



**CIVIL COURT
FIRST HALL**

**THE HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO**

Sitting of the 30 th March, 2011

Citation Number. 287/2004

David James and Carmen spouses Sammut

Versus

Advocate Tonio Azzopardi and Legal Procurator Louisa Tufigno appointed by decree of 27 June 2005 as curators on behalf of Joseph Gilbert and Grace *sive* Grazia spouses Warner; by decree of 13 March 2009 the curators were removed from the suit which continued against Joseph Gilbert and Grace *sive* Grazia Warner in person; and by a further decree of 30 March 2011 the suit continued against Grace *sive* Grazia Warner also as successor of Joseph Gilbert Warner after the latter passed away

1. This case concerns a promise of sale.
2. Plaintiffs declared that on the 11 December 2003 they entered into a promise of sale agreement with defendants whereby defendants undertook to sell, and

plaintiffs undertook to buy, the tenement *Antares II* in Munxar Street, Marsascala, together with the movable objects situated therein and the garage without an official number in the same street, for the agreed price of ninety-seven thousand Maltese liri (Lm97,000) – equivalent to two hundred and twenty-five thousand, nine hundred and forty-nine euro and twenty-two cents (€225,949.22) – of which seven thousand liri (Lm7,000) – equivalent to sixteen thousand, three hundred and five euro and sixty-one cents (€16,305.61) – represented the price of the garage.

3. For no valid reason at law, defendants informed plaintiffs that they would be selling them the house but not the garage. On the 30 March 2004 the parties signed the deed for the transfer of the house and movables for the price of ninety thousand liri (Lm90,000) – equivalent to two hundred and nine thousand, six hundred and forty-three euro and sixty-one cents (€209,643.61) – but defendants persisted in their refusal to transfer also the garage; plaintiffs therefore filed a judicial letter in terms of art. 1357 of the Civil Code.

4. Plaintiffs claim that defendants' refusal to transfer the garage is causing them damages due to loss of use of the same garage. They therefore filed the present action wherein they are requesting the court:

i. to declare that defendants, in refusing to sell to plaintiffs the garage mentioned in the promise of sale agreement, are in breach of their obligation in terms of the said agreement;

ii. to order defendants to proceed to the sale of the garage for the price of seven thousand liri (Lm7,000) – equivalent to sixteen thousand, three hundred and five euro and sixty-one cents (€16,305.61) – and subject to the terms and conditions agreed to in the promise of sale agreement, to appoint a notary public to publish the deed of sale, to fix a day, time and place for the publication of the deed, and to nominate curators who are to act on behalf of any party who fails to appear on the deed;

iii. to declare that, due to the failure by defendants to abide by their contractual obligations, plaintiffs suffered damages from the day when the promise of sale lapsed until the day when the deed will be

published, to assess the said damages, and to order defendants to pay the damages so assessed; and

iv. alternatively to the second and third claims, if these claims cannot be granted due to reasons beyond the power of the court, to declare that, due to the failure by defendants to abide by their contractual obligations, plaintiffs suffered damages from the day when the promise of sale lapsed, to assess the said damages, and to order defendants to pay the damages so assessed.

5. Plaintiffs are also claiming interests and costs, including the cost of the judicial letter of the 30 March 2004 and of the warrant of prohibitory injunction of the same date.

6. The curators appointed on behalf of defendants initially reserved their defence, stating that they did not know the facts of the case. Subsequently, defendants filed the following pleas:

i. the promise of sale agreement of 11 December 2003 is not valid because it was not duly registered in terms of law;

ii. by appearing on the deed of sale of 30 March 2004 plaintiffs renounced to other rights arising from the promise of sale;

iii. the deed of 30 March 2004 amounts to a novation which extinguished all obligations arising from the promise of sale;

iv. generically, plaintiffs' claims are ill-founded.

7. The relevant facts are as follows: By virtue of a private agreement dated 11 December 2003 defendant Grace Warner on behalf of the other defendant, her late husband Joseph Gilbert Warner, undertook to sell to plaintiffs, who undertook to buy, "the terraced house, including its relative airspace comprising a groundfloor, first floor and second floor, officially unnumbered named *Antares II* in Triq il-Munxar, Marsascala, Malta, as subject to the annual and perpetual revisable sub-groundrent of fifty Maltese liri (Lm50) payable to the Joint Office, with all rights and appurtenances, and with vacant possession", including also "the garage, excluding its airspace, without an official number and without name, being the second garage from the right hand side of the block as one looks at the block from the street, being the garage next to the

door of the block of flats overlying the said garage
... as subject to an annual and temporary groundrent of fifteen liri (Lm15) payable to the Joint Office”.

8. The agreed price was ninety-seven thousand liri (Lm97,000) in total. The agreement states further that “included in the above mentioned price is the value of the movables amounting to seven thousand Maltese liri (Lm7,000)”. Contrary to what is stated by plaintiffs in the sworn application, the part of the price in consideration of the sale of the garage is not specified in the promise of sale; it is part of the global price of ninety-seven thousand (Lm97,000) for the house, tenement and movables. It is only the value of the movables which is specified apart from the global value.

9. The promise of sale was binding until 31 March 2004.

10. On the 30 March 2004 – one day before the promise of sale lapsed – the parties entered into a contract of sale whereby defendants sold to plaintiffs the house and movables for a total price of ninety thousand liri (Lm90,000) – eighty-five thousand liri (Lm85,000) for the house and five thousand liri (Lm5,000) for the movables. No mention is made of the garage; a clause relative to the garage which appeared on the original draft of the deed was deleted prior to signing and publication.

11. On the same day – 30 March 2004 – plaintiffs filed a judicial letter in terms of art. 1357 of the Civil Code calling upon defendants to transfer the garage.

12. When giving evidence on the 13 March 2009 defendant Grace Warner gave no coherent reason for her refusal to sell the garage notwithstanding the undertaking in the promise of sale. She started by saying that defendants had no intention of selling the garage because they wanted to keep it as “a summer garage” because it was close to the beach, but she soon admitted that they put it up for sale, only at a higher price than that agreed upon with plaintiffs.

13. In their statement of defence, defendants also say that the promise of sale is not valid because it was not registered in terms of law. During the sitting of 30 June 2009 the parties jointly recorded the fact that “the promise of sale and purchase was not registered with the

Commissioner of Inland Revenue in terms of section 3 of Chapter 364 of the Laws of Malta”.

14. Art. 3(6) of the Duty on Documents and Transfers Act (Chapter 364) provides as follows:

3. (6) Notwithstanding the provisions of any other law a promise of sale or of a transfer of immovable property or any real right thereon shall not be valid unless notice thereof is given to the Commissioner within such time and in such manner, and containing such particulars, as may be prescribed. Such notification shall be accompanied by a provisional payment equivalent to twenty per centum of the amount chargeable

15. Reg. 10 of the Duty on Documents and Transfers Rules (S.L. 364.6) further provides as follows:

10. (1) For the purposes of article 3(6) of the Act, the transferee and the transferor or their authorised representative shall give notice, of the relative promise of sale or of a transfer of any immovable property or any real right thereon, to the Commissioner:

... ..

(5) The Commissioner shall be notified of all such promises of sale or of a transfer of any immovable property or any real right thereon made on or prior to the 31st December, 2003 by the 31st October, 2004;

Provided that no notification shall be required in the case of promise of sale or of a transfer of an immovable property or real right thereon drawn prior to the 1st January, 2004, where deed is to be published prior to 1st November, 2004.

16. In the present case the promise of sale was made before the 31 December 2003 and the deed was to be published before the 1 November 2004: no notice to the Commissioner of Inland Revenue was required and the plea is therefore dismissed.

17. In their second and third pleas defendants are claiming that, by accepting to purchase the house without the garage, plaintiffs were in effect renouncing to their right to purchase the garage, which right in any case was extinguished by novation.

18. It is obvious, in the view of the court, that there was no renunciation on the part of plaintiffs. The sale of the house was, in effect, a part payment of the obligation to

sell house and garage. Although the creditor is entitled to refuse part payment¹, his acceptance thereof is not equivalent to renunciation of the balance. Plaintiffs manifested their intention to insist on the full performance of the obligation by filing a judicial letter in terms of art. 1357 of the Civil Code on the same day that the deed was published.

19. Further, in terms of art. 1179(a) of the Civil Code, “Novation takes place when the debtor contracts towards his creditor a new debt, and this is substituted for the old one which is extinguished”. In the present case the effect of the deed of sale was not the substitution of the debt created by the promise of sale but a part payment thereof. Moreover, in terms of art. 1180(2) of the Code, novation “is not to be presumed; the intention to effect it must clearly appear”. As already stated, there is no evidence of such intention in the present case.

20. Defendants’ second and third pleas are therefore dismissed.

21. Although no formal plea was raised, defendants are also claiming that the promise of sale is not binding, neither on defendant Grace Warner, because she signed not on her behalf but on behalf of her husband Joseph Gilbert Warner, nor on behalf of the said Joseph Gilbert Warner, because, although his wife signed also as attorney on his behalf, she did not have a valid power of attorney.

22. The promise of sale states that defendant Grace Warner was appearing on behalf of her husband as “duly authorised in virtue of a power of attorney a copy of which is attached to this agreement and marked document letter «A»”. However, no document marked letter «A» is attached to the copy of the agreement filed in the records². Notary Mary Grech Pace, who drafted the agreement, stated in evidence that an issue concerning the power of attorney arose and “most probably [it] was decided that we have to send [for] another power of attorney. It could be [the issue] cropped up during

¹ Art. 1156, Civil Code.

² *Foll. 6 et seqq.*

[the signing of] the promise of sale but we went ahead to conclude on that day not to leave anything pending”³.

23. Although it was highly irregular for the written agreement to state that a copy of the power of attorney was being attached thereto when in actual fact it was not, a power of attorney, in general, need not be in writing. However a power of attorney granted by one spouse to the other must, in terms of art. 1322(6) of the Civil Code, be by means of a public deed or a private writing if it refers to acts of extraordinary administration such as, as in the present case, a sale of immovable property. There is a copy of a written power of attorney in the records⁴, but this document was only made on the 1 March 2004, and it is specifically limited to the sale of the house, not the garage.

24. Under these circumstances, defendant Joseph Gilbert Warner was not validly represented on the promise of sale: he cannot be considered a party thereto and the promise is therefore not binding on him.

25. It is true that, as already stated, no formal plea was raised in this sense; however, for plaintiffs action to succeed they must show, as one of the elements of the action, that Joseph Gilbert Warner was a party to the promise of sale; this, in the view of the court, they have failed to do.

26. It is also evident from the records that plaintiffs’ premiss in their written submissions that Mrs Warner signed the promise of sale on her own behalf as well as on behalf of her husband is also incorrect: the promise of sale states merely that Grace Warner “is appearing on this agreement in the name, for and on behalf of her husband Joseph Gilbert Warner”. Grace Warner also was not a party to the promise which, consequently, is not binding on her.

27. For the above reasons the court dismisses plaintiffs’ claim with costs, other than the costs of defendants’ pleas which were dismissed, which are to be borne by defendants.

³ Fol. 111.

⁴ Foll. 21 *et seqq.*

Informal Copy of Judgement

< Final Judgement >

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