MALTA

COURT OF APPEAL

THE HON. MADAM JUSTICE

EDWINA GRIMA

Sitting of the 16 th December, 2014

Civil Appeal Number. 209/2011/1

PROFS. ALBERT FENECH

Vs

MICHEL VAT AND CARLA WINTERS

The Court,

Having seen the judgment delivered by the Court of Magistrates (Malta) of the 11th July 2013 wherein it was decided:-

"The Court:-

After having considered the Application submitted by Professor Albert Fenech on the 1st July 2011 by means of which he requests the Court to condemn Michel Vat and Carla Winter to pay him the sum of nine thousand two hundred Euro (€9,200) representing rent due, at the rate of €2,300 per month payable monthly in advance, for the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, for the period 24th April

2011 to 24th August 2011, and this in terms of an agreement dated 17th June 2009, with legal interest payable till date of effective payment and costs against Michel Vat and Carla Winter;

After having considered the Reply submitted by Michel Vat by means of which he pleads that: (i) first of all in terms of Section 2(b) of Chapter 189 of the Laws of Malta these proceedings are to be conducted in the English Language since he is a Dutch national and does not speak and understand Maltese but speaks and understands English and that in terms of Section 5 of Chapter 189 of the Laws of Malta he must be served with a translation of the Plaintiff's application; (ii) the Plaintiff be non suited because he (that is Michel Vat) is not the legitimate respondent to the Plaintiff's claim since Flat 13, The Elms, Gorg Borg Olivier, Sliema, was rented to Carla Winter and not to him too. Furthermore, even though he and Carla Winter reside in Malta in the same apartment they are not married and between them there exists a registered partnership which is a state of co-habitation duly recognised under Dutch Law which however does not amount to marriage and which institute is not recognised in or comparable to any other institute under Maltese law, and in any case between him and Carla Winter there subsists the separation of estates; (iii) the Plaintiff's claim is unfounded in fact and at law; and (iv) the amount claimed by the Plaintiff in his Application, that is the sum of €9,200 representing rent due for the period between 24th April 2011 and 24th August 2011, is exaggerated and is not due in full by him;

After having considered the documents submitted by Michel Vat together with his Reply and marked as Dok. "MV1" and Dok. "MV2" at folios 13 to 21 of the records of the proceedings;

After having considered the Reply submitted by Carla Winter by means of which she pleads that: (i) first of all in terms of Section 2(b) of Chapter 189 of the Laws of Malta these proceedings are to be conducted in the English Language since she is a Dutch national and does not speak and understand Maltese but speaks and understands English, and that in terms of Section 5 of Chapter 189 of the Laws of Malta she must be served with a translation of the Plaintiff's application, (ii) the Plaintiff's claim is unfounded in fact and at law; and (iii) the amount claimed by the Plaintiff in his Application, that is the sum of €9,200 representing rent due for the period between 24th April 2011 and 24th August 2011, is exaggerated and is not due in full;

After having considered that by Decree dated 11th October 2011 the Court ordered that these proceedings be conducted in the English Language;

After having considered the records of the proceedings for the revocation of the Garnishee Order No. 1955/11 in the names "Professur Albert Fenech v. Michel Vat et" and of the Warrant of Seizure No. 1957/11 in the names "Professur Albert Fenech v. Michel Vat et", determined on the 20th September 2011, which records form an integral part of these proceedings as minuted during the sitting held on the 31st October 2011[1];

After having considered the affidavits by Simone Micallef and Roslyn Casolani submitted by the Plaintiff on the 31st October 2011 and marked as Dok. "ED1" and Dok. "ED2" at folios 65 to 67 of the records of the proceedings, and the affidavits by Respondents Michel Vat and Carla Winter and by Peter Borg submitted by the Respondents on the 21st February 2012 and marked as Doc. "SS1" to Doc. "SS3" at folios 75 to 125 of the proceedings and the documents submitted together with the affidavits by Michel Vat and Carla Winter;

After having heard and considered evidence under cross-examination by Roslyn Casolani[2] and evidence given by the Plaintiff[3] during the sitting held on the 21st February 2012, and evidence under cross-examination given by Simone Micallef[4], the Plaintiff[5] and Respondent Carla Winter[6] during the sitting held on the 23rd April 2012;

After having considered all remaining records of these proceedings;

Considers:

By virtue of these proceedings the Plaintiff is requesting that the Defendants be condemned to pay him the total sum of €9,200 representing rent due, at the rate of €2,300 per month payable in

1 Folio 63 of the records of the proceedings.

2 Folios 126 to 132 of the records of the proceedings.

3 Folios 133 to 142 of the records of the proceedings.

4 Folios 144 to 146 of the records of the proceedings.

5 Folios 147 and 148 of the records of the proceedings.

6 Folios 149 to 150 of the records of the proceedings.

advance, for the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, for the period 24th April 2011 to 24th August 2011, in terms of the agreement dated 17th June 2009. The Defendants have replied separately to the Plaintiff's claim however in so far as concerns the merits of the said claim they both oppose it on the grounds that it is unfounded in fact and at law and that the amount being claimed by the Plaintiff is exaggerated and is not due in full. Apart from the pleas on the merits, Defendant Michel Vat puts forth a preliminary plea in the sense that the Plaintiff be non suited in his regard because he is not the legitimate respondent to his claim since Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, was rented to Carla Winter and not to him too. To further substantiate his plea the Defendant submits that even though he and Carla Winter reside in the same apartment they are not married and between them there exists a registered partnership which is a state of co-habitation duly recognised under Dutch Law but does not amount to marriage and is not comparable to any other institute under Maltese law. He further argues and pleads that in any case between him and Carla Winter there subsists the separation of estates.

Prior to entering into the merits of the proceedings the Court must first deal with and determine the preliminary plea raised by Defendant Michel Vat, that is that Plaintiff be non suited because he (that is Michel Vat) is not the legitimate respondent to his claim. However, prior to that, the Court deems it fit to make the following observation regarding the first plea raised by each one of the Defendants, that is the plea that these proceedings be conducted in the English language. As a matter of fact by a Decree dated 11th October 2011 the Court ordered that these proceedings be conducted in the English Language, thus effectively acceding to the first plea raised by the Defendants and making any further consideration of the same completely unnecessary.

