# Court Of Appeal

## Judges

**THE HON. CHIEF JUSTICE SILVIO CAMILLERI**
**THE HON. MR JUSTICE TONIO MALLIA**
**THE HON. MR JUSTICE JOSEPH AZZOPARDI**

**Sitting of Friday 27th May 2016**

**Number: 10**

**Application Number: 1015/10 AE**

**Ekaterina Momtcheva**

**v.**

**Danseller Company Limited (C 35006) u**
**Jarrow Limited (C 12945)**

**The Court:**

Having seen the sworn application brought forward by the plaintiff on the 7th October, 2010, whereby it was claimed that:

> "on the 27th of November 2008 she signed a promise of sale agreement with the defendant companies who jointly and severally promised and bound themselves to sell and transfer a penthouse apartment in a block of flats named Urban Court in Triq it-Tiben, Swieqi as described in the said agreement.

"The promise of sale agreement was initially valid till the 30th of June 2009 but was extended on numerous occasions till the 30th of April 2010.

"That in terms of the said promise of sale agreement the said vendors warranted that the property to be transferred would be covered by valid building permits and would be built according to the plans and permits approved by law and sanitary regulations.

"That by means of an official letter of the 30th of April 2010 plaintiff requested defendant companies to enter into the conctract in accordance with the terms and conditions of the said contract.

"The deed of sale was not carried out.

"Until the promise of sale agreement expired, the building in question was not in conformity with any building permits and plans and consequently, plaintiff had valid reasons at law not to enter into the final deed.

"That this failure is totally imputable to defendant companies and therefore besides the fact that plaintiff is entitled to get a refund of the ammount she paid when signing the promise of sale agreement, she is also entitled to be compensated for the damages suffered.

"During the signing of the *konvenju*, plaintiff paid the sum of €11,000 and apart from that, subsequent to the said promise of sale agreement she incurred damages and paid various ammounts as indicated in the statement attached to the lawsuit which statement was initially indicated to state €9,885 but was subsequently corrected to read €10,885.

"Plaintiff is therefore requesting the Court

- "to declare that she was justified in not acquiring the property and
- "to declare to the defendants jointly and severally responsible to refund the ammount of €11,000 paid on the 27th of November 2008 when the promise of sale agreement was signed.
- "to declare the defendants responsible for damages suffered by plaintiff because of the defendants' failures and
- "that the defendants jointly and severally be therefore ordered to refund the sum of €21,885 representing as to €11,000 , the refund of the ammount paid by plaintiff when signing the promise of sale agreement and €10,885 representing costs incurred and damages suffered by plaintiff as a result of the defendants' failure.

> "Plaintiff is also requesting that interests be paid on the said sum of €11,000 with effect from the 27th of November 2008 when the promise of sale agreement was signed and interests on the remaining sum with effect from the date of filing of this lawsuit.

Having seen the sworn reply brought forward by the defendants which states as follows:

> "1. That the lawsuit as proposed is unsustainable in respect of the ammount concerning damages since these are not due unless the procedures established in Article 1357 of Chapter 16 have been followed.
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> "2. Preliminarily and without prejudice to the above, they are also stating that the lawsuit filed is premature since the case refers to the refund of a deposit, which deposit the defendants were prepared to pay back. They also state that plaintiff was prepared to accept as stated in her letter of the 5th October 2010.
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> "3. On the merits, the defendants reiterate their position that they were and still are willing to refund the sum of €11,000 which ammount they received as a deposit on account of the price as will be explained further on in the lawsuit and in declaration of facts and without prejudice to the above, in respect of their claim of damages, plaintiff is solely responsible for any expenses which she could have incurred since she has incurred them as she was in a hurry to decorate and furnish her property before she even bought it.
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> "4. Furthermore and for all intents and purposes and without prejudice, the defendants also state that they had offered plaintiff an adjacent penthouse apartment for the same price and under the same conditions as originally agreed to even though this alternative penthouse apartment was bigger than the original one and therefore its market value was higher than that of the property which was offered to plaintiff but plaintiff refused this offer.
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> "5. Without prejudice to the above, the claim for damages is exaggerated and speculative.
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> "6. That the defendant should not suffer any costs of interests and in any case and without prejudice to the above, the claim for interest from the date of signing of the promise of sale agreement is unsustainable."

