MALTA

QORTI TAL-MAGISTRATI
(GHAWDEX) GURISDIZZJONI SUPERJURI

MAGISTRAT DR.
ANTHONY ELLUL

Seduta tat-12 ta' Gunju, 2008

Citazzjoni Numru. 85/1998/1

Dr. Martin and Marthese spouses Cutajar

Vs

Roy and Rosemary spouses Fleming

The Court,

Warrant of prohibitory injunction – penalty – damages.

Having seen the writ of summons filed by the plaintiffs on the 20th April 1998 wherein they are requesting the liquidation and payment of damages and penalty in terms of Article 836 of the Code of Organization and Civil Procedure (Chapter 12), following the issue of a warrant of prohibitory injunction on the 12th January 1995 whereby plaintiffs were prohibited from performing works on the side of their property which adjoins the wall that is the

property of the defendants. Subsequently defendants filed a law-suit (**Roy Fleming vs Dottor Martin Cutajar** – writ number 10/1995) and on the 6th November 1996 the defendants renounced to the proceedings after they were ordered to provide a guarantee for damages. Plaintiffs claim that they have incurred damages following the issue and keeping in force of the precautionary warrant.

Having seen the statement of defence filed on the 14th May 1998 by spouses Fleming (fol. 14) wherein they claim:-

1. The request for payment of a penalty in terms of Article 836 of Chapter 12 of the Laws of Malta is not admissible as the request had to be filed by means of an application and not a writ of summons.
2. The claims of the plaintiffs are totally unfounded as the warrant of prohibitory injunction was filed to protect the rights of the defendants and therefore the law-suit was not capricious.
3. Plaintiffs have to prove that they suffered damages and this in view of the permits and stop notices issued by the Planning Authority.
4. Although the defendants renounced the law-suit, plaintiffs have not continued with the construction works in their property. Therefore any claim for damages is unfounded.

The court also referred to the following court files:-

(a) Prohibitory Injuction 10/1995 – **Roy Fleming et vs Tabib Dottor Martin Cutajar** – decided on the 12th January 1995.
(b) Writ no 10/1995 – **Roy Fleming et vs Tabib Dottor Martin Cutajar et**[1].
(c) Writ no 174/95 – **It-Tabib Dottor Martin Cutajar et vs Roy Fleming et** – filed on the 5th October 1995 and adjourned for the sitting of the 13th January 2009.

[1] Plaintiffs renounced to these proceedings by a note filed on the 6th November 1996 (fol. 151).

On the 12th December 2000 the court ordered that *"since the defendant is English speaking and does not understand the Maltese language, the court orders that the proceedings be held in the English language"* (fol. 26). Notwithstanding, proceedings were conducted in the Maltese language and none of the parties objected. However it does not transpire that the above-mentioned decree was revoked and therefore judgment is being delivered in the English language.

Having seen the notes of submission filed by the plaintiffs on the 14th March 2008.

Considered:-

1. The facts of the case are the following:-

(a) By means of a public deed dated 12th April 1991 published by Notary Paul George Pisani, plaintiffs purchased from the defendants *"….the tenement marked with the number seven (7) at Saint Leonard Street, Victoria, Gozo"* (fol. 9). At the time defendants were also the owners of tenement number six (6). Parties agreed that *"The said property hereby sold shall be subject to the servitude altius non tollendi in favour of the property number six (6) in Saint Leonard Street, Victoria, Gozo, owned by appearers Roy and Rosemary Fleming proprio in the sense that no building of whatsoever nature may be erected highter than the wall marked with the letters "X" "E" "Y" and this to a maximum depth of ten feet (10') equivalent to three point zero four eight metres (3.048m) from the existing courtyard wall; provided that this servitude applies to that part of the property hereby sold which is adjacent to the part marked "X" – "E" on the said plan, and until the said property number six (6) in Saint Leonard Street, Victoria, Gozo is owned by appearers Fleming proprio". However the client/purchaser is being authorised to raise the height of the party wall limitedly to the area marked with the letters "X"-"E" on the said plan up to the height of two (2) standard courses of Maltese stone and the height of the normal concrete roof. The thickness of the party wall in this particular area namely*

the area marked with the letters "X" – "E" on the said plan shall be made equivalent to that of the existing wall as a continuation of it.".