In so far as concerns the preliminary plea raised by Defendant Michel Vat the Court observes that the same plea – or rather the issue raised by said plea – had also been raised by the Defendant in his request (together with Carla Winter) for the revocation of the Garnishee Order No. 1955/11 and the Warrant of Seizure No. 1957/11 obtained against him and Carla Winter by the Plaintiff. In those proceedings the Court rejected the said plea on the grounds that irrespective of the fact that the agreement dated 17th June 2009[7] pertinent to the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, was signed only by Carla Winter, and despite the fact that he and Carla Winter are not married but have a

[7] Dok. "MV1" at folios 13 and 14 of the records of the proceedings.

*registered partnership, that is a state of co-habitation between them, from evidence submitted by him and Carla Winter in those proceedings it is clear that it was their **joint intention** to rent the said apartment from the Plaintiff, thus making them both liable to the payment of rent.*

*In the decrees determining those proceedings the Court observed that: From testimony given by the Applicant, Carla Winter and the Respondent during the sitting held on the 5th September 2011 and from the exchange of correspondence between the same said persons submitted by the Respondent together with his Reply, it is prima facie evident that it was **their** intention, that is Carla Winter **and** the Applicant, to lease Apartment No.13, The Elms, Gorg Borg Olivier Street, Sliema, from the Respondent, which intention consequently gave rise to contractual rights and obligations in both Carla Winter **and** the Applicant towards the Respondent, even though the lease agreement was signed only by Carla Winter and she and the Applicant are not married. It is an established principle under Maltese Law that an individual who contracts in his own name generally binds only himself **unless** he expressly indicates that he is contracting in someone else's name or if he does not so expressly indicate, the other contracting party has reason to believe that he is contracting in some one else's name – hija haga minn lewn id-dinja li bniedem normalment jikkontratta ghalih innisfsu sakemm ma jindikax li qieghed jikkontratta f'isem haddiehor jew **jekk dan ma jindikax espressament, il-konraent l-iehor ikun ragonevolment jaf li jkun qieghed jikkontratta f'isem haddiehor**[8]. The Court is of the opinion that in the present case, even though Carla Winter did not necessarily expressly indicate to the Respondent that though signing the lease agreement in her own name she was binding both herself and the Applicant towards him, there are sufficient facts to show that the Respondent had grounds to reasonably understand and believe that though signing the lease agreement in her name, Carla Winter was effectively binding both herself and the Applicant towards him. From testimony given by the Applicant and Carla Winter it has emerged that they are both currently residing in Malta and when a little over two years ago, they were looking for a residence they viewed the apartment owned by the Respondent as their potential home. Prior to the signing of the lease agreement they viewed the apartment more than once and on these occasions they were always together. They also discussed matters with the Respondent together and they always presented*

[8] Frank Cilia noe v. Charles Scicluna, Commercial Court 27th April 1992.

themselves to him, even after the signing of the lease agreement[9], as a couple, tough not necessarily as a married couple, acting together and not one distinctly from the other[10]. The Applicant tries to obviate the legal implications of his and Carla Winter's attitude and intentions towards the Respondent by claiming that since he and Carla Winter are not married they are not bound by the principles which regulate the matrimonial regime in Malta, and that Carla Winter could have never bound him towards the Respondent since between them there exists the separation of estates, as results from the Domestic Partnership Agreement submitted by him and marked as document Doc. "GV2". Whilst agreeing with the Applicant that he and Carla Winter are not subject to the principles which regulate the matrimonial regime in Malta and while acknowledging that the Domestic Partnership Agreement between them provides that there is not to be any community property in any way between the domestic partners[11], the Court points out that the said agreement also provides that the household expenses, including the costs of the care and upbringing of the children the domestic partners have together, the interest on debts incurred with respect to the home they live in together, and of the household property and of all the day-to-day expenditures that are part of the joint living pattern of the domestic partners, are to be paid by both domestic partners proportionally to each of their incomes from their salaries, and if their salaries are inadequate, the incomes from each of their capital[12]. This provision essentially contradicts the Applicant's claims since in reality it confirms that independently of what might appear on paper – that is the lease agreement with the Respondent – in so far as concerns domestic issues, including the home they live in, the Applicant and Carla Winter always intended to act together and not one independently of the other. Therefore though signing in her name, Carla Winter intended to bind also the Applicant towards the Respondent. Further proof that it was their intention to be both bound towards the Respondent for the lease of the apartment results from their acts, particularly the Applicant, following the signing of the lease agreement. The Applicant confirmed that save for the last four months of the lease the monthly rent of €2,300 was always paid by him directly to the Respondent from his personal account. Even though he insists that these payments were being effected on behalf of Carla Winter, the Court cannot consider such statement to be truthful. First of all from the exchange of

[9] Vide the exchange of correspondence between the Applicant and Carla Winter and the Respondent, submitted by the Respondent together with his Reply.
[10] Vide testimony by the Applicant and Carla Winter given during the sitting held on the 5th September 2011.
[11] Section 1- Exclusion of Community Property.
[12] Section 3(1) – Household expenses/taxes.

correspondence between the Applicant and Carla Winter and the Respondent, submitted by the Respondent together with his Reply, the Applicant never indicated that he was acting in representation of Carla Winter. On the contrary from said correspondence it clearly results that he and Carla Winter always acted jointly towards the Respondent. Secondly, it is rather strange that whilst claiming to act in representation of Carla Winter, the Applicant never asked the Respondent to issue a receipt for payments received, either in his name on behalf of Carla Winter or directly in the name of Carla Winter. Had the Applicant really and truly been effecting payments to the Respondent on behalf of Carla Winter and not in their joint name, it would undoubtedly have been in his primary interest to request the issue of such a receipt, both for accountability purposes between him and Carla Winter in view of the Domestic Partnership Agreement existing between them and for the clear indication of who really is bound towards the Respondent for the lease of the apartment since the electronic payment transaction between the Applicant and the Respondent could of itself be considered to constitute a receipt issued in favour of the Applicant himself thus giving him legal title over the apartment in question.