Having seen the judgement delivered by the First Hall Civil Court on the 27th April, 2012, by means of which the case was decided in the sense that it rejected the pleas raised by the defendants and upheld the plaintiff's requests, (although not the full amount claimed) and:

(1) declared that the plaintiff was justified in refusing to purchase the penthouse in Urban Court, Tiben Street, Swieqi; (2) declared defendants responsible in solidum for refunding the deposit paid by the plaintiff on the 27th November 2008; (3) declared defendants responsible in solidum for damages incurred by the plaintiff due to the breach of the preliminary agreement; and (4) condemned the defendants to pay in solidum to the plaintiff:- a) eleven thousand euro (€11,000) paid as deposit, together with interest with effect from the 27th November 2008 up to date of payment; and b) seven thousand two hundred euro (€7,200), with interest with effect from the 21st October 2010 (date of notification of the lawsuit).

Defendants were also condemned to pay all the costs in solidum.

By means of a decree dated 14th May 2012, the same Court, due to a mathematical error, acceded to plaintiff's request and ordered a correction in the sense that under paragraph 4 (b) of the judgement, the sum seven thousand two hundred euro (€7,200), was cancelled and

replaced with the words seven thousand five hundred and two euro (€7,502).

The First Court delivered its judgement after making a number of considerations which are being reproduced hereunder:

> "This case relates to a promise of sale signed on the 27th November 2008 for the purchase of a penthouse in a block of apartments Urban Court, Tiben Street, Swieqi which had not yet been built. Plaintiff paid a deposit of eleven thousand euro (€11,000). The promise of sale was valid up to the 30th June 2009. Subsequently, on the 24th June 2009, 31st July 2009, 31st August 2009 and 30th October 2009, further agreements were signed to extend the period for the publication of the final deed of sale. In the agreement dated 30th October 2009 the parties agreed to *'..... extend the period of validity of the convenium dated 27th November 2008.... relating to sale of property..... Until the 30th April 2010 or until six weeks from the date of the issue of the Full Development Building Permit on the said Penthouse whichever of the said two (2) events is the first to occur'*. Unfortunately the sale never materialized. Plaintiff is claiming refund of the deposit and damages she claims to have incurred. It transpires that the property was not covered by a building permit (vide testimony of architect Nicholas Sammut Tagliaffero, sitting of the 24th January 2011). An application 912/2010 was pending in appeal when this case was filed on the 7th October 2010. In terms of the agreement dated 27th November 2008, the sale was to take place, amongst other conditions:
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> "(i) *'subject to verification that the immovable property is covered in all respects by all required building permits and that it conforms to such permits and approved plans and to all relevant building and sanitary laws and regulations.'* (clause 6).
>
> "(ii) *'The apartment shall be built as per attached plan which is to be in conformity with and covered in all respects by a valid building permit.'* (clause 11).
>
> "There is no doubt that the plaintiff was fully justified in refusing to purchase the property. Prior to the filing of the lawsuit the defendants declared that they were willing to refund the deposit in full and final settlement of her claims. Plaintiff refused this offer. In a letter dated 5th October 2010, her legal adviser confirmed that:- *l-klijenta tieghi hi disposta taccetta t-€13,000 minnek indikati pero` mhux li dawn ikunu ghas-saldu tal-pretensjonijiet taghha.* ***Hija disposta pero` li taghti ricevuta li dawn il-pagamenti jirraprezentaw hlas ghas-saldu biss***

***tad-depozitu izda mhux li m'ghandiex pretenzjonijiet ohra.'***. Plaintiff had no obligation to accept the deposit in full and final settlement of her claims, whereas defendants were legally obliged to refund the deposit and had no right of imposing conditions.

"It would have been of no use for the plaintiff to file a request that the defendants are condemned to sell her the property according to the terms and conditions of the promise of sale, since on the date of filing of the lawsuit the matter concerning the building permits had not been settled. The relevant period is the date when the contract of sale was supposed to be published. Any developments which occur during the period that the lawsuit is pending, is irrelevant to establish whether a vendor could honour his promise to sell.

