175 of Chapter 12 of the Laws of Malta this Court orders that the name of the defendant in the judgement of the First Court be corrected as above stated and that this is also reflected in this present judgment.

36. It is now established that this Court, *qua* Court of Revision, is not to replace the discretion exercised by the Court of first instance in the evaluation of the evidence but it is incumbent on this Court however, to make a thorough examination of the evidence adduced before the first court to determine whether the Court of first instance was reasonable in the conclusions reached.

37. The Court notes that in its judgment, the First Court reproduced detailed summaries of all the testimonies tendered both before it and by means of an affidavit. As correctly pointed out by the First Court in its judgment, the point at issue is really and truly one relating to credibility, as the parties presented diametrically opposed versions of how the events leading up to the filing of the proceedings unfolded. It is apparent to this Court that Plaintiff Company based itself entirely on the version of events as presented to it by Mr Dai Lingyun, and whose testimony was for the most part incoherent. In fact, as correctly observed by the First Court, no copies of the relative deeds of sale were filed by Plaintiff Company, let alone authenticated or legal copies to affirmatively prove the acquisition of said properties by said purchasers. Plaintiff company justified this shortcoming by invoking logistical difficulty despite having previously boasted of its operational reach in Cyprus.

38. In its appeal application, appellant company also reproduces

succinct summaries of the evidence tendered in first instance. The Court also notes that instead of pointing out where in its evaluation of the evidence brought before it, the First Court was so erroneous, Plaintiff Company on an *ad verbatim* reproduction of Plaintiff' Company's note of submissions. The Court notes that Plaintiff Company was never Defendant's employer as indicated in the appeal application; Defendant was entitled to a commission following the acquisition of a property. Granted that Defendant's accommodation and travel expenses were paid for by plaintiff company, no remuneration was given for the preparatory work that preceded the trips to Cyprus in this case.

39. Following a somewhat assiduous examination of the acts of the proceedings it transpires to this Court that this state of affairs was brought about by the formation of a number of relationships namely: (i) that between Plaintiff Company and Defendant and (ii) that between Plaintiff Company, Defendant and Mr Dai Lingyun and his wife Xue Yang; (iii) that between Plaintiff Company and Lanitis Development Limited; and (iv) that between Defendant and Lanitis Development Limited.

40. The relationship between Plaintiff Company and Defendant was throughout its span, regulated by a number of agreements, with the most recent one superseding the one before it. In fact, the Court notes that the commission agreed upon in the first agreement, that of March 2012

indicated a commission of 50%, whereas the final agreement decreased said commission to a flat rate of 18%. In its essence Plaintiff Company appointed Defendant as its agent. Similarly Lanitis Development Limited also appointed Plaintiff Company and subsequently Defendant as one of their agents. Plaintiff Company also reached a verbal agreement with Mr Dai and his wife as to a commission payable for every referral made by the couple to Plaintiff Company.

41. A common factor in all these intertwined commercial relations is the fact that no relationship was bound by exclusivity. This was in fact confirmed viva vice by Trafford Busuttil in one of his testimonies (*vide fol* 287 *et seqq*.)

42. This Court also observed the following:

i. Plaintiff company as per its agreement with defendant Juheng Chen had passed on a list of circa two hundred (200) names of Chinese nationals who had left their contact details at Plaintiff's company stand during a convention the latter had participated in, in Beijing. Defendant had to contact said individuals and follow up on their interest in participating in the Cypriot residency programme and subsequently acquire immovable property in Cyprus;

ii. One of the names pertained precisely to Mr Dai Lingyun and his

wife Xue Yang also known as Nancy.

iii. Both had agreed to join in the group of other prospective buyers travelling to Cyprus organised by Plaintiff Company. Thus, both Mr Dai Lingyun and Xue Yang have been established to have been clients pertaining to Plaintiff Company. This was never contested. Visa formalities for this trip were taken care of by Plaintiff Company and its employees. Defendant had joined in as a translator/negotiator.

iv. Mr Dai Lingyun and Xue Yang agreed to purchase two distinct properties which formed part of the Aphrodite Hill complex.