Even though the considerations of the Court in proceedings for the revocation of a precautionary warrant are of a prima facie nature, upon consideration of evidence submitted by the Defendants in these proceedings the Court finds no reason why it should depart from or vary the observations made in the above-mentioned Decrees dated 20th September 2011 with regard to this particular submission put forth by the Defendant Michel Vat.

In fact the evidence submitted by the Defendants in these proceedings[13] *– namely their affidavits and various correspondence attached thereto, in particular an e-mail dated 11th May 2011 from Dr. Sarah Sultana to Dr. Edward Debono*[14] *and a letter addressed to the Plaintiff dated 4th May 2011*[15]*, which correspondence was clearly sent on behalf of and made specific reference to both the Defendants and not just to Carla Winter – further confirms that even though the agreement dated 17th June 2009 was signed only by Carla Winter, in reality it was the intention of both Michel Vat* ***and*** *Carla Winter to rent Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, from the Plaintiff and therefore they are both liable for the payment of rent for the said lease.*

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[13] Folios 75 to 123 of the records of the proceedings.

[14] Doc. "MV5" at folio 88 and 89 of the records of the proceedings.

[15] Doc. "CW4" at folio 118 and 119 of the records of the proceedings.

In view of the said considerations, the Court deems that the preliminary plea raised by Defendant Michel Vat is completely unfounded and must therefore be rejected.

After having considered the preliminary plea raised by Defendant Michel Vat the Court will now proceed to deal with and determine the merits of the proceedings. As already pointed out above, the Defendants object to the claim put forth by the Plaintiff for the payment of the total sum of €9,200, representing rent, at the rate of €2,300 payable monthly in advance, for the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, for the period 24th April 2011 to 24th August 2011, on the grounds that the said claim is unfounded in fact and at law and that in any case it is exaggerated.

The Defendants claim that they are justified in not paying the rent being claimed by the Plaintiff in these proceedings because by living in the room on the roof overlying the said apartment, the Plaintiff violated the lease agreement dated 17th June 2009 which lease, according to them, included the said room. The Plaintiff on the other hand claims that the room on the roof overlying the apartment rented to the Defendants was specifically excluded from the lease of the apartment and therefore he could freely live in or make any other use of the said room without thus violating the lease agreement with the Defendants.

The lease agreement dated 17th June 2009 refers to Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, and makes no reference whatsoever of the room on the roof overlying the said apartment. The Plaintiff acknowledges this fact but insists that when the Defendants viewed the apartment they were specifically informed by the estate agent, who in turn was instructed to that effect by the Plaintiff himself, that the room on the roof overlying the apartment was excluded from the lease agreement. In his testimony during the sitting held on the 21st February 2012, the Plaintiff stated that I got in touch with Bernard's Estate Agent showing the flat to a couple and they liked it and they came the second time when I met them, including the time when they came for the signing of the lease, and they were told that the room on top was not part of the lease[16]. Simone Micallef, who at the time was the Plaintiff's partner, also stated that prior to them moving into the apartment Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, when the tenants Michel Vat and Carla Winters indicated that they were interested in renting the apartment,

[16] Folios 133 to 142 of the records of the proceedings.

Prof. Albert Fenech and myself had clearly stated that we will be using the room on the roof. This was never part of the lease agreement signed between Prof. Fenech and the tenants. When they saw the roof itself (not the room) they showed interest in using the roof for entertaining and Albert generously said he has no problem with them using it for that and he will give them a copy of the roof key at no additional cost. He stressed to them at that point that only they can use the roof (as indicated in our letter to them of 24th August 2009 – attached). At no point were they told they can use the room or were they ever given a key to the room – the lock to the door was old and copies would not have been able to be done without changing the lock (this is further explained). Moreover, we had valuable pieces of art work in the room and would certainly not have entrusted anyone with access to the room. The rental agreement clearly stipulates that they are renting the apartment (as attached) and there is no mention of the roof or the room – the roof was only mentioned in our letter to them after Albert agreed to allow them to use it with us[17].

The Defendants on the other hand claim that the very fact that in the lease agreement no mention is made of the room on the roof overlying the apartment rented by them, confirms that the said room was included in and not excluded from the lease. In his affidavit Defendant Michel Vat states that in the beginning of 2009 my partner Carla Winter and myself decided to look for another apartment since the place we were living in at the time on The Strand, Sliema, was too noisy, both from the traffic and the neighbours living above us. We decided to look for a penthouse away from the Strand, to cut down on the noise. Particularly we were interested in renting out a penthouse as we did not want to have anyone living on us anymore – and whatever estate agent we use, was informed that we were only interested in a penthouse. At one point our agent from Bernards Real Estate, Joanna Corser, took us to the penthouse No.13, The Elms, Gorg Borg Olivier Street, Sliema. At the apartment we were met by Roslyn, who introduced herself as a good friend of Albert Fenech and a freelance Real Estate Agent. At no point did she mention that anything in the premises was to be excluded: 1. If the top floor including the room and the terrace was to be for Albert Fenech, she was not offering the penthouse, which is by definition the top floor, but merely an apartment high up. 2. She would not have offered it (we stated clearly we were looking for a penthouse including the reasons for this) and we would certainly not have taken that place had there been even the remote possibility of Albert actually occupying the place and living in it at

[17] Dok. "ED1" at folios 65 and 66 of the records of the proceedings.

any point of time he deemed necessary. 3. It would have been put in the contract by any Real Estate Agency if something this large as the room on the roof was to be excluded. It was not. 4. Official electricity and water meters were not installed for the top room and no other readings were taken other than the main meters in the entrance hall in the common parts of the building at the beginning of the lease. When we were shown the room on the roof, we walked around where it was possible as it was packed with all sorts of paraphernalia, and we noticed no water and electricity meters. 5. The top room and terrace are not a separate address, there is no separate doorbell, mailbox and there are no separate official electricity and water meters, it has always been part of the same address. At one point we also found a summons for a contravention issued on Mr. Fenech's name and addressed to our apartment 13, The Elms, Gorg Borg Olivier, Sliema posted in our own mailbox together with our own mail. 6. The ceiling of the main living room has been raised and fitted with transparent windows all around so that from the roof terrace you can actually look through and see the living room. Leaning over the roof terrace, you can look over the terraces at penthouse level and from the room on the roof you can see straight into the bathroom. There would be no privacy whatsoever for us, if the room on the roof was excluded from the lease – we were happy with the penthouse because of these particular features and had we been aware Albert Fenech intended keeping the room on the roof for his own personal use and habitation, this meant that it would have seriously undermined our privacy which we value so much. Had Albert Fenech intended to keep the room on the roof to live in, then the premises would have never been rented out. 7. Things have to make sense: who would pay €2,300 a month as rent for a place without privacy and sign a lease for two years on a place that does not fulfill the main reason for which a person wanted to move in the premises in the first place. This is definitely not the case with me and Carla[18]*.*