"Furthermore, plaintiff had no obligation to accept the offer made by the vendors to take an alternative adjacent apartment, no with standing that this might have been larger in size. In an email dated 22nd October 2009 and sent to notary Gambin, she explained that the offer was not acceptable as *'I don't like the lay out of the other one (the most expensive), no matter how better finish it has and how big it is.'*. Plaintiff was fully entitled to make such a decision, and her refusal cannot prejudice the outcome of these proceedings.

"In terms of Article 1357 of the Civil Code, a promise to sell creates ***'..... an obligation on the part of the promisor to carry out the sale, or, if the sale can no longer be carried out, to make good the damages to the promise.'***.

"In the court's opinion the fact that plaintiff did not sue for enforcement of the promise of sale, does not mean that this provision of law is not applicable. It is evident that up to the 30th April 2010 the sale could not be carried out under the terms and conditions agreed upon, and this through no fault of the plaintiff. On the 30th April 2010 plaintiff filed a judicial letter against defendants requesting them to transfer the property according to the terms and conditions stipulated in the promise of sale of the 27th November 2008. Defendants were in no position to transfer the property in terms of the agreement since the premises had no valid building permit. The court is aware of various judgments confirming that no damages may be claimed unless the plaintiff requests the enforcement of the promise of sale in terms of Article 1357(2) of the Civil Code. In the court's view it is unreasonable to argue that the plaintiff has no right to claim damages for the simple reason that she did not include a demand for the defendants to be condemned to transfer the property. There is ample proof that on the 30th April 2010 defendants were not in a position to honour their contractual obligations. As stated in the judgment delivered on the 5th March 2010 by the Court of Appeal (Mr Justice Philip Sciberras) in the case **Alfred Galea et vs Perit Anton Zammit et**:-

> "*'Ovvjament, m'ghandux ghalfejn jinghad illi l-otteniment tal-permess relattiv mill MEPA, ex post facto l-iskadenza tal-konvenju, ma jiswiex biex itappan jew ixellef il-motiv gust ta' l-atturi li ma jersqux ghall-pubblikazzjoni ta' l-att ghaliex, kif ukoll pacifikament akkolt, meta wiehed ghandumotiv gust biex jirriselixxi minn weghda ta' xiri ma tistax il-parti l-ohra, bir-rimozzjoni ta' dak il-motiv, wara li jkun skada z-zmien tal-promessa, tobbligah jezegwiha. Ara "**George Xuereb -vs- Carmelo Pace**", Appell Civili, 8 ta' Gunju, 1964.'*."

"In the case **Steve Cachia et vs Nicholas Cutajar et**, in a judgment delivered by the Court of Appeal on the 1st July 2005, it was held that *"La darba l-istess konvenuti ma setghux jonoraw l-obbligu taghhom assunti fil-konvenju, u cioe' li jiggarantixxu l-pacifiku pussess, dan il-bejgh ma setghax isir konsegwentement dik il-weghda ma setghetx tigi enforzata u* ***l-uniku rimedju li kellhom l-atturi kien dak ta' risarciment ta' danni minhabba l-inadempjenza tal-istess konvenuti.'.***

"Therefore plaintiff had every right not to sue for the enforcement of the promise of sale. The default of the seller to honour his obligation within the agreed time frame and under the terms and conditons as agreed to in the private writing dated 27th November 2008, entitle the plaintiff to request damages.

"From the exchange of emails it is evident that plaintiff was being made to believe that the permit issue was a nonissue and that it was only a question of time for the matter to be solved. On this pretext the plaintiff also placed an order for the manufacture of the furniture and paid €3,000as a deposit. On the 7th April 2010 the Dhalia property consultant (Gordon Attard) informed notary Gambin that *"Daniel has recently re applied to sanction this minor issue that has been holding him back to sign the final deed and is very confident that things will go through this time round."*. Things were far from being as described by Attard.

"The plaintiff filed a statement of the money she is claiming from defendants. Having gone through all the evidence, the court is of the opinion that plaintiff is justified in her claim for the:-

"i. Refund of €11,000, the sum paid on account of the price on signing the preliminary agreement.

"ii. Payment of interest on the sum of €11,000 with effect from when the money was paid to the vendors. Although defendants claim that they have no obligation to refund the interest as long as the promise of sale was binding, they forget that they were in default in their obligation to sell the penthouse under the terms and conditions stipulated in the preliminary agreement. The sale did not materialize through no fault of the plaintiff. The interest qualifies as damages incurred by the plaintiff since she does not have the use of her money.