v. Mr Dai expressed his interest with Trafford Busuttil in being involved in this dealings and had requested whether Busuttil would be interested in giving him a commission if he were to refer any friends that may be interested in the programme- a verbal agreement was reached to this effect;

vi. Payment of commission for purchases made by Mr Dai and his wife were forwarded by the developer to a Property line Account.

vii. Mr Dai had in fact introduced three friends: Mr Jia, Mr Yang, and Ms Liu – only Mr Yang agreed to join on a Cyprus visit- however, said Mr Yang eventually decided not to participate and had a fall out with Plaintiff Company with regards to the ground handling fee which was mandatory for all visitors. Said fee was paid by Mr Dai.

viii. Processing of Mr Dai's and Ms Xue's application took longer than

expected. This made the two somewhat disappointed with service tendered by Plaintiff Company, after the latter's employees seemed to have misplaced or lost an important document.

43. It is from this point onwards that the parties' versions of events become considerably contradictory and irreconcilable. The First Court made the following observations:

> "*Having summarised the salient evidence produced, the Court considers that before any assessment of the facts, the Court must refer to Maltese jurisprudence relevant to this case. The point in issue here truly and solely regards the credibility of the parties, balanced out with the level and nature of evidence advanced to proof or rebut the claim. It is an established irrefutable principle that the level of proof necessary to sustain or rebut a claim in a civil law suit is one that reaches a level of probability. It depends totally on the Court's assessment whether this level is reached by the parties when all facts, evidence oral and documentary are well examined and assessed. In line with the above jurisprudential citations the Court finds that it simply cannot uphold plaintiff's claim on an amount of inconsistencies arising from the evidence deduced.*
>
> *Court notes that plaintiff complained or rather made it a point to inform the Court of its difficulty to produce documentary evidence in connection with deeds of sale of the four properties Dai and Cheng are to have received commission for, the very issue de quo agitur. So much so that plaintiff company presented a note in the records of the case enlisting the difficulties it was encountering to produce the proof necessary, including the alleged damage it incurred. Yet plaintiff company boasts of its expertise in the property market, its range of operation in Cyprus and China, amongst other territories, it even has an agency agreement with the Lanitis Development with whom these sales were effected and in the course of time of these lengthy proceedings could not produce any proper documentary evidence of a sale transfer, which is duly registered in Cyprus. A quick look at the internet on Cypriot law results that their is quite an effective Land Registration System in operation in the country in issue.*
>
> *The best the plaintiff company could do in all these years was to produce a photocopy of a deed of sale; a photo copy! The court here refers to the document a folio 146, one that is meant to prove the sale of property therein indicated. Neither does the poorly presented declaration that*

preceeds it, unsworn, of the alleged purchaser help plaintiff's claim. Plaintiff, should have been better adviced how to present its evidence if it is meant to be intended to be admissible at law. No photocopy of any deed of sale or declaration that is unsworn or any email not supported by proper evidence is deemed as such.

On these lines plaintiff proceeded during the case to present unsupported evidence. Documents like the email given it by Mr.Dai purporting to prove payment of the commission, the contents of which was never confirmed under oath. The court here refers to Dok TB377. The court would have at least expected a sworn affidavit/declaration of the sender of this email, a person known to all parties it seems, Michael Mantis, who being a lawyer would have understood the importance of his cross examination in regard. It also resorted to referring to expunged evidence, this in relation to the USB and two declarations which were both removed from the records of the case. Yet even in the note of submissions plaintiff company ignores the related interlocutory decrees and proceeds to utilise the said documents as if they were still part of the records of the case and moreover admissible at law.

Plaintiff company also resorted to gratuitous conclusions to rebut Ms Xue's evidence in that since she is now divorced from Mr Dai, she chooses not to support his version of events78. Plaintiff claims that her evidence, contradicting Dai's version, was the result of an acrimonious divorce, also vindicative, as said a gratutious conclusion. Not only does Ms Xue herself dispute and negate this, but no such evidence was ever forwarded by plaintiff company to support this conjecture.

Omissis

Contrary to Dai's recollection of events, the defendant, his wife and Dai's ex-wife give a different testimony of who referred the four clients to the Lanitis project. Their claim that it was in fact Dai and Ms Xue that referred the prospective buyers to Cheng, to the exclusion of Trafford is not only supported by the evidence of defendant's secretary Zong Wen, but from other circumstantial evidence that supports defendant's line of defence. Again Dai denies knowing Cheng's secretary when it seems she was the one who actually dealt with the permanent residence applications and prior visas of the referred clients. He seems to have forgotten that she was even a guests at this house together with his prospective buyers.

Omissis

All this being said the Court cannot on the basis of probability come to the conclusion that plaintiff company successfully proved that it has any right to the commissions perceived from the four related sales. On the contrary on a question of probability the version handed by defendant holds more water."

44. The Court concurs with the conclusions reached by the First Court. It is also this Court's considered opinion that Plaintiff Company failed to produce tenable evidence to corroborate its claims and instead opted to rely on the testimony of a Mr Dai, who simply sought a revenue generating opportunity within Europe. This is particularly evident from the fact that Mr Dai even contradicted the amount of EUR 10,000 as the commission verbally agreed upon with Trafford Busuttil - an amount which was confirmed both by Busuttil, by Ms Xue and Defendant, during his testimony, and instead insisted that the agreed percentage was that of 50%. Dai also secured an agreement with the developer underhandedly, whilst claiming money both from Defendant and Plaintiff Company and at the same time also engaged the services of Gingko Wang to negotiate on his behalf directly with Michael Mantis as per the email correspondence in the acts. Thus it is clear that Dai's disclosures to Plaintiff Company were made in retaliation.

45. It is clear to this Court that Mr Dai attempted to secure some form of payment from any of the available avenues, and disposed of Defendant as quickly as he disposed of Plaintiff Company when the services rendered by the latter did not live up to his standard. It is event to this Court that Mr Dai partnered up with the person he deemed to be most profitable for him at that point in time. These actions, and Mr Dai's particular character were also confirmed by Mr Dai's ex-wife, Ms Xue,

whose testimony was considerably consistent and rightly deemed by the First Court as a credible one, despite the criticism directed in her regards by Plaintiff Company.

46. Thus, it is the Court's considered opinion that the version tendered by Defendant as corroborated by both his wife and Ms Xue, is the most tenable of the two. It is apparent to this Court that Mr Dai's fallout with Plaintiff Company following her tardiness in processing his application and that of Ms Xue, coupled with the argument relating to the payment of the ground handling charge, spurred Mr Dai and Ms Xue, to solely work alongside Defendant, who by then appeared to have as much contacts and was just as knowledgeable about the programme and the relative procedures as Plaintiff Company. In fact following Mr Dai's insistence, Defendant even managed to attain a higher rate of commission from the developer.

47. The Court also observed that Defendant's version, namely that these four sales, were made by clients who belonged solely to Defendant, Mr Dai and Ms Xue is also supported by a number of circumstantial evidence. As aforementioned, the Plaintiff's Company impossibility to get hold of and exhibit the relative deeds of sale, also leaves much to be desired. Additionally the Court notes that no ground-handling fee was charged to the individuals behind these four sales, a fee which Plaintiff

Company always insisted upon even when no sale was concluded. As previously alluded to, both Plaintiff Company and Defendant were simply one of the agents having a commercial relationship with the developers. It appears that the company had a specific set of rules with regards to clients and competing agents. In fact, in an email exchanged between Defendant and Nicolas Papachristodoulou (vide dok 27 at fol 431), the latter affirms to Defendant that a client is denoted as belonging to a particular agent if and when registration of said client is made by the agent that accompanies the client to their relative appointment.

48. It appears that the developers' have procedures in place to ascertain this, for the Court notes that whereas the commission, following the acquisition of property in Cyprus by Mr Dai, was paid directly to one of Plaintiff Company's bank accounts, the commission due following these four sales, was intended to be paid to Mr Chen, but has instead been held by Mantis.

49. Thus, and in light of these considerations, the Court rejects this second grievance.

Decision:

For these reasons, the Court rejects the appeal in its entirety.

Costs are to be borne by Appellant Company.

Mark Chetcuti Chief Justice	Robert G Mangion Judge	Grazio Mercieca Judge

Deputy Registrar
ss