(b) Whilst works for the development of the property purchased by defendants were in progress, **on the 9th January 1995** defendants filed an application requesting the issue of a prohibitory injunction against plaintiff[2]. They requested the court *"…tordna l-hrug ta' mandat ta' inibizzjoni kontra l-intimat sabiex dan jigi immedjatament inibit milli jkompli b'kull tip ta' kostruzzjoni ulterjuri kif fuq imsemmi fis-sit 7, St. Leonard Street, Victoria"*. By means of a decree delivered on the 12th January 1995, the court upheld the request filed by the defendants and ordered the issue of an injunction *"….kontra l-intimati sabiex dawn jigu inibiti milli jkomplu jaghmlu xogholijiet ta' kostruzzjoni fuq in-naha li tmiss ma hitan proprjeta tar-rikorrenti"*.

(c) **On the 23rd January 1995**, defendants filed a law-suit against plaintiff (Dr. Martin Cutajar)[3] wherein they requested the Court to:-

- Declare that during the progress of works the defendant caused damages to their property.
- Declare that the defendant failed to comply with the obligation he undertook in the contract dated 12th April 1991 in the acts of notary Dr. Paul Pisani as he did not maintain a distance of ten (10ft) from the boundary wall.
- Liquidate the damages suffered by the plaintiffs.
- Condemn the defendant to pay the damages.
- Condemn the defendant to carry out all remedial works.
- Condemn the defendant to demolish the construction that is in breach of the obligation undertaken by the defendant in terms of the above-mentioned public deed.
- In default to authorise the plaintiffs to effect the necessary works at the expense of the defendant.

(d) **On the 29th October 1996**, plaintiff Dr. Martin Cutajar filed an application wherein he declared that

[2] **Roy Fleming et vs Tabib Dottor Martin Cutajar** (Application no:- 10/1995).
[3] **Roy Fleming et vs Tabib Dottor Martin Cutajar** (Writ. 10/95PC).

defendants had sold their property[4] and requested the court's permission to file additional pleas as the servitude established by the contract dated 12th April 1991 published by Notary Paul George Pisani was extinguished following the sale of the property by plaintiffs. By means of a note filed on the 6th November 1996 the plaintiffs (Fleming) renounced to the proceedings.

(e) **On the 20th April 1998** plaintiff (spouses Cutajar) filed this law-suit requesting payment of a penalty, damages and interests due to the suspension of the development of their property following the issue of the prohibitory injunction.

2. With respect to the first plea raised by defendants, the Code of Organization and Civil Procedure stipulates that a request for payment of a penalty is to be made by application (Article 836). Notwithstanding, the writ of summons does not invalidate the judicial act or the request for payment of a penalty in terms of the said provision of the law. In this respect the Court refers to Article 164 of the Code of Organization and Civil Procedure[5]. Therefore this plea will be refused.

3. In terms of Article 836(9)[6] of the Code of Organization and Civil Procedure (Chapter 12):-

> (9) In the case under the previous sub-article, the court at the request, by writ of summons, of the person against whom the precautionary act was issued may condemn the applicant at whose request the precautionary warrant was issued to pay such damages as may have been caused by the issue of the warrant, and in any such proceedings the court shall refer to, and make use of, the records of the proceedings of the precautionary act and of any other proceedings arising therefrom or consequential thereto, and such records shall be admissible evidence for the purposes of this action.

In the case **Busietta Gardens Madliena Limited vs Civil Engineering and Contractors Company Limited et**, the

[4] Contract dated 19th October 1996 and published by Notary Enzo Dimech.
[5] Vide version prior to introduction of amendments by Act XXII of 2005.
[6] Introduced by Act XXIV of 1995.

First Hall of the Civil Court[7] expressed the view that: *"Ukoll meta mandat kawtelatorju jinhareg in bona fide u f'cirkostanzi li ma humiex imsemmija fl-imsemmija art. 836(8) jista' jaghmel hsara lill-parti li kontra taghha jkun inhareg. Xi hadd irid ibaghtihom dawn id-danni: jew dak li nhareg il-mandat kontra tieghu meta fil-fatt ma kienx debitur, jew dak li, ghalkemm mexa in bona fede meta talab il-hrug tal-mandat, tilef il-kawza ghax fil-fatt ma kienx kreditur. Ga rajna illi d-dritt li tikseb il-hrug ta' mandati kawtelatorji ma hux wiehed li jinghatalek gratis; jekk taghmel hsara lil haddiehor bil-hrug tal-mandat, ikollok taghmel tajjeb ghal dik il-hsara u mhux tippretendi li tbatiha l-parti l-ohra, li wara kollox, tkun rebhitlek il-kawza"*.

With due respect this Court considers this judicial opinion as being too wide in concluding that damages are due even where the plaintiff files a law-suit in good faith. The prospect that a plaintiff is not successful is always possible notwithstanding how strong his arguments are. The scope of a precautionary warrant is to secure the rights of the plaintiff before judgment and in particular in the case of the prohibitory injunction to maintain a *status quo* prior to the final outcome of the trial. Although the law states that warrants are issued on the responsibility of the person requesting their issue[8], the system aims at providing an interim safeguard to the aggrieved individual.

The general principle at law is *qui suo jure utitur neminem ledit*. The nature of the action for damages following the issue of a precautionary warrant were eloquently highlighted in the case **Jane Spiteri vs Nicholas Camilleri**[9]:

"(a) illi huwa principju fundamentali illi min jezercita dritt li jispetta lilu ma jistax jitqies li f'dan l-ezercizzju ikun responsabbli ghall-hsara li bhala konsegwenza jista' jbaghti haddiehor, in ommagg ghall-massima 'qui suo iure utitur non videtur damnum facere' bil-konsegwenza li d-

[7] Mr. Justice G. Caruana Demajo, 11th January 2002.
[8] Article 829 Chapter 12.
[9] First Hall of the Civil Court (Justice J. Said Pullicino), 10th January 1992.

dritt ghar-rikors ghall-protezzjoni tal-Qorti, huwa dritt li l-ezercizzju tieghu mic-cittadin ma ghandhu bl-ebda mod jigi mxekkel;
(b) Illi tali dritt tac-cittadin ghar-rikors lejn il-Qorti ma ghanux jigi abbuzat;
(c) Illi l-fatt li t-talba ta' min ipprovoka l-proceduri tigi michuda mill-Qorti, bl-ebda mod ma jfisser necessarjament li sar abbuz mid-dritt li tigi adita l-Qorti. "Non e' in colpa chi, credendo in buona fede di possedere un diritto, ne chiede al tribunale il riconoscimento, sebbene non vi riesca" (Demajo vs Page Kollez. Vol. XV.34 Prim'Awla 24/1/1985). Dan ghaliex ghalkemm il-ligi hi l-istess ghal kullhadd, huwa veru ukoll li l-ligi hija soggett ghal diversi, interpretazzjonijiet li l-partijiet jafdaw fil-gudikant biex jinterpreta u jiddeciedi dwarhom;
(d) Illi tali abbuz jigi riskontrat biss f'kazijiet eccezzjonali u dan kwazi dejjem f'kazijiet ta' vessatorjeta' (Emanuele Calleja vs Carmelo Grima Kollez. Vol. XXXIX.i.24) ***nascenti minn mala fede jew dolo jew almenu negligenza gravament kolpuza*** *(Agius vs Dott. Carbone nomine Kollez. Vol. XIII.434), fejn min ikun agixxa lill-Qorti ghall-hrug ta' tali mandat kawtelatorju ikun ibbaza fuq cirkostanzi* ***manifesti 'priva di qualsiasi fondamento nel fatto e nel diritto per cui il giudizio promosso si dimostri vessatorio.*** *Ma un fallace apprezamento dei fatti posta a base dell'istanza e delle conseguenze giuridiche che ne derivano non e' sufficiente a legittimare una domanda per danni dap arte del vincitore nelle lite" (Mugliette vs Bezzina Kollez. Vol. XXVI.i.405).*
(e) Illi dan l-ahhar principju huwa bbazat fuq il-fatt li l-element ta' vessatorjeta' jimplika abbuz tad-dritt ta' azzjoni gudizzjarja, ghaliex inghad sew illi: "il diritto cessa dove comincia l'abbuso… Riteniamo che basta, per proteggere tutti l'interessi che ne sono degni, per dare una base giuridica alle diverse decisioni che provocano I bisogni della societa', di aderire al concetto generale che tutti I diritti hanno dei limiti"[10].

[10] Kif rapportata fis-sentenza tal-Prim'Awla tal-Qorti Civili (Imhallef R. Pace) fil-kawza **Yorkie Clothing Industry Limited vs Dr. Lilian Calleja Cremona** deciza fit-30 ta' Mejju 2002.

4. The court has to assess whether under the particular circumstances prevailing at the time, the defendants were justified in requesting the issue of a prohibitory injunction. What were the circumstances existing at the time that encouraged the defendants to request the issue of a prohibitory injunction against the plaintiff, and whether those circumstances warranted the request for such an injunction to safeguard that which the defendants were considering to be their rights that were being violated. Obviously, this does not mean that the judicial proceedings filed by defendants (spouses Fleming) had to be successful. The claims made by them had to be determined in the case **Roy Fleming et vs Tabib Dottor Martin Cutajar** (Writ. No:- 10/95). In our case we have no final judgment as the defendants renounced to the proceedings after the sale of their property. This in itself does not mean that defendants are liable for payment of damages. The circumstances that induced the defendants to file an application for the issue of a prohibitory injunction was the demolition of the derelict building bought by plaintiffs, rock cutting next to a section of the dividing wall, and preparation for construction of two floors. In the application the defendants claimed that:-

(a) The works had already weakened the stability of their premises and caused damages;
(b) Continuation of works would increase the damages;
(c) Due to rock cutting, the dividing wall had become weak, the arches that had been placed next to the dividing wall had left openings;
(d) Plaintiff had built roofs in such a way that water would seap into defendants property;
(e) Concrete beams were occupying more than half the thickness of a section of the dividing wall;
(f) The wall where there are pigeon holes had been left without any support;
(g) The development was in breach of the obligation undertaken by the plaintiff in terms of the deed dated 12th April 1991.

In support of their arguments plaintiffs filed an architect's report[11] confirming that *"….the stability of the west and south walls of the living room (on the ground floor) and the bed room (on the first floor) is being jeopardized for the following reasons:-*

1. *The rock cutting so close to the old wall will cause the rubble inside the wall to get loose and push out the outside wall skin with the risk of destabilizing the same wall.*
2. *The footings for the two arches have been placed close to the wall with the result that some stones have been removed from the wall and voids have been left open.*
3. *omissis*
4. *The wall with the pigeon holes has been left unsupported after the old building has been removed. Some of the top stones on this wall have been dislodged"*.

From the court file it is **apparent** that:-

(a) rock cutting was undertaken for the construction of the arches (vide photos at fol. 132) next to the dividing wall, at a distance which is less than that stipulated by law (vide Article 439 of the Civil Code)[12]. This is contrary to what is stated in a report issued by architect Guido Vella wherein it was certified that no such rock cutting was carried out. The photos exhibited by defendants prove a different scenario. Furthermore one can confirm what was stated by architect Joseph Dimech, *"that the foundations of the west and north side walls are on an outcrop of rock (globergina lime stone) which is about 1.50 m above the street level"* (fol. 108). From these documents it is also evident that this part of the building owned by defendants was an old construction. The defendants had already filed a judicial protest (fol. 103) claiming that in the course of

[11] J.P. Dimech & Associates dated 5th January 1995.

[12] *"Illi r-raguni ghal din il-projbizzjoni hija semplici u tikkonsisti fil-fatt li thaffir f'dik id-distanza jikkawza normalment hsara fl-istess hajt u fond kontigwu…("**Nicholas Ellul et vs Mary Cutajar et**" – (P.A. (RCP) – 28 ta' Frar 2002)."* (**Simone de Brincat et vs John Baptist Sammut**, Prim'Awla tal-Qorti Civili (Imhallef R. Pace) digriet moghti fit-3 ta' Gunju 2008).

construction plaintiffs were in breach of Article 439 of the Civil Code.

(b) In the report issued by architect Joseph Dimech it is stated that *"the original one story building* (i.e. no. 7)*, on the west side of this house was not resting against the west side wall"* (fol. 72), rock cutting still had to be carried out by the owners of tenement number 6 (vide item 4 of the list of outstanding works - fol. 48), during works a part of the dividing wall had been dislodged (vide report by architect Joseph Dimech [fol. 109] and photos [fol. 124]).