Once the sale could not take place since the building had no valid development permit, the plaintiff refused the refund as payment in full and final settlement. From the letter dated 29th September 2010 it was expressly stated that the plaintiff had to accept *'..... il-flus ghas-saldu u qeghda tirrinunzja ghal kwalsiasi pretensjoni li jista' jkollha rigward l-iskritturi de quo.'*. The plaintiff was justified in her refusal.

"iii. Expenses paid to Bathroom Design - €1,150. Having read the transcript of the testimony given by the plaintiff, Antoine Magrin and Daniel Farrugia, the court is morally convinced that the payment was effected by the plaintiff. Furthermore, at the time of payment (18th March 2009) the plaintiff was in Malta. Also relevant is that the plaintiff filed the original receipts of payment (fol. 86b and 86c). The court would presume that Daniel Farrugia would not have given the original invoice had he paid the supplier and had plaintiff not paid him. Furthermore, in terms of the preliminary agreement plaintiff had to pay the expenses for the bathroom and kitchen. Therefore the court concludes that on a balance of probability plaintiff paid the bill and the supplier signed the invoice issued in Daniel Farrugia's name.

"iv. Expenses paid to Notary John Gambin - €1,402, as confirmed by the notary.

"v. Expenses paid to Architect Nicholas Sammut Tagliaferro - €300.

"vi. Payment of a deposit for the purchase of furniture - €3,000. However, the plaintiff is obliged to deliver to the defendant's the furniture and wood which is still in Emanuel Spiteri's possession (fol. 83). The carpenter (Emanuel Spiteri) confirmed that, *'Id-deposit li hallset fuq il-kcina zammejtu jien u ghadu ghandi u l-ghamara li lhaqt lestejt u l-injam li qattghajt ghall-ghamara ghadu ghandi pero` din kienet kollha made to measure u ma stajtx inbieghom lil haddiehor.'* (fol. 83)

"vii. Travelling expenses to Malta in March 2009, June 2009 and October 2010. In this respect plaintiff did not file complete documentation with respect to each visit, although it is not contested that plaintiff was in Malta at the time. The court, after having seen the documents at fol. 123-129, is arbitrio *boni viri* liquidating the sum of €1,400.

"viii. Storage of kitchen appliances - €250.

"The defendants claim that plaintiff is not entitled to claim a refund of expenses as she took a rash decision to place orders for furnishings in the apartment, at a time when she was still not the owner. The court is not of the opinion that the plaintiff should be penalized for having ordered the furniture prior to the publication of deed of sale. From the emails exhibited, it is evident that the plaintiff was being told that the issue relating to the permit was a minor matter which would be

resolved in a short time. In an email dated 29th April 2009, and copied to Daniel Farrugia, the Dhalia representative informed the plaintiff: *'I just spoke to Daniel re: completion date. Your property will be complete in 2 to 3 weeks time. I recommend you book your flight tickets accordingly.'* (fol. 17). In another email dated 29th May 2009, and copied to Daniel Farrugia, the same person wrote: *'So I spoke with Daniel today. The bedroom wall is now up. The remaining things are as follows: The internal doors which you need to choose while you are here, The water and electric metres which can only be applied for and installed with your signature, The painting of the walls which is usually done after you install the air condition unit if you are going to install one....'*. The order for the furniture was placed on the 13thMarch 2009 (fol. 84). Based on the feedback the plaintiff was receiving, there was no reason for her to doubt what she was being told. Furthermore, at the time she had still not spoken to architect Nicholas Sammut Tagliaferro, and advised that the permit issue was in reality not a minor issue. Therefore the plaintiff should not incur any loss. It also transpires that all concerned were aware of what the plaintiff was doing and were assisting her get works completed, and at no point in time did they object or express any doubt due to the permit issue.

"On the other hand the court will not be upholding plaintiff's request for the payment of:

i. "AIP permit - €233. This amount is already included in the notary's bill as confirmed by the plaintiff in the note she filed on the 15th December 2011.
ii. "Banks transaction and interest on Retirement Savings - €1,950. No documentary evidence was filed which explains, in a satisfactory manner, the amount being claimed by the plaintiff.
iii. "Tax for exceeding weight luggage – €200. No documentary evidence was filed. Furthermore, this claim has no relation to defendant's contractual default.