In her affidavit Defendant Carla Winter essentially confirms that stated by Defendant Michel Vat and claims that when we decided to rent the apartment, after Michel had seen it as well, we went for a meeting with Albert Fenech in the hospital. In this meeting and the meeting afterwards when signing the contract of lease, nowhere was it mentioned on paper or verbally that Albert would be retaining the right to occupy the room and live in it. Nor was it ever mentioned by anyone present that the room on the roof was not included in the lease, that it was a separate unit and that hence we had absolutely no rights over that same room. Had any of

[18] Doc. "SS1" at folios 75 to 82 of the records of the proceedings.

this been the case, renting out Mr. Fenech's penthouse would have been completely out of the question and no contract would have been signed as I together with Michel would have never conceded to having the owner of the premises or anyone else for that matter, living on top of us whenever he wanted to and pleased. I remember rather that in the meeting we had with Albert in hospital, Albert mentioned that he needed it for storage. He explained that he was having a house built for many years now, and it was far from finished and he needed the room for storing a lot of things, since the apartment of Simone Micallef, his partner at the time, where they lived, had not enough storage space. It was clear from the start that the roof including the room on the roof was part of our contract and that it was a kind gesture from our side that we agreed that Albert and Simone should keep the room for storage. I explain that Albert and Simone did show me the room before signing the lease, which was <u>fully</u> packed with boxes full of clothes and other stuff as well as all sorts of junk that was running around all over the same room on the roof. There was no place to sit or lie down, all dirty and dusty – clearly a place of storage and by no means a place a person would actually live in. We were actually shown things that were sorted in the room such as fans as well as a cupboard that we chose to use in the penthouse. I recall seeing a place where there was a toilet and a shower but everything was dusty and dirty and there was no door enclosing the space. It was definitely not a place to actually live in. The place got later even more packed, due to the fact that when we moved into the penthouse we moved in our own furniture instead of using the furniture which was in the penthouse and most of the same furniture belonging to Mr. Fenech had to be stored in the roof room as well. Besides this the room on the roof is made up of glass doors and windows that are similar to the outside doors of the penthouse [photos of the room on the roof hereunder attached as Doc. CW][19]*.*

Even though it is an established principle at law that in forza ta' l-obbligu li l-lokatur ghandu versu l-konduttur bis-sahha tal-kuntratt ta' lokazzjoni, il-lokatur ghandu jikkonsenja lil konduttur il-haga mikrija bl-accessorji kollha taghha bla eccezzjoni, jekk ma jkunx hemm patt ta' xi eskluzjoni. Dawn l-accessorji jikkomprendu l-faccata u l-parti esterna tad-dar, konsidrata tant bhala spazju kemm mill-punto di vista tal-prospettiva taghha, il-ghaliex anke dana jikkostitwixxi parti mill-godiment tal-haga mikrija; u l-istess lokatur ghandu jara li l-konduttur ikun mantenut fil-pacifiku godiment tal-haga li jkun krielu, u induttivament u intwittivament ghandu huwa stess jastjeni ruhu milli jaghmel dawk l-attijiet li bihom il-

[19] Doc. "SS2" at folios 96 to 103 of the records of the proceedings.

konduttur ikun disturbat f'dak il-godiment ghaz-zmien kollu tal-lokazzjoni[20] *and that in tema legali jigi osservat li hija gurisprudenza kostanti li fin-nuqqas ta' ftehim specjali, fil-kuntratt tal-kirja, il-lokatur ghandu l-obbligu li jaghti lill-kerrej il-godiment mhux biss ta' l-immobbli oggett tal-kirja, imma wkoll tal-partijiet accessorji tieghu; u ghaldaqstant il-kiri tal-fond jikkomprendi l-kiri tal-bejt ta' dak il-fond, jekk dak il-bejt ma jkunx gie eskluz fi ftehim espress fil-kirja; u mhux argument tajjeb favur din l-eskluzjoni l-fatt li l-bejt mhux accessibbli b'tarag regolari jew li hemm nuqqas ta' opramorta. [PA (JCC) Carmela Cassar v. Paolo Galea [1963] Vol. LXVII.II.705; App. Inf. Pace v. Muscat [1953] Vol. XXXVII.I.561; PA (AM) Francesco Agius v. George Borg (1959)]*[21]*, the Court is of the opinion that in the case under consideration the room on the roof overlying Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, rented to the Defendants, was not included in the lease of the said apartment, even though this particular exclusion was not specifically provided for in the lease agreement dated 17th June 2009.*

From the testimony given by the Defendants it clearly results that the room on the roof overlying the apartment rented to them was completely packed with items belonging to the Plaintiff and that even though the apartment was being leased to them, the said room was to be retained by Plaintiff to be used by him for storage purposes. In fact from the affidavits of both Defendants it results that even though they allegedly had a key to the said room – which allegation however has not been satisfactorily proven by them – they never entered or made use of the room in question since it was being used for storage purposes by the Plaintiff. In this regard Defendant Michel Vat claims that he [the Plaintiff] had given us several keys and the one that we always thought was for the room upstairs, we never used because his personal stuff was stored there and we had not reason to go in. This key we never used was always hanging inside next to the front door of the house – at one point in time however the key vanished from its place never to be replaced and we were not the only persons who had access to the house – our maid was Fenech's maid and in court after the warrant of seizure it resulted that even Albert had a key to the house because he opened the house for the court marshals and the key he had was definitely not a key returned by us since the key was still in our possession once the lease

[20] Emmanuele Bianco et v. Michele Galea et, Civil Appeal, 22nd May 1950; Compex Company Limited v. Joseph Pisani et, Applic. No. 1770/97, Civil Court First Hall, 26th October 2005.