(c) On the 1st July 1994 architect Teddie Busuttil issued a certificate (fol. 102) and confirmed that he had inspected the property owned by defendants and *"..that most of the rooms have no cracks or damages whatsoever. However there are a few fine cracks in the rooms adjacent to the site being demolished and excavated…… I suggest that the rebuilding of the demolished and excavated site take place immediately so that Mr Fleming's building would be propped up and no other cracks or damages would develop. The more this excavated site is left as it is presently, the more chance there is for damages and cracks to develop"*. On the other hand, the defendants were advised by architect J. P. Dimech that the with the rock cutting the west and south walls were **"being jeopardized"** (fol. 109[13]).

(d) In a section of the dividing wall, defendants had occupied nearly the whole width of the stone wall by placing precast concrete (vide photo fol. 130). This is contrary to what the law states.

(e) The original building permit (1st September 1992) (fol. 179) was valid for two years from date of issue. A second permit was issued by the Planning Authority (no. PA5380 dated **5th April 1995** – fol. 184). According to Mark Cini[14], in December 1994 he held a site inspection *"…u kien instab illi l-ground floor kien lest biex jissaqqaf, kien tela' imma mhux imsaqqaf. Il-permess tan-nineteen ninety one (1991) kien skada filwaqt illi l-applikazzjoni li kien hemm ghall-proposta ta' emenda kien ghadha mhix approvata"* (fol. 174). He also confirmed that by fax dated

[13] Certificate dated 5th January 1995.
[14] Sitting held on the 5th January 2007 (fol. 173-178).

28th December 1994 he requested the permission of the enforcement manager (John Agius) and architect Reuben Abela to authorize the works for the roofing of the ground floor, notwithstanding that development application was still pending. Authorization was granted.

(f) As per approved plan by the Malta Environment and Planning Authority (fol. 185)[15] it is evident that plaintiffs were not intent on honouring the servitude established in the contract of sale dated 12th April 1991 and published by notary Paul George Pisani (clauses three[3] and four [4]). In this respect reference is made to that part of the plan which portrays the first floor, to which clauses three (3) and four (4) of the contract dated 12th April 1991[16] relate.

(g) The plan is dated 2nd August 1994, and the development permit dated 5th April 1995 (PA5380/94) was issued in terms of this plan.

(h) In a declaration dated 10th January 1995 and issued by architect Guido Vella, he claimed *"…dawn kollha huma supposizzjonijiet tar-rikorrenti u l-intimat m'ghandu ebda intenzjoni li jikser il-kundizzjonijiet tal-kuntratt tal-akkwist imsemmi"*. It is evident that the servitude was created for purposes of privacy and presumably to ensure that natural light in defendant's courtyard is not obstructed by an additional storey. During the course of the proceedings plaintiffs failed to explain how the development (as shown in the approved plan - fol. 185) was in terms of the contractual obligations they undertook and defendant declared that *"…they had already built a wall three feet (3') away from this courtyard wall as opposed to ten (10)…."* (sitting of the 27th September 2007 – fol. 231). Thus, for example in terms of clause four (4) the parties agreed that *"….no building of whatsoever nature may be erected higher than the wall marked with the letters "X" "E" "Y"[17] on the said plan and this to a maximum depth of ten feet (10')…."* (fol. 9). Furthermore, *"the purchaser hereby binds himself not to make use of the roof area which lies within ten foot*

[15] Permit no. 5380/94 dated 5th April 1995.
[16] Fol. 6.
[17] Vide plan fol. 25 in the court file relating to the prohibitory injunction 10/1995, **Roy Fleming et vs Tabib Dottor Martin Cutajar** – 12th January 1995.

(10')….. from the above mentioned property wall "X" – "E" and not to have access to this area of the roof area except for the purpose of maintenance and repair". From the approved plan it is clear that the first floor was going to be accessible from a staircase which leads up to this area and *prima facie* it appears that the ten feet (10ft) distance was not going to be observed.

(i) Although the defendants requested the court to stop the plaintiff *"…. milli jkompli b'kull tip ta' kostruzzjoni ulterjuri kif fuq imsemmi fis-sit 7, St. Leonard Street, Victoria"*, the court ordered the plaintiff not to carry out *"…..xogholijiet ta' kostruzzjoni fuq in-naha li tmiss ma' hitan proprieta tar-rikorrenti"*. Therefore, it is evident that the court did not prohibit all works.

Under these circumstances the Court does not consider that defendants were imprudent, negligent or in bad faith when they requested the court's protection. The Court is not satisfied that *"……la pretensione cautelata non avesse alcun fondamento nel fatto e nel diritto"*. Characteristics that are essential for *culpa* (**Alfred Bartolo Parnis nomine vs Carmelo Morana et** – Court of Appeal[18]). Neither can it be stated that their claim was vexatious. The application was based on the activity that was taking place at the time in plaintiffs property. The fact that the property was in a derelict state and that it was evident that it had to be demolished for purposes of construction, does not mean that defendants had no right to protect their property. Without doubt their request was based on architect Joseph Dimech's report. As regards to the matter of vexatiousness, the Court does not consider that the aim of the request for the issue of a prohibitory injunction was to annoy the plaintiffs but at protecting the rights of the defendants. The precautionary warrant was the means to stop the works which defendants considered were in prejudice to their rights as owners of the adjacent tenement. From the evidence collected during in the course of proceedings the Court is not morally convinced that defendants intended to abuse their rights by initiating the judicial proceedings. Although defendants had

[18] 20th March 1953.

expressed their intention on selling their property[19], they still enjoyed proprietary rights. They were the owners of the property and therefore had a right to seek protection and ensure that plaintiffs (at the time defendants) honour their obligations. Therefore, the defendants were not in default by the fact that the warrant was retained and still had an interest in the matter until they sold the property. Furthermore, plaintiffs failed to prove that the defendants opposition was without a valid reason.

Another issue raised by plaintiffs is that defendants were negligent in the manner in which the proceedings were conducted. It is a fact that the party who succeeds in obtaining the issue of a precautionary warrant has a duty to file judicial proceedings within the time period prescribed by law, and to pursue them diligently till the end. The case was appointed for hearing for the sitting of the 20th April 1995, when the court appointed Dr. Mario Scerri and architect Richard Aquilina as judicial referees. In that sitting the court ordered the defendants to give a guarantee in terms of Article 538 of the Civil Code. On the 24th April 1995 defendants filed an appeal. Plaintiffs complained at the lack of progress that was being registered during the proceedings. It is true that in the sittings held on the 7th November 1995, 5th December 1995, 7th May 1996 no progress was registered as defence counsel for spouses Fleming failed to attend. For the sitting of the 7th May 1996 spouses Fleming did not attend. Evidence was however heard in the sittings held on the 30th May 1995, 4th July 1995, 5th September 1995, 23rd February 1995, 29th July 1996. Whilst the court appreciates that plaintiffs were anxious to settle the issue as soon as possible, the Court does not consider that the fact that defendants failed to produce evidence during the above-mentioned sittings is sufficient to render them liable for damages being claimed by plaintiffs.

[19] Letter dated 7th May 1994: *"we write to inform you that, regretfully because of health reasons we have decided to sell our property re 6, St. Leonard Str, Victoria"* (vide court file 174/95).

The same arguments apply *mutatis mutandis* to plaintiffs claim for payment of a penalty in terms of Article 836 of the Code of Organization and Civil Procedure.

5. Notwithstanding what has been stated the Court considers it appropriate to make a number of observations with respect to the damages being claimed by plaintiffs:-

(a) The Court is not convinced that following the issue of the injunction (12th January 1995) the defendants had no other options (from a technical aspect) in the manner in which construction works could have progressed and at the same time abide with the court's order.

(b) *Reimbursement of the subsidy received from the Housing Authority*: in a letter dated 31st October 1998 addressed to the Housing Authority, plaintiffs explained that they had a pending disputed with defendants which was the subject matter of the law-suit **Dr. Martin Cutajar et vs Roy Fleming et** (Writ. 174/1995): *"Minn din il-kawza jiddependi d-dritt ta' l-atturi ghall-akkwist ta' porzjon mdaqqsa ta' gnien. Naturalment din taghmel differenza kbira fl-izvilupp billi jekk tintrebah huma jkunu f'posizzjoni li jizviluppaw il-proprjeta' taghhom b'mod divers minn dak originarjament prospettat…. Tapprezza li ma jkunx ghaqli ghat-Tabib Cutajar li jissokta bix-xoghol ta' bini qabel ma jkun hemm gudizzju jew arrangement fil-kawza 174/1995. Fil-prezent id-dar ghandha bitha zghira izda jekk tintrebah il-kawza huma jakkwista gnien konsiderevoli u jkunu jridu modifikazzjoni fl-izvilupp progettat biex jigi nkorporat fil-bqija"* (fol. 54). Therefore, it is evident that at that particular stage plaintiffs had no intention to continue with the development prior to knowing the outcome of the above-mentioned judicial proceedings. This contradicts the statement made by the plaintiff that: *"Minhabba l-mandat, ahna nqasna milli nlestu x-xoghol ta' kostruzzjoni u nabitaw god-dar mibnija minna fiz-zmien rikjest mill-ghoti tas-sussidju, u b'hekk ahna tlifna wkoll dan is-sussidju"*.

(c) *Increase in price for purchase of material and payment of works involved in the construction of the*

house in the sum of Lm10,000:- works were suspended until November 1996 when defendants ceded the law-suit filed on the 23rd January 1995 **Roy Fleming et vs Dr. Martin Cutajar**. Had works continued after this development, the increase would have certainly been minimal. The letter sent to the Housing Authority in October 1998 confirms that prior to continuing with the development plaintiffs wanted to wait for the final outcome of the law-suit they had filed against defendants concerning their right to purchase land owned by defendant and bordering their property (174/95).

(d) *Payment of rent for rental of an office*:- no evidence was produced by the plaintiffs as to the rent. Their claim is merely based on an estimate made by architect Guido Vella.

(e) *Payment of duty on publication of the deed of purchase of the property bought in San Anard in the sum of Lm3,150*:- this certainly does not qualify as damages since the plaintiffs opted to purchase property as alternative accomodation. Although they claim that they had no other option, the Court is not convinced. They could for example have leased property as alternative accommodation, as suggested by architect Guido Vella (vide fol. 78 item no. 4). Furthermore, on a balance of probabilities full completion of the premises would not have been ready by the time that defendants renounced to the law-suit. In any case plaintiffs knew that defendants were about to sell their property. In fact by an application filed on the 25th September 1995[20] they requested the Court to prohibit the defendants from selling part of their property as they had a right of first refusal in terms of the contract dated 12th April 1991. In the application plaintiffs confirmed: *"illi wara li skada t-terminu msemmija l-intimati ghaddew biex iffinalizzaw konvenju ma terz dwar il-bejgh tal-proprjeta intiera"*[21]. In actual fact a preliminary agreement was signed on the 31st August 1995. The plaintiffs were full aware of the fact that a similar agreement was about be signed as on the 22nd August

[2020] Prohibitory Injuction no. 619/1995 – **Tabib Dottor Martin Cutajar et vs Roy Fleming et**.

[21] Fol. 29 of the court file **it-Tabib Dottor Martin Cutajar et vs Roy Fleming et** (writ 174/95).

1995 a letter was sent by defendants that the offer was valid up to the 30th August 1995 *"…as we are signing a konvenju (promise of sale) on Thursday 31st August 1995."*[22]. The plaintiffs bought the property in Gharb by a contract dated 10th December 1996 and the plaintiff confirmed that a preliminary agreement had been signed three (3) months before[23] (that is 10th September 1996).

(f) *Damages caused to tenement 7, St. Leonard Street, Victoria*:- from the evidence compiled during the proceedings it does not transpire what these damages are, as plaintiffs have based their claim on a declaration made by architect Guido Vella at the time that precautionary warrant was filed (fol. 74-77). Furthermore, it does not appear that plaintiffs took remedial measures to ensure that the building does not incur damages and the court is not morally convinced that during the period that judicial proceedings were pending damages were caused to the premises due to the suspension of works. Furthermore, the Court sees no reason why the plaintiffs blame the defendants for any damages possibly caused to the premises after defendants declared that they had no further interest in the judicial proceedings. From that moment plaintiffs had no restrictions to continue with the development. However, plaintiff stated that construction works resumed in 2007 (sitting of the 20th July 2007 – fol. 208).

For these reasons the Court decides the law-suit by rejecting the first plea and upholds the second plea raised by defendants, and therefore rejects the requests made by the plaintiffs in the writ of summons filed on the 20th April 1998.

Costs are to be apportioned in the following manner:-

(a) Costs with respect to the first plea are at the charge of defendants.

(b) All other costs are at the charge of the plaintiffs.

[22] Exhibit MC9 in the court file writ 174/95.
[23] Fol. 209.

< Sentenza Finali >

----------TMIEM----------