"In her second affidavit filed on the 11th March 2011, plaintiff stated that she is insisting on getting a refund for €2,000 paid as a deposit for a contract of works she signed on the date of the promise of sale. In this regards, the court comments as follows:-

"(a)This amount was not included in the money claimed by the plaintiff in the sworn application whereby proceedings were commenced. The plaintiff is requesting the payment of €21,885 according to the statement of account Doc. A attached to the judicial act whereby these proceedings were commenced.

"(b) It transpires that a judgment was delivered in favour of the plaintiff whereby Daniel Farrugia was condemned to pay her this sum (judgment delivered by the Small Claims Tribunal on the 30th

> September 2011 in the law suit Ekatarina Momtcheva vs Daniel Farrugia).”

Having seen the application of appeal filed by the defendant companies Danseller Company Limited and Jarrow Limited, requesting that for the reasons contained therein, this Court invalidates, revokes and annuls the judgement given by the First Hall Civil Court on the 27th of April, 2012, (as amended by the subsequent decree in terms of Article 825 of Chapter 12 of the Laws of Malta, dated 14th May, 2012) in the case between the parties and that the plaintiff’s claims be refused, with all the costs to be decided against the appealed plaintiff.

Having seen the reply filed by the respondent plaintiff, by means of which, and for the reasons contained therein, she respectfully submitted that this Court should dismiss the appeal filed by defendant companies with costs to be borne by defendants.

Having seen that during the sitting of the 15th of March, 2016, it was agreed that the case be put off for judgement following oral submissions by the respective parties’ legal representatives.

Having seen all the acts of the case and documents exhibited thereat;

Considers:

That in this case, the plaintiff is seeking reimbursement of the deposit paid by virtue of a promise of sale agreement of the 27th November, 2008, relative to the purchase of a penthouse at Urban Court, Tiben Street, Swieqi, together with interests and damages sustained arising as a consequence of the defendant companies' failure to honour the conditions arising out of the promise of sale, relative to the property being duly covered by all the building permits necessary, according to building and sanitary laws and regulations.

The defendant companies on the other hand contend that the plaintiff does not have a right to pursue such a claim, given that the procedure stipulated in Article 1357 of the Civil Code was not adhered to. Thus in view of the fact that the defendants had offered to refund the deposit, they reject the claims for interests and damages as unfounded and exaggerated, given that plaintiff incurred expenses on an apartment which was not as yet her property.

The First Court held that plaintiff was justified in refusing to purchase the property in question, considering that the defendants could not transfer such property, since it was not covered by the relative building permits, and that plaintiff was under no obligation to accept the alternative property offered by vendors, by way of an adjacent, larger

apartment. Moreover, it decided that the fact that the plaintiff did not sue for the enforcement of the promise of sale did not preclude her from suing for damages, notwithstanding the fact that the Court was fully aware of the extensive jurisprudence retaining such enforcement to be a prerequisite to making a claim for damages. The Court based its decision on the wording of Article 1357 (1) of the Civil Code and sustained that the default of the seller to honour his obligations within the agreed timeframes and under the terms and conditions of the private writing entitle the plaintiff to request damages and consequently acceded to plaintiff's request for reimbursement of deposit paid, together with interests, as well as the damages.

In their appeal, the appellants raise a number of grievances relative to the judgement under appeal.

The first grievance of the appellant companies relates to the fact that when the First Hall of the Civil Court condemned the defendant companies to pay the plaintiff damages, including expenses incurred by the plaintiff, this went contrary to the dispositions of Article 1357 (2) of the Civil Code, which provides that the effects of a promise of sale are extinguished unless the procedure specified therein is followed. Consequently, appellants contend that plaintiff's claim for damages should not have been acceded to, once plaintiff failed to adhere to the

procedure established by law and as expounded upon extensively under local jurisprudence.