[21] Jeanne Vassallo Grant v. JoeRo Limited et, Applic. No. 1416/96, Civil Court First Hall, 29th October 2004.

had not yet terminated[22] *and Defendant Carla Winter declares that when we moved in the penthouse, we got 5 different keys: 1. A key for the mailbox (very small and recognisable); 2. A key for the door at street level, which was green; 3. A key for the front door of the penthouse, which has a special shape so it is easy recognisable; 4. A key for the roof terrace, which had a yellow colour on the top and 5. A key that looked ordinary. We only used the keys for our front door, the roof terrace door and the entrance door at street level and of course the mail box. I do not know what key 'number 5' was for. I never tried it: we had access to all the areas we wanted whenever we wanted. I had no business in going into the storage room of Albert and Simone. I do recall however that key 'number 5' disappeared somewhere in the last few months we lived there – from when I rented the apartment it was hanging on the wall inside the penthouse next to the front door, over the intercom and next to it there was the key of the roof terrace that was yellow [hereunder attached a photo of the entrance of the apartment with these two keys hung on the wall marked as Doc. CW3]. I have no idea what happened with the key, who took it and why they took it. What I know is that we were not the only people who had access to the house – our maid was Fenech's maid and Albert proved he also had a key to our apartment when he opened the door of the house for the court marshals to execute the warrant of seizure while we were not around and when the lease had not yet expired, hence we had never returned the key to the front door to Albert Fenech*[23]*.*

Since the letting of things is a contract whereby one of the contracting parties binds himself to grant to the other ***the enjoyment of a thing for a specified time and for a specified rent*** *which the latter binds himself to pay to the former*[24]*, it is very difficult – if not all together impossible – for the Defendants to successfully argue that the room on the roof overlying the apartment rented to them was included in the lease agreement. However, even though the Court is convinced that the said room was not rented to the Defendants together with Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, it is likewise convinced that there was an understanding between the Plaintiff and the Defendants as to the use which the Plaintiff could make of this room during the course of the lease of the apartment in favour of the Defendants. In fact the Court is of the opinion that whilst the Plaintiff retained possession of the room on the*

[22] Doc. "SS1" at folios 75 to 82 of the records of the proceedings.

[23] Doc. "SS2" at folios 96 to 103 of the records of the proceedings.

[24] Section 1526(1) of Chapter 16 of the Laws of Malta. Emphasis by the Court.

roof overlying the apartment rented to the Defendants, there was an understanding between him and the Defendants that he would use this room solely for storage purposes.

Confirmation of the existence of this verbal understanding between the Plaintiff and the Defendants results from the testimony given by the Plaintiff during the sitting held on the 21st February 2012[25]. During the said testimony in reply to the question put by the Defendants' lawyer am I correct in stating that you failed to give them and provide them with an electricity and water bill throughout the whole duration although they asked several times for them? the Plaintiff replied they asked me twice to be precise and I said I will do that and then when this question of me occupying the top floor arose in March of last year, I told that I was giving them six months for free as I was not going to charge them for electricity and water, and in reply to the question the six month period of grace, has it remained effective? the Plaintiff stated they haven't received a single bill for any period of time, and in reply to the further question the discussion for this six month period where they weren't paying for the water and electricity, at what point in time was it held, prior to the signing of the agreement, following that? the Plaintiff replied no it was after February of last year where for circumstances I told Michel that I had to live in the place and to make sure that they would not feel that electricity would be taken for free I put on a meter. I couldn't put a meter for water so for the water supply I might have used for the two, three months I stayed there, I decided to say that I won't charge them for six months.

The Court is of the opinion that the only interpretation which can be given to the Plaintiff's testimony and his unilateral decision to waive in favour of the Defendants one of the conditions of the lease agreement – namely the condition stipulating that the electricity, water, gas, cable TV and telephone bills, as well as the consumption thereof, shall be borne by the Lessee. The Lessor is in no way responsible for these services or consumption – is that he acknowledges the existence of a verbal understanding with the Defendants regarding the use which he could make of the room on the roof overlying the apartment rented to them during the course of the lease and that he also acknowledges the fact that by going to live in the said room for a number of months during the course of the lease he acted contrary to that same understanding.

[25] Folio 133 to 142 of the records of the proceedings.

Having determined that there existed a verbal understanding between the Plaintiff and the Defendants regarding the use which he could make of the room on the roof overlying the apartment rented to them during the course of the lease and that the Plaintiff acted contrary to that same understanding, the Court must now determine whether the Defendants are justified not to pay for the rent of the apartment for the period 24th April 2011 to 24th August 2011, because the Plaintiff violated the said understanding they had with him.

The legal relationship between the Plaintiff and the Defendants stems from a contract of lease and established principles under Maltese Law with regards to such legal relationship provide that:

- *Huwa pacifikament akkolt fil-gurisprudenza in linea ta' principju illi l-obbligu primarju tal-kerrej li jkun qed igawdi fond lokat lilu huwa l-hlas tal-kera lis-sid, u f'kull kaz dan mhux iktar tard miz-zmien prefiss mill-ligi. Xort'ohra jkun hemm morozità fis-sens tal-ligi. Hekk, per ezempju l-kerrej ma jistghax izomm il-kera ghax jippretendi li kellu jeddijiet kontra s-sid (Carmel Bellia et v. Joseph Frendo, Appell, 14 ta' Dicembru 2001). Dan ghaliex il-kerrej m'ghandux dritt jirrifjuta li jhallas il-kera (Joseph Borg noe v. Edgar Galea, Appell, 7 ta' Ottubru 1996)*[26]*;*
- *L-inkwilin ma jistax jippretendi li jzomm il-kera biex jithallas jew jikkompensa kreditu minnu pretiz kontra l-lokatur, jekk ma jkunx wiehed mill-kazi li fihom il-ligi tippermetti lill-inkwilin li jzomm il-kera, jew jekk il-kreditu tieghu ma jkunx likwidu. Jekk il-konduttur jinsisti fir-rifjut tieghu li jhallas il-kera minhabba dik il-pretensjoni tieghu, huwa jinkorri fil-morozità kontemplata mil-ligi biex huwa jiddekadi mill-lokazzjoni*[27]*;*
- *Il-kera patwita ghandha tithallas dejjem ghax hija l-korrispettiv tat-titolu lokaztizju gawdut mill-inkwilin. Il-ligi tinsisti li l-kera ghandha tithallas; anke jekk is-sid jonqos milli jesegwixxi l-obbligazzjonijiet tieghu, l-inkwilin ma jistax jagixxi unilateralment u biex "jaghmel tajjeb" ghan-nuqqasijiet tas-sid, izomm lura milli jhallas il-kera. Anke meta si trattat minn tiswijiet straordinarji li, skond il-Ligi, jaqghu fir-responsabilità tas-sid, jekk dan ta' l-ahhar jonqos milli jaghmel it-tiswijiet methiega, il-ligi trid li l-inkwilin jadixxi l-Qorti u jaghmel ix-xoghlijiet mehtiega taht id-direzzjoni tal-Qorti. Meta inkwilin jagixxi wahdu u ma jsegwix il-procedura li trid il-ligi, jitlef id-dritt li jzomm il-kera biex jikkompensa l-ispejjez minnu*

[26] Hilda Debrincat v. Mario Farrugia et, Civil Appeal No. 5/01, Court of Appeal (Inferior Jurisdiction), 14th July 2004.

[27] Wisq Nobbli Konti Bernardo Manduca Piscopo Macedonia Zammit –vs- Geltrude Chalmers, 13th November 1953, Judgments by the Superior Courts of Malta, Vol. XXXVII pI 325; Alfred Falzon et noe v. Karmenu Scerri et, Civil Appeal No. 128/98, Court of Appeal (Inferior Jurisdiction) 23rd June 2004.

inkorsi (ara Piscopo Macedonia Zammit v. Chalmers, deciza mill-Onorabbli Qorti ta' l-Appell fit-13 ta' Novembru 1953 u Calleja v. Dimech, deciza mill-Onorabbli Qorti ta' l-Appell (Sede Inferjuri) fit-3 ta' Dicembru 1985). Intqal ukoll li l-fatt li l-kera ma tkunx giet stabbilita mill-Bord Li Jirregola l-Kera jew ikun hemm diskordju dwaru, mhux gustifikazzjoni ghan-nuqqas ta' hlas (Schembri v. Dimech, deciza minn din il-Qorti fil-5 ta' Novembru 1982 u Borg v. Galea, deciza mill-Onorabbli Qorti ta' l-Appell fis-7 ta' Ottubru 1996). Kwindi, ma hemm ebda raguni ghala l-konvenuti m'ghandhomx ihallsu l-kera dovuta. Kaz li jixbah, fil-principju, il-meritu ta' dan il-kaz, huwa dak li kien il-meritu tal-kawza fl-ismijiet "Abela v. Gauci" deciza mill-Onorabbli Qorti ta' l-Appell (Sede Inferjuri, allura presjeduta mill-President tal-Qorti l-S.T.O. Prof. Anthony Mamo) fit-2 ta' Awwissu 1958. F'dik il-kawza gie ribadit il-principju li l-lokatur hu obbligat li jara li ma jigix li jonqos bil-fatt tieghu stess, li jhares l-obbligazzjoni tieghu naxxenti minn natura stess tal-kuntratt tal-kiri, dik cioè li jassigura lill-inkwilin it-tgawdija pacifika tal-fond ghaz-zmien tal-kirja u ghall-uzu li ghalih il-kirja tkun saret. F'kaz li l-lokatur jikser din l-obbligazzjoni, l-inkwilin ikollu dritt li jitlob ir-rizoluzzjoni tal-kuntratt. Dik l-Onorabbli Qorti, però, kompliet izzid illi: "jekk huwa, ghalkemm ma jibqax jabita fil-fond minhabba l-agir tal-lokatur jew tal-familja tieghu, izomm l-istess fond okkupat bl-ghamara tieghu filwaqt li hu jmur jabita band'ohra, u jzomm ic-cwievet ta' l-istess post, hu tenut ihallas il-kera pattwit, u ma jistax, f'kawza li jaghmillu l-lokatur ghall-hlas ta' dak il-kera jirrifjuta li jhallas dik il-kera[28]*.*

From the above-mentioned principles it therefore results that a tenant can withhold payment of rent only in specific instances expressly provided for in the law, the instance forming the merits of this case not being one of them, and in the eventuality of any other violation of the terms and conditions of the lease the remedy available to the tenant is to seek the termination of the lease and not to remain in occupation of the leased premises and withhold payment of the rent. Therefore the Defendants are not, in spite of the circumstances of this case, justified in refusing to pay rent to the Plaintiff for the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, particularly in view of the fact that they remained so in occupation of the apartment until the 28th July 2011, when they were forcibly evicted from the same upon the change of the locks to the said apartment.

Defendants contest the Plaintiff's claim on the further ground that his request for the payment of the sum of €9,200 representing rent for Flat

[28] John Galea et v. Raymond Falzon et, Applic. No. 1419/00, Civil Court First Hall, 28th April 2005.

13, The Elms, Gorg Borg Olivier Street, for the period 24th April 2011 to 24th August 2011, is exaggerated. Defendants found this claim on the following facts: (i) on the 28th July 2011 they were forcibly evicted from the apartment because the locks to the same were changed and they weren't provided with a copy of the key. They could not remove their belongings from the apartment because they were seized by virtue of a Warrant of Seizure issued against them upon the Plaintiff's request; (ii) the Plaintiff already has in his possession the sum of €2,300 paid by them by way of deposit on the signing of the lease agreement; and (iii) the rent for the month of April has already been paid.

With regard to these particular observations made by the Defendants, the Plaintiff has during testimony given before the Court during the sitting held on the 21st February 2012[29], confirmed: (i) that he still has in his possession the sum of €2,300 which was paid to him by way of deposit on signing of the lease agreement and that he is keeping the said sum by way of payment of the rent due to him; (ii) that with effect from the 28th July 2011 the Defendants could no longer occupy the apartment in question because the locks to the premises were changed and they were not given a copy of the key and their belongings have been seized by virtue of a Warrant of Seizure obtained against them and they could therefore not retrieve them from the apartment; and (iv) the installment of rent due for the month of April has been paid.

In view of this testimony given by the Plaintiff the Court is of the opinion that his claim must be reduced by the sum of €2,300 representing the deposit he already has in his possession and by a further €2,300 representing the rent due for the last month of the lease during which period the Defendants were precluded from occupying the apartment in question. In so far as concerns the payment of rent for the month of April, the Court observes that this payment does not form part of the merits of the case since the same revolve round the last four installments of rent due for the lease of the apartment, which rent has not been paid by the Defendants as acknowledged by Defendant Michel Vat during the proceedings for the revocation of the Garnishee Order No.1955/11 of and Warrant of Seizure 1957/11 Therefore, the rent which is still due by the Defendants to the Plaintiff for the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, amounts to €4,600 and not €9,200 as claimed by the Plaintiff.

In view of all the above-mentioned reasons the Court:

[29] Folios 133 to 142 of the records of the proceedings.

1. Declares that it will not take further cognizance of the first plea raised by each one of the Defendants;
2. Rejects the second plea raised by Defendant Michel Vat;
3. Rejects the third plea raised by Defendant Michel Vat and the second plea raised by Defendant Carla Winter;
4. Upholds the fourth plea raised by Defendant Michel Vat and the third plea raised by Defendant Carla Winter; and therefore
5. Upholds the Plaintiff's claim up to the value of €4,600 and condemns Defendants Michel Vat and Carla Winter to pay the Plaintiff the said some of €4,600 representing the rent still due for the lease of Flat 13, The Elms, Gorg Borg Olivier Street, Sliema, with legal interests due from the 1st July 2011, the date of filing of these proceedings, till date of effective payment.

In view of the circumstances of this case, costs are to be borne equally between the Plaintiff and the Defendants."

Feeling aggrieved by this judgment, plaintiff lodged an appeal to this Court requesting that such decision be set aside primarily on the interpretation given by the Court of First Instance to the clauses in the lease agreement entered into between the parties regarding the room found at roof level, the use thereof, according to appellant, was never rented out to respondents together with the penthouse. Appellant claims that the agreement never excluded his right to reside in the said room, although it was being used as a store when the premises had been rented out to respondents, since he had reserved unto himself the unlimited right of use of the said room.

Furthermore he claims that the First Court erroneously decided to reduce the amount of rent due in respect of the last month of occupation by the tenants of the premises, from the amount requested, since respondents were making use of the premises in the beginning of the said month, and consequently the rent had already fallen due, which rent was to be paid in advance. This transpires from the acts of the warrant of seizure 1957/11, issued on the 28th of July 2011

which indicates that respondents still had all their belongings in the premises and were consequently making use of it. Therefore the rent for the period between the 24th July 2011 and the 24th August 2011 had fallen due.

Also the deposit paid by respondents upon signature of the lease agreement was a guarantee for any damages which could have been caused during their occupation of the property and for any pending utility bills. Thus the First Court erroneously set off the said amount with the outstanding rent, also in view of the fact that there were electricity bills which had not been paid by respondents, such claim never having formed part of the present claim. Appellant further reiterates that he had never put forward such a claim since the said amount was being guaranteed by the deposit held.

In their reply respondents raise a preliminary plea of nullity of the appeal application asserting that the same should have been filed in the English language, since proceedings before the First Court were so conducted, appellant having filed a translation of the application in the English language only after the expiration of the expressed term for the filing of the appeal established by law. Respondents cite the provisions of Chapter 189 of the Laws of Malta in order to substantiate their plea. This Court, however finds that according to law, and this with particular reference to article 5 of the Act referred to by respondents thesmelves, it is the duty of the Registrar to deliver a translation of the acts where he has reason to believe that either of the parties is English speaking. In default of the same it is then incumbent on the person receiving notification of an act in the maltese language to demand a translation of the same. Article 5 reads:

(1) Where any act is to be served on any person whom the registrar has reason to believe to be English-speaking, the registrar shall cause a translation thereof to be made into the English language by an officer of the

registry and service shall be effected by delivering a copy of the original and its translation.
(2) If, for any cause whatsoever, the translation into English of any such act is not served on an English-speaking person, such person may make in the registry, or forward to the registrar, in any manner, a declaration to the effect that he is an English-speaking person and apply for an English translation of the act served on him.
(3) Upon any such application, the registrar shall cause a translation of the act to be made as aforesaid and delivered to the applicant as soon as practicable; and, if in any such case the said application reaches the registry of the court not later than the time established for the closing thereof on the third working day after the date of service of the copy of the original act, any legal or judicial time the running of which is dependent on the service of the original act shall commence to run from the date of delivery of the translation.

From this provision of the law, it transpires that the act filed in a language the person being notified with does not understand does not as a consequence bring about the nullity of the same. In fact article 789 of Chapter 12 of the Laws of Malta, dealing with the nullity of judicial acts, does not contemplate such a situation as that brought forward by respondents, who, in terms of article 5 of Chapter 189 could have requested a translation of the appeal application upon being notified with the same in the Maltese language. Their inaction cannot therefore be now used by them to their advantage claiming the nullity of the appeal application. Consequently their plea is being rejected.

Having therefore established the validity of the proceedings instituted by appellant, the Court will now pass on to deal with the grounds of appeal filed by him which revolve primarily around the interpretation given by the Court of First Instance of the lease agreement signed between the parties and this with regard to the inclusion of the room at roof level in the premises rented out. It is argued by respondents that the use which appellant was permitted to make of the said room was for storage purposes only, since upon signature of the lease agreement the landlord already possessed items stored in the said room. It was

never intended, argue respondents, that the landlord could make use of the room for residential purposes which would be tantamount to an invasion of their privacy since the roof area had direct access to the penthouse they were living in. Consequently appellant had no right to move in and live in the room thus breaching the contract of lease. This is when respondents refused to pay the rent due thus leading to the present claim filed by appellant and this for payment of arrears of rent. Above all it results from the acts that after the execution of a warrant of seizure and garnishee order filed by appellant against respondents on the 28th July 2011, claimant illegally broke into the apartment giving access to the same to the court marshalls and subsequently changed the locks of the premises thus depriving them from access to their possessions and to the premises.

From the grounds of appeal put forward by claimant, it is evident that he is requesting this court of Second Instance to examine once again the evidence brought forward before the First Court. Having examined the judgment delivered by the Court of Magistrates, this Court cannot but reiterate that the decision given contains a detailed exposition of the facts of the case in the light of law and jurisprudence on the matter. The claim put forward by appellant is for the sum of €9200 representing the rent due for the period between the 24th April 2011 and the 24th August 2011 at the rate of €2300 per month, which rent is payable in advance. It also transpires from the acts that as from the 28th July 2011 the tenants were denied access to the premises rented out. A deposit of €2300 was given to appellant upon signature of the lease agreement. Also the rent for the month of April had already been paid by the tenants.

The First Court therefore concluded after a detailed exposition of the facts applied to jurisprudence that in actual fact the amount owing by defendants is of €4600 and this after deducting the deposit held by the landlord and after

considering the fact that the rent for the month of April had been paid. Both these issues have no bearing on appellants preliminary grounds of appeal dealing with his occupation of the room at roof level since the First Court awarded him a reduced amount to that claimed on two premises - the first one being the forced eviction of tenants from the premises and the second being the set off of the deposit with the rent due. Although it is true that the First Court in the operative part of the judgment deals with the interpretaion of the lease agreement as to the inclusion of the room at roof level in the premises rented out to respondents, however the same does not seem to have had a bearing upon the final liquidation of the amount respondents were condemned to pay wherein the Court stated verbatim:

"**In view of the testimony given by plaintiff the Court is of the opinion that his claim must be reduced by the sum of €2300 representing the deposit he already has in his possession and by a further €2300 representing the rent due for the last month of the lease during which period the defendants were precluded from occupying the apartment in question.**"

This being the decision reached by the First Court, it would be a futile exercise for this court of second instance to deal with the ground for appeal filed by appellant regarding alleged breach of appellant's contractual obligations since this was not taken into consideration by the First Court in its liquidation of the amount due. In actual fact, the First Court dealt with the matter in view of the plea put forward by defendants and this to justify their refusal to pay the rent still owing, which plea was however rejected by the Court and no appeal thereto has been filed. In the course of the proceedings before the First Court, respondent Carla Winter filed a constitutional application alledging that her fundamental human rights had been breached due to the abusive and illegal occupation by the landlord of part of the premises leased out to her and her

partner. In fact after a detailed exposition of all the legal arguments at issue the First Court declares:

"**From the above-mentioned principles, it therefore, results that a tenant can withhold payment of the rent only in specific instances expressly provided for in the law, the instance forming the merits of this case not being one of them, and in the eventuality of any other violation of the terms and conditions of the lease the remedy available to the tenant is to seek the termination of the lease and not to remain in occupation of the leased premises and withhold payment of the rent**."

Consequently the grounds of appeal put forward by appellant with regard to his occupation of part of the premises rented out to his tenants is being rejected.

The other remaining grounds for appeal deal with the unjustified set off made by the First Court of the deposit paid by the tenants and the declaration that no rent was due from the moment that tenants were forcibly evicted from the premises.

From an examination of the lease agreement entered into between the parties on the 17th June 2009, it results that a deposit of €2300 was paid by the tenants which deposit was to be refunded by the landlord upon the termination of the lease provided that there are no damages to the property upon inspection by the landlord. In the event that outstanding electricity and water bills have not been paid the deposit will be retained until settlment is made to the lessor's satisfaction. That from the evidence tendered by plaintiff, it results clearly that he had unilaterally waived in favour of defendants the condition regulating the payment of the utility bills by respondents and this for a period of six months. In fact appellant never presented any utility bills to his tenants and never claimed any arrears of the same, so much so that no claim regarding any such arrears was filed by him together with his claim for outstanding rent. Consequently

were the Court to decide that such deposit should not be set off with the amount of rent owing, this would be tantamount to a case of unjustified enrichment and this once it has been established that no damages were caused to the premises and the fact that the landlord had waived his right to claim any arrears of electricity and water bills. Also no evidence in this regard was brought forward before the First Court.

Article 1196 et seq. of the Civil Code gives the right of set off *ipso iure* when there are two debts of two mutual debtors:

1196. (1) Where two persons are mutual debtors, a set-off takes place between them.

(2) Set-off operates ipso jure, and even without the knowledge of the debtors. The moment two debts exist simultaneously, they are mutually extinguished to the extent of their corresponding amounts. Between which debts set-off takes place.

1197. (1) Set-off shall only take place between two debts both of which have for their subject-matter a sum of money or a determinate quantity of fungibles of the same kind, and which are both for a liquidated amount and exigible.

(2) A debt shall be deemed to be for a liquidated amount if it is certain even with respect to the quantity thereof.

The only limitations put forward in article 1199 do not apply to the merits of this case as may be seen by the terms adopted in this article of law:

"**Set-off takes place whatever may be the consideration of either of the debts, except in the following cases:**

(*a*) when a demand is made for the restoration of a thing of which the owner was unjustly deprived;

(*b*) when a demand is made for the return of a deposit, or of a loan for use or *commodatum*;

(*c*) in the case of a debt in respect of maintenance not subject to attachment."

Since no such demand was ever put forward by appellant for any arrears owing in connection with utility bills, therefore the limitations set out in article 1199 do not apply to this case and the court was legally justified to set off the rent due with the deposit held. As a result of the above-made considerations this ground for appeal is also being rejected.

Finally the Court also finds no reason to distance itself from the decision reached by the First Court to deduct the rent owing for the period commencing 24th July 2011 since tenants were evicted from the premises on the 28th July 2011. This in view of the fact that tenants were refused enjoyment of the property by the landlord himself who decided to take judicial action against them for their eviction due to their refusal to pay the rent owing.

For the above reasons the appeal filed by appellant is being rejected and the decision of the First Court is being hereby confirmed in its entirety.

All judicial expenses in connection with these proceedings are to be borne by appellant Albert Fenech.

< Final Judgement >

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