



**QORTI TAL-MAGISTRATI  
(GHAWDEX) GURISDIZZJONI SUPERJURI**

**MAGISTRAT DR.  
JOSETTE DEMICOLI**

Seduta tas-6 ta' Dicembru, 2011

Citazzjoni Numru. 79/2008

**Doctor William Cuschieri in his quality as special attorney of the absent Catherine Elizabeth Braithwaite; Benjamin Shaun Taylor and Stephen James Braithwaite and by means of a note dated 30th October, 2008 Catherine Elizabeth Braithwaite assumed the acts of the case due to her presence in Malta**

**Vs**

**Henry sive Harry Braithwaite**

The Court,

By means of their sworn application, plaintiffs requested this Court to declare and decide that, (i) by his behaviour, defendant caused damages to plaintiffs and that he is answerable in damages according to article 1874(1) of the Civil Code; (ii) to liquidate a sum payable by defendant to

plaintiffs representing the said damages; (iii) to condemn defendant to pay plaintiffs the said sum and (iv) to condemn the defendant to render an account according to law of his management and of everything he has received by virtue of the powers of attorney released by the plaintiffs and this within a brief and peremptory time limit established by this Court. Plaintiffs are also requesting this court to award them the costs of these proceedings.

In his reply defendant states that (i) plaintiffs' claims are unfounded both in fact and at law and should be dismissed with costs; (ii) that plaintiffs failed to indicate the purpose for which certain witnesses mentioned by them would be summoned in breach of article 156(4) of Chapter 12; (iii) as regards the merits, defendant's behaviour in executing the mandate given to him by plaintiffs was neither malicious nor negligent and therefore the first three claims submitted by plaintiffs should be dismissed; (iv) that the fourth claim is premature since before the filing of the lawsuit, defendant was never called upon to render an account as therein requested. He also pleaded that in any case, he always kept plaintiffs informed of all that he was doing and would do in executing the mandate and that this will be proved in greater detail during the case and furthermore that he never received anything by virtue of the power of attorney documents granted to him; on the contrary he disbursed considerable sums in favour of his children. (v) Defendant also pleaded that without prejudice to the other pleas raised, he will prove that the property of the farmhouse in Cini Street, Qala, Gozo was acquired by funds belonging to him and that the late Mary Margaret Braithwaite was merely acting as a *prestanome* for him due to the fact that under local legislation he could not be the owner of more than one immovable property at the same time. (vi) He pleaded further that the said property was acquired with the clear and specific understanding that it would be transferred to defendant as soon as it would be possible for him to own more than one property in Malta, plaintiffs were aware of this understanding and that he would effect this transfer once it was possible.

### Facts of the Case

From a reading of the acts of the proceedings, it results that both parties are in agreement with regards to certain facts which led to the instant case. The court will thus proceed to refer to such facts:

- Plaintiffs are all the children of the late Mary Margaret Braithwaite and defendant is the father of two of the plaintiffs, namely Catherine Elizabeth Braithwaite and Stephen James Braithwaite.
- Mary Margaret Braithwaite and defendant were divorced. However, at some point in time they reconciled but never remarried.
- Mary Margaret Braithwaite died on the 31<sup>st</sup> August 2004.
- By means of her last will dated 28<sup>th</sup> September 2002 enrolled in the acts of Notary Maria Vella Magro, Mary Margaret Braithwaite bequeathed to plaintiff the right of use and habitation of a farmhouse in Cini Street, Qala, Gozo and instituted as her universal heirs her three children.
- This farmhouse was acquired by means of a deed of sale dated 17<sup>th</sup> October 2003 enrolled in the acts of Notary Maria Vella Magro.
- Plaintiffs issued a number of power of attorneys in favour of defendant. Catherine Elizabeth Braithwaite issued two such documents dated 6<sup>th</sup> May, 2002 and 14<sup>th</sup> September, 2007. Benjamin Shaun Taylor and Stephen James Braithwaite issued a power of attorney in his favour on the 22<sup>nd</sup> October, 2004.
- Plaintiffs Benjamin Shaun Taylor and Stephen James have issued a power of attorney in favour of their maternal uncle James Aherne.

- A promise of sale agreement dated 28<sup>th</sup> October 2004 regarding this farmhouse in Qala was signed between James Aherne who on that act appeared on behalf of his niece and nephews and the defendant.
- Defendant used the power of attorney documents to appear in plaintiffs' name and stead on the deed of declaration *causa mortis* of the late Mary Margaret Braithwaite of the 28<sup>th</sup> October, 2004 enrolled in the acts of Notary Maria Vella Magro.
- Defendant used the power of attorney documents to appear in plaintiffs' name on a deed of sale of the 23rd November, 2007 enrolled in the acts of Notary Maria Vella Magro to transfer the title to the farmhouse to himself. On his behalf appeared the Notary's secretary by virtue of a power of attorney given in her favour by defendant himself.
- Defendant in his testimony admits that although in the promise of sale agreement and the contract of sale it was declared that a sum of three hundred thousand Maltese Liri had already been paid to plaintiffs, in actual fact no money has been paid upon the transfer<sup>1</sup>.

### Considerations

Plaintiffs' version of what happened is that when their mother died, defendant failed to inform them that their mother had left a will by virtue of which they were instituted as her universal heirs. On the contrary he gave them reason to believe that their mother had left no inheritance. In fact in her sworn application, Catherine Elizabeth Braithwaite stated that she and her brothers were never advised of the inheritance. In 2005 she received a letter dated 23<sup>rd</sup> February, 2005 from her father's solicitors in England saying that her mother died intestate and that she should contact defendant and agree on any terms she felt her mother might have bequeathed

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<sup>1</sup> Defendant's testimony given during the sitting of the 27<sup>th</sup> November, 2008

to her but did not do so<sup>2</sup>. On contacting defendant regarding the inheritance he would say to her that her brothers and herself would get all the inheritance when he passed away. Both brothers confirmed that they were never advised of the will in Gozo.

Catherine Elizabeth Braithwaite explained that the first power of attorney issued by her in 2002 was a general power of attorney. According to her this was issued in connection with the purchase of the property in Gharb, Gozo which deed of sale and purchase was published by Notary Maria Vella Magro on the 17<sup>th</sup> September, 2002. It results however that this power of attorney was also used by defendant to appear on the deed *causa mortis* of the late Mary Margaret Braithwaite. Plaintiff also states that defendant made use of such power of attorney at a time when they were not on speaking terms. She stated in her cross-examination that after her mother's death she was not on speaking terms with plaintiff. Defendant himself did not exclude such a possibility.

As regards the second power of attorney she issued in favour of defendant in September 2007 Catherine Elizabeth Braithwaite stated<sup>3</sup> that her father never informed her why he needed this document, but she assumed that it was to do with her property in Gharb. They had met in England and asked her to sign documents for him the next day. This was a time when she was emotionally weak because she had just been through the end of a relationship. The following day her father handed her a house plaque with her mother's name on before they went to the Notary. This upset her and went to the Notary crying. The notary advised her not to sign but she was scared of defendant and she signed. She was neither consulted before nor after the deed was signed on the 23<sup>rd</sup> November 2007 and defendant never sought her authorization.

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<sup>2</sup> Dok CBX 1

<sup>3</sup> Fol 180 of the file

Plaintiff continued that her brother Stephen received a letter from IRD whereby he was informed that he had paid inheritance tax in Malta. This is what made them enquire further. Thus, she contacted IRD in Malta and spoke to Cynthia Grech<sup>4</sup> who informed her of the *causa mortis* and of the deed and that defendant had appeared on her and her brothers' behalf. Plaintiff also commented that her receipt and Benjamin's were addressed to addresses pertaining to defendant and thus they could never have become aware of same. Following this, she contacted her lawyer who ordered the relative searches from which it resulted that her mother owned a farmhouse in Qala<sup>5</sup> and that she had a will and that defendant used the power of attorney entrusted to him to appear on *causa mortis*. Defendant did not seek prior authorisation. She declared that she did not pay inheritance tax.

The other two plaintiffs basically confirmed their sister's version of events. In his cross-examination Benjamin Shaun Taylor<sup>6</sup> explained that defendant told him two months' after his mum's death to sign a form or his mum would lose her home. A Notary in England advised him and his brother to read the form before signing. He did not, but he still signed. He had no idea that he was giving a power of attorney to defendant. He was not given any information as to where this document was going to be used but that he only knew *'that the document related to something about my mother's house'*.

In his cross-examination Stephen James Braithwaite stated that his mum told him that she bought property in Gozo in Qala and that his father bought the house next door. His mother got the money from the sale of a house in England. As regards the power of attorney issued in favour of his father, he states that the Notary advised him before signing that the power of attorney was not for specific things and that it had wide powers and that the

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<sup>4</sup> Who confirmed email exhibited in fol 52 when she testified in fol 174 of the file and confirmed that Catherine Braithwaite phoned on the 25<sup>th</sup> March 2008 to request information on the filing of a *causa mortis* declaration.

<sup>5</sup> Plaintiff states that her mother never told her that she was acting as nominee for her father with regards to this farmhouse in Qala.

<sup>6</sup> Fol 445 of the file

person to whom he was giving the power of attorney could do anything. However, he trusted his father. He then states the following:

*'Had my father been honest and told me that he wanted this power of attorney so that he could transfer the property from my mother's name onto his personal name I would have absolutely had no problem with this. However, my father was not honest. He never told me what was going to do with this power of attorney.'*

Plaintiffs also submitted that defendant has misappropriated the monies, movable and precious items. As regards the jewellery during the pendency of this case defendant returned the said precious items with the exception of the pearl necklace. It has not been proved that the late Margaret Braithwaite had any monies.

On the other hand, defendant's version of events is the following: when he and his partner, the late Mary Margaret Braithwaite, came to Gozo they decided upon buying three properties from Baron Group, a property in Gharb, and two adjacent properties in Cini Street, Qala. The problem was that according to Maltese law, a non-Maltese citizen could not buy more than one property in Malta at the same time. So it was suggested to them that the properties be bought in the names of three separate individuals, with defendant buying one property, Mary Margaret Braithwaite buying the second one – these two properties eventually being the two adjacent properties in Qala, and Catherine Elizabeth Braithwaite the third property, in Gharb. This notwithstanding, all the money necessary for these purchases and all ancillary expenses, be they fiscal dues, notarial dues or expenses necessary for carrying out alterations and renovations to the structures of the properties and eventually furnishing the properties was provided by the defendant.

Shortly after setting herself up in Malta, Mary Margaret Braithwaite was diagnosed with a terminal illness and she died some years later. According to defendant, this necessitated a reorganisation of his financial affairs. He

had to pay for succession duty in respect of the property registered in Mary Margaret Braithwaite's name. Moreover that property was now owned by three different individuals. Thus, he proceeded to have the contract of declaration of transfer *causa mortis* relating to her assets published. Whilst in the process he states that he approached his three children with the purpose of having the second property in Qala transferred to his proper name.

He explained that to this end the two plaintiffs Benjamin Shaun Taylor and Stephen James Braithwaite issued a power of attorney in favour of their uncle James Aherne, whereas he as attorney of his daughter substituted the said James Aherne as her power of attorney; and the latter appeared on a promise of sale dated 28<sup>th</sup> October, 2004 whereby they bound themselves *in solidum* to transfer the property in Cini Street, Qala originally registered in the name of Mary Margaret Braithwaite to Henry sive Harry Braithwaite. In terms of this promise of sale agreement, the contract of sale was to be published within five years from the date of signing thereof. This promise of sale was duly registered with the Commissioner of Inland Revenue. Subsequently, during the validity of the promise of sale, defendant took care to have the contract of transfer itself duly published by Notary Maria Vella Magro on the 23<sup>rd</sup> November 2007.

Defendant's submissions are that (i) in executing the mandate entrusted to him, he did not act either negligently and even less fraudulently; and (ii) plaintiffs did not in actual fact suffer any damages as a consequence of his actions when acting as their attorney and thus their claims should be dismissed.

Parties have produced various witnesses, whose testimony will be referred to later on in this judgment.

First of all, with regards to defendant's first plea the Court rejects such plea considering that the witnesses have been duly produced and their testimony was relevant to the case.



Regarding the merits of the case, plaintiffs are basing their action primarily upon article 1874 of the Civil Code. This article states that:

*'(1)A mandatary is answerable not only for fraud, but also for negligence in carrying out the mandate.*

*(2) Nevertheless, such liability in respect of negligence is enforced less rigorously against a person whose mandate is gratuitous than against one receiving a remuneration'.*

First of all, mandate is a nominate contract which the Civil Code defines as 'a contract whereby a person gives to another the power to do something for him'. In fact article 1856 of the Civil Code stipulates that

*'(1)Mandate or procuration is a contract whereby a person gives to another the power to do something for him.*

*(2) The contract is not perfected until the mandatary has accepted the mandate'.*

Article 1857 of the Civil Code states that 'subject to any other special provision of the law, a mandate can be granted by a public deed, by private writing, by letter or verbally, or even tacitly'. The Maltese legal system does not contain a number of articles that specifically regulate the written form of mandate. The written form of mandate is often termed a power of attorney and it seems that the Maltese legal system, by adopting a number of articles common to both, illustrates that mandate and powers of attorney are inter-related. However, one must also bear in mind that, *'mandato e procura, sono negozi distinti ma funzionalmente collegati'*<sup>7</sup>. The written form of mandate, or rather a power of attorney may be defined as, *'...un atto giuridico con cui un soggetto conferisce ad un altro il potere di rappresentanza'*<sup>8</sup>.

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<sup>7</sup> Mandato, Disposizioni Generali, Carlo Santagata.

<sup>8</sup> Thesis by Dr Adriana Vella : Reform to the Law of Mandate

Plaintiffs are not requesting the rescission of the contract of sale but are seeking the liquidation and payment of damages.

In view of this defendant submits that article 1874 applies only where a mandatory, who has been validly appointed, acts negligently or in a fraudulent way vis-a-vis his principal. It does not take into consideration the circumstances under which a power of attorney has been obtained, and does not apply for instances where principal alleges that he was coerced or duped into issuing the power of attorney in favour of the mandatory. That would require an entirely different type of action to be brought forward by the plaintiffs.

As has already been mentioned, plaintiffs are not requesting the rescission of the contract of sale notwithstanding that the farmhouse in Qala is still in defendant's possession. Neither are they impugning the validity of the powers of attorney issued in favour of defendant, the power of attorney issued in favour of James Aherne, the preliminary agreement itself and lastly the contract of sale. Thus, all these are valid at law.

First of all, it is this court's belief that plaintiffs' action cannot be acceded to when taking into consideration the fact that the contract of sale still stands as being valid at law. It would be quite contradictory to liquidate damages on the basis that their mandatory has acted fraudulently (even though this has not been proved) on a contract and yet at the same time that same contract is still valid with all the legal effects and consequences of a valid contract and the property is still in defendant's possession.

As stated by defendant in his note of submissions, there is a clear distinction between fraud in the obtainment of the power of attorney and fraud in the execution of the power of attorney. It is evident from the proof adduced that plaintiffs are alleging that defendant duped them into issuing the power of attorneys. However, they have not impugned their validity at law. Thus, strictly speaking, such evidence cannot have bearing on the real point in

issue which is negligence or fraud in the execution of the mandate given.

Secondly, the Court after having taken into consideration all the proof in the acts of these proceedings concludes that plaintiffs' action could not have been acceded to even if the action filed by them was the right course of action.

In fact, their version of events is not credible. There are various reasons which have convinced this Court that the events did not occur as depicted by plaintiffs:

- Plaintiffs have nominated defendant as their attorney and they granted him general powers to appear in their stead.
- Plaintiffs claim that when they signed the power of attorneys they did not question why they were granting the power of attorney and that they were duped or even coerced into signing the documents on the basis of which the transfer was executed. They in fact sustained that defendant did not inform them that their mother had left a will and that they were instituted as her universal heirs.
- With regards to the assertion that their father did not tell them about their mother's will, defendant himself does not exclude this possibility. The court, however, does question the following – plaintiffs maintain that their mum never told them that the property in Qala was not hers (as defendant claims) but that she was only acting as a prestanome. Bearing this in mind, how come plaintiffs, once they believed their mum had a property in Gozo, did not endeavour to ask a notary or a lawyer to carry out the necessary researches? They state that they trusted their father but this is not credible either. In fact the three of them testified that they did ask him of the inheritance which makes the Court believe that they were not completely trusting him.

- It has also transpired that plaintiff Catherine Elizabeth Braithwaite had issued in favour of defendant another power of attorney. This was in 2002 and was used so that property in Gharb could be purchased and for the declaration *causa mortis*. Catherine Elizabeth Braithwaite stated that she did not know the import of the power of attorney when it was granted because she was too young to understand. However, Notary Maria Vella Magro testified that she explained to Catherine Briathwaite in detail what was happening and the power of attorney was signed in her office.

At the time, the Notary testified that Henry Braithwaite explained to his daughter that the property was going to be bought in her name because he could not according to Maltese law have two properties registered in his name. There was no agreement drafted between Henry Braithwaite and Catherine Elizabeth Braithwaite that the latter was allegedly going to purchase property as a *prestanome* of her father. However, it was Henry Braithwaite who was forking out the money. This Court will certainly not delve into the merits of whether Catherine Braithwaite was acting as a *prestanome* of Henry Braithwaite on the contract. But the Court does believe the Notary's testimony that she explained to Catherine the consequences of a power of attorney.

- On the 22<sup>nd</sup> October 2004, Benjamin Shaun Taylor and Stephen James Braithwaite drew up a general power of attorney in favour of James Aherne (their uncle). This power of attorney specified that *'it may only be used in respect of the sale/transfer of properties movable and immovable situated in the Maltese Islands, and for all ancillary things thereto'*. These power of attorneys were signed abroad.

- On the same day, the two sons drew up a power of attorney appointing defendant as their lawful attorney.

- Benjamin Shaun Taylor and Stephen James Braithwaite do not say anything with regards to the power

of attorney they issued in favour of their uncle James Aherne. It has not resulted why there was the need to issue such a power of attorney when on the same day they issued another power of attorney in favour of defendant. To the Court the reason is clear: they knew what was going to happen. They knew that there was going to be signed the preliminary agreement regarding the farmhouse in Qala, so much so that the power of attorney issued in favour of Aherne was specific '*sale of transfer of properties movable and immovable situated in the Maltese Islands and for all ancillary things*'. These two plaintiffs did not have any property in their own name in the Maltese Islands except for the farmhouse (even though they declared that they were not aware of the inheritance) and thus there could be no other reason why they had to issue a power of attorney in favour of their uncle. It is also clear that they issued this power of attorney out of their own free will because at no point in time they alleged that defendant asked them or coerced them to do so.

- With regards to Catherine Elizabeth Braithwaite, Henry Braithwaite on her behalf constituted and appointed as her lawful attorney James Aherne. Again, Catherine Braithwaite did not criticize in any manner this course of events. Hence, it is obvious that she knew and approved of it.

- Following this, James Aherne represented the three plaintiffs on the preliminary agreement for the sale of the property in Cini Street, Qala signed on the 28<sup>th</sup> October, 2014. Even the timing of signing of the power of attorney convinces this Court that plaintiffs knew of the preliminary agreement.

- James Aherne stated that when he signed the documents which Henry asked him to sign he just signed it without being aware of its contents but he trusted Henry Braithwaite. Whilst in the Notary's office he did not contact his niece. Moreover, he stated that he had no discussions with his niece and nephews regarding property in Gozo.

However, he must have discussed with his nephews as to why he was going to act as an attorney in their stead whilst he was in Gozo. In normal circumstances, when a person is going to visit a friend there would be no need for the issue of a power of attorney. So, it is clear that there was a very specific reason for James Aherne's visit in Gozo at the time.

- It must also be borne in mind that plaintiffs are aware that their father had helped them financially over the years as evidenced by documents produced and also because they also confirmed this. They knew that there was no divorce settlement when their parents divorced, they were aware of their reconciliation and that their father sustained financially their mother. They argue that their mum had sold a property in England and she bought the farmhouse in Qala with the proceeds. Yet, they did not support this with evidence. Henry Braithwaite testified that Mary Margaret Braithwaite contributed £100,000 to the purchase of three properties. When she got sick, Henry Braithwaite paid for all medical expenses as proven by him. Thus, it can safely be said that plaintiffs must have questioned where did their mum get their money.

- The power of attorneys issued by Benjamin Shaun Taylor and Stephen James Braithwaite dated 22<sup>nd</sup> October 2004 in favour of defendant was used by him on declaration *causa mortis* and on the contract of sale published on the 23<sup>rd</sup> November 2007 so that property in Qala could be transferred from plaintiffs' name to defendant's.

- Catherine Braithwaite issued another general power of attorney in 2007 in favour of Henry Braithwaite signed on 14<sup>th</sup> September 2007. This power of attorney was used for the contract of sale published on 23<sup>rd</sup> November 2007.

Plaintiffs in their note of submissions filed after having taken cognizance of defendant's note of submissions also reiterate that defendant was aware that when he signed the final deed of sale there was a false declaration namely

that purchase price had been paid in full. Admittedly defendant states that no money had been transferred.

Again, plaintiffs' claim sustains the court's opinion that they should have impugned the contract of sale by virtue of which the farmhouse in question was transferred. The Court cannot of its own motion delve into such argument without their being a proper claim.

Now, with regards to plaintiffs' claim that defendant acted fraudulently in execution of his mandate, the Court cannot censure the fact that the defendant appeared on their behalf in the declaration *causa mortis*. This was a fulfilment of a duty imposed by Maltese fiscal legislation. Plaintiffs were not in any way prejudiced by the publication of this deed. Defendant has even paid inheritance tax that would otherwise have been due by the defendants. He never claimed that plaintiffs should reimburse him. Thus, the Court cannot see any negligence or fraud on defendant's part.

With regards to plaintiffs' claim that defendant acted fraudulently when appearing on their behalf on the contract of sale, it must be pointed out that the power of attorneys were general in nature. Henry Braithwaite acted within the powers granted to him by virtue of those powers of attorney. As has already been stated, the validity of the powers of attorney issued in favour of defendant, the power of attorney issued in favour of James Aherne, the preliminary agreement itself and the contract of sale have not been impugned by plaintiffs.

The defendant is correct in stating that it was plaintiffs' uncle James Aherne who represented plaintiffs on the preliminary agreement whereby plaintiffs bound themselves to transfer property to defendant. They should have attacked and impugned the act executed in 2004 whereby they assumed legal duty and obligation to actually transfer the property. But, they should have also impugned the contract of sale itself. Plaintiffs stated they did not do so because of Registry fees. However, it was their decision to choose this way of action.

Thus, plaintiffs did not suffer any damages and, hence, the court cannot accede to their request.

Given this conclusion, the Court will abstain from taking cognizance of defendant's sixth plea.

Plaintiffs by virtue of this lawsuit also demanded that defendant acted in breach of article 1875 of the Civil Code. Defendant submitted that plaintiffs never asked him to render an account. However, in any case he always kept his children informed of what he was going to do in execution of his mandate. Moreover, he has never received anything by virtue of the powers of attorney. On the contrary he disbursed considerable amounts of money to his children's benefit.

Article 1875 of the Civil Code states the following:

*'The mandatary, unless expressly exempted by the mandator, is bound to render to the latter an account of his management and of everything he has received by virtue of the mandate, even if what he has received was not due to the mandator'.*

To start with it does not result that plaintiffs exempted defendant from rendering an account. In actual fact, there is no need to ask the mandatary to render account of his management because this is one of the obligations imposed upon him by virtue of the law.

However, the Court is convinced that defendant has kept plaintiffs informed of what he was going to do. Moreover, defendant during these proceedings has declared in actual fact the use he has made of the power of attorneys given in his favour by plaintiffs. Thus, there is now no need to fix a time-limit within which he should be rendering an account when the plaintiffs know fully well in which way the powers of attorneys were used.

Consequently, for the above-mentioned reasons, the Court decides this case in that whilst rejecting defendant's



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second plea, accepts first, third, fourth and fifth plea where this does not contrast with what have been above-stated, abstains from taking cognizance of sixth plea, and thus, rejects plaintiffs' claims.

Costs are to be borne by plaintiffs except for the costs relating to defendant's second plea which are to be borne by him.

**< Sentenza Finali >**

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