This Court shall first reproduce the text of the relative article, before carrying out an analysis of the grievance under examination:

> "***1357.*** *(1) A promise to sell a thing for a fixed price, or for a price to be fixed by one or more persons as stated in the foregoing articles, shall not be equivalent to a sale; but, if accepted, it shall create an obligation on the part of the promisor to carry out the sale, or, if the sale can no longer be carried out, to make good the damages to the promise.*
> "*(2) The effect of such promise shall cease on the lapse of the time agreed between the parties for the purpose or, failing any such agreement, on the lapse of three months from the day on which the sale could be carried out, unless the promise calls upon the promisor, by means of a judicial intimation filed before the expiration of the period applicable as aforesaid, to carry out the same, and unless, in the event that the promisor fails to do so, the demand by sworn application for the carrying out of the promise is filed within thirty days from the expiration of the period aforesaid.*"

This Court is of the opinion that the first paragraph of the said article should not be examined in isolation, and therefore if either the enforcement of the obligation on the part of the promisor to carry out the sale is being requested, or if the sale can no longer be carried out, a request to make good the damages to the promise can only be sustained if the effect of such promise of sale is kept in force, as stipulated in the second paragraph, namely if the promisee sends a judicial intimation to the promisor, prior to the expiry of the promise of sale, **and** in the case of promisor's continued default, files a sworn application within thirty days from the last extended period.

The effects of the above mentioned judicial letter are solely to extend the effects of the promise of sale by a period of thirty days. Before this last extended period expires, in order for the effects of the promise of sale to be retained and for the purposes of safe guarding the rights arising therefrom, the appropriate lawsuit has to be filed as set out in the said provision of the law. The above mentioned sub-articles of the law are there to establish the procedure to be adopted in the quest for the safeguard of a party's rights and interests arising out of a promise of sale in the case that the other party has failed to adhere to its obligations, as arising out of the promise of sale.

In this case under review, it is uncontested between the parties that whereas the plaintiff did send the defendants a judicial letter on the 30th of April, 2010, this being the day the promise of sale was due to expire, the sworn application was filed, well over five months after such judicial intimation. It thus follows that the defendants' grievance is well-founded in terms of Article 1357 (2) of the Civil Code, in that the plaintiff failed to abide by the relevant dispositions of the law. Failure to act in accordance with the provisions of Article 1357 of the Civil Code, will lead to the end of the promise of sale, in that no party can then insist on either its execution by having the contract published, nor can a party

request consequential damages arising from the fact that the contract could not be published.

This affirmation is also being made on the basis of the extensive jurisprudence in this regard, which this Court sustains and holds as its own. Reference is made to a series of judgements listed, by this Court in its judgement dated 1st February, 2008, in the names **Gloria Pont v. J.L.J. Construction Company Limited,** whereby it was held that:

> "ghax jekk il-konvenju jiskadi, jigi bla effett, u dak li jkun ma jistax aktar jinvoka l-konvenju biex izomm ghalih il-hlas kondizzjonat li sar fuq il-konvenju. Konvenju ma jibqax fis-sehh biss ghax tintbaghat l-ittra ufficjali prevista fl-Artikolu 1357 tal-Kodici Civili. Kif osservat il-Prim'Awla tal-Qorti Civili fil-kawza **Del Negro v. Grech**, deciza fl-10 ta' Jannar 1994,
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> > "L-Artikolu 1357 tal-Kap. 16 jippreskrivi li l-effett ta' weghda ta' bejgh jispicca **meta jaghlaq iz-zmien miftiehem** bejn il-partijiet ghal hekk... kemm-il darba l-accettant ma jsejjahx lil dak li wieghed, b'att gudizzjarju **pprezentat qabel ma jghaddi z-zmien** applikabbli kif intqal qabel, sabiex jaghmel il-bejgh, u kemm-il darba, fil-kaz li dak li wieghed jonqos li jaghmel hekk, it-talba b'citazzjoni sabiex titwettaq il-weghda ma tigix ipprezentata fi zmien tletin jum minn meta jaghlaq l-imsemmi zmien."
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> "Biex konvenju jinzamm fis-sehh hemm zewg proceduri li jridu jittiehdu, u jekk ma jittiehdux it-tnejn, il-konvenju jiskadi anke bhala titolu ta' obbligazzjoni. Meta konvenju jiskadi l-partijiet iridu jirrevertu ghall-istat antecedenti ghall-istess konvenju u allura min ