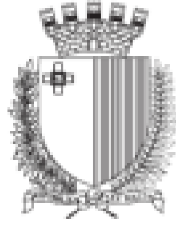

MALTA

COURT OF APPEAL

HIS HONOUR THE CHIEF JUSTICE

SILVIO CAMILLERI

THE HON. MR. JUSTICE

TONIO MALLIA

THE HON. MR. JUSTICE

JOSEPH AZZOPARDI

Sitting of the 5 th December, 2014

Civil Appeal Number. 287/2004/1

David James and Carmen spouses Sammut

v.

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

The Court:

Having seen the sworn application filed by plaintiffs on the 23rd day of April, 2004, which reads as follows:

> "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."

The curators appointed to represent defendants initially reserved their defence, stating that they where unaware of the facts leading up to this 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.

Having seen the judgment delivered by the First Hall of the Civil Court on the 30th March, 2011, whereby plaintiffs' action was dismissed with costs;

The said Court gave its judgment on the bases of the following considerations:

"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 2099 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 payment[1], 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.

[1] Art. 1156, Civil Code.

"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 records[2]. 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 [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 records[4], 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.

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[2] *Foll*. 6 *et seqq.*
[3] *Fol*. 111.
[4] *Foll*. 21 *et seqq.*

"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' premises 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.

Having seen plaintiffs' application of appeal whereby, for the reasons stated in the same application, they requested that this Court agrees to:

"… … … modify and amend the judgment delivered by the Honorable First Hall of the Civil Court on the 30th March 2011 in the names 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 (Writ of Summons Number 287/2004 GCD) by annulling, revoking and rescinding the said judgment insofar as it rejected plaintiffs' judicial demands, with the costs of both instances at expense of defendants."

Having seen defendants' reply and cross-appeal whereby for the reasons stated in the same document, they requested that this Court agrees to:

"… … … modify, amend and vary the judgment delivered by the Honorable First Hall of the Civil Court on the 30th March 2011 in the names 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 (Writ of Summons Number 287/2004 GCD) by confirming it insofar as it dismissed all of the plaintiffs' claim, and ordered the same to pay the costs as indicated in the said judgment and annul, revoke and rescind the said judgment insofar as it dismissed the defendant's pleas and condemned the defendant to bear the costs of the pleas and instead proceed to amend and vary by accepting the defendant's pleas and condemning the plaintiffs to bear all the costs of both instances."

Having heard oral submissions of counsel to the parties during a sitting held for such a purpose;

Having examined the evidence submitted and all the acts of the proceedings;

Considers:

The parties to this case entered into a promise of sale agreement whereby defendants bound themselves to sell and transfer to plaintiffs a house and garage in Marsascala. The defendants, on the 30th March, 2004, transferred the house to plaintiffs, who paid the relative price, but refused to sell the garage – as, it seems, they where seeking a higher price. Plaintiffs are seeking the enforcement of the promise of sale in so far as it relates to the garage. Defendants raised four pleas, the first three of which were dismissed

by the first Court. The fourth general plea was accepted on the grounds that while defendant Grace Warner appeared on the agreement on behalf of her husband Joseph Gilbert Warner, she did not have a valid power of attorney to represent her said husband, and the said agreement was, therefore, null at law.

Plaintiff appealed from this decision arguing that a written power of attorney is required by law for the actual sale and not for signing a promise of sale agreement; that a spouse cannot attack her own ability to represent the other; that, in a worst case scenario, Grace Warner should be held liable for damages as it was her fault that the agreement might be considered null.

This Court agrees, at least in part, with plaintiffs' arguments.

The law, in article 1322(6) of the Civil Code, specifies that a written and witnessed power of attorney is required where the subject-matter thereof is acts of extraordinary administration on objects forming part of the community of acquests or a compromise. The list of acts of extraordinary administration is exhaustive (in the case **Elmo Insurance Services Ltd. v. Pace**, decided by the First Hall of the Civil Court on the 3rd October, 2003, it was pointed out that "*huma biss dawk l-atti elenkati fl-artikolu 1322(3)(a) sa (m) li ghandhom*

jitqiesu ta' natura straordinarja u, ghalhekk, ghandhom jinghataw interpretazzjoni restrittiva", which principle was accepted in subsequent decisions of these courts) and it does not provide for the signing of a promise of sale agreement. Various agreements are listed as extraordinary acts of administration in article 1322(3), but the signing of a promise of sale agreement is not listed. The law, in article 1322(3)(a) lists as acts of extraordinary administration "*acts whereby real rights over immovable property are acquired, constituted or alienated*", but a promise of sale agreement does not have this effect.

In the Court's view, a spouse can sign a promise of sale agreement to buy or sell immovable property having only an oral power of attorney from the other spouse, and such a promise would be valid and binding on the other spouse but in doing so he/she would be implicitly binding himself/herself to obtain a written and witnessed power of attorney to sign the public deed on behalf of the other spouse, unless the two spouses decide to appear jointly on the final deed. If the spouse who signs the promise of sale agreement on the bases of an oral power of attorney, subsequently fails to acquire a proper valid power of attorney, or the other spouse fails to appear on that deed, then they can be forced to do so or, if publication is impossible, the spouses could be liable for damages. After all, it is settled case-law that a vendor on a promise of sale agreement need not be owner of the immovable to be sold at the time of signing of the promise of sale agreement, but promises to acquire ownership

to be able to effect transfer when called upon to do so in terms of the promise of sale agreement; he would be liable for damages if he fails to do so. (Vide **Zahra v. Cutajar**, decided by the First Hall of the Civil Court on the 30th October, 2006, and **Zahra v. Cutajar**, decided by this Court on the 25th February 2005). So what is required on the public deed, need not necessarily always exist at the time of the promise of sale agreement.

It is also settled case-law, that although certain contracts, under article 1233 of the Civil Code, require a written instrument for their execution and validity, a promise to enter into such contracts is valid even if made orally and such promises have been held to be binding and enforceable (vide, among others, **Fenech v. Mifsud**, decided by this Court on the 8th March, 1943, **Fiteni v. Mazzitelli**, decided by this Court, Inferior Jurisdiction, on the 2nd June 2003, **Awtorita` tad-Djar v. Schembri**, again decided by this Court, Inferior Jurisdiction, on the 17th March, 2003, and **Borg v. Fenech**, decided by this Court on the 20th June, 2009).

Furthermore, in the light of the principle *ex turpi causa non oritur actio*, it would be wrong to allow defendants to opt out of the agreement citing their own inability to appear on the deed of sale. Spouses Warner wanted to sell the house and garage, and Joseph Gilbert Warner manifested his consent in the proper way and is, therefore, bound.

The promise of sale agreement is, therefore, valid and can be enforced, given also that the agreement was not at any time repudiated by the husband. There is no reason why the sale of the garage should not proceed as promised. The fact that defendants want a higher price or want to keep the garage for their own purposes is not a valid reason for the non-performance of the obligations under the promise of sale agreement.

There is, however, in this case, another problem. The promise of sale agreement was signed by Grace Warner "*appearing on this agreement in the name for and on behalf of her husband Joseph Gilbert Warner*" only, and the wife did not promise in her name to sell the property. It results from the deed of sale of the house dated 30th March, 2004, that the property belonged to both spouses, having acquired the property in February, 1991. The Court cannot consider the issue as a "*lapsus*" on the part of the Notary as it was not shown that the notary who wrote the promise of sale agreement had made a mistake while drafting, and none of the parties present drew her attention to this supposed error. It does not result to the Court why the promise of sale agreement was so drafted, but it is clear that defendant Grace Warner, as the first Court also noted, was not a party to the promise which, consequently, is not binding on her. This Court cannot order a "correction" of the promise of sale agreement as no such request was made and, in any case, it has not

been shown that the promise of sale agreement, as drafted, carried a mistake and does not reflect the intention of all the parties thereto.

Under these circumstances, defendant Grace sive Grazia Warner cannot be forced to transfer her share of the garage, but defendant Joseph Gilbert Warner is still bound by the promise entered into on his behalf by his wife. By buying just a half share of the garage plaintiff would come to own it in common with defendant Grace Warner. However, as noted, no attempt was ever made by plaintiffs to contest the promise of sale agreement as not fully representing their intentions, even though about eleven years have passed since they signed the promise of sale agreement. The promise of sale agreement, for all intents and purposes of law, is valid as written and signed and, therefore, defendant Joseph Gilbert Warner has to transfer his one-half share of the garage to plaintiffs for the price of €8152.81 (equivalent to Lm3500, half the balance of Lm7000 remaining unpaid from the promise of sale agreement).

Defendants' other pleas where dismissed by the first Court, and rightly so in the opinion of this Court. Defendants did not submit any argument why their first three pleas should be accepted, but, in any case, this Court agrees with the reasoning adapted by the first court in dismissing these pleas, and has nothing further to add.

As to plaintiffs' claims for damages, it does not result, from the evidence, that defendants had any "fault" as to the way the promise of sale agreement was drafted, and it does not result that, at that stage, any party sought to deceive the other. As to damages for delay, it is true that the defendants were not justified in refusing to transfer the one-half share in the garage, but there is no evidence that this delay actually caused any damage to plaintiffs. Plaintiffs showed that, had they bought the whole garage, they would have sold it to a third party for a profit, but they did not show that this third party was willing to buy a half share of the garage, and in all probability he would not have done so given that he wanted the garage to store his boat. There is therefore, no evidence of actual loss caused by the delay.

Now therefore, for these reasons, the Court accepts plaintiffs' appeal, partly revokes and cancels the judgment delivered by the first Court on the 30th March, 2011, and instead accepts in part the first two requests of plaintiffs as drafted, but only with respect to Grace Warner as successor in title to her husband Joseph Gilbert Warner, who has since passed away, and for the purpose of the second request appoints Notary Dr. Sean Critien to publish the public deed in terms of the promise of sale agreement dated 11th December, 2003, on the 23rd January, 2015, or at such other day and time as may be fixed by the Court at the request of any interested party, and this within the Court buildings, and appoints Dr. Kevin Camilleri Xuereb as curator to act on behalf of any party who fails to appear on the deed; dismisses the third

request for lack of evidence, and abstains from deciding on the fourth request in the light of its acceptance of plaintiffs’ first two requests.

All costs of the case, including those at first instance, are to be paid by defendant Grace sive Grazia Warner.

< Final Judgement >

---------------------------------END---------------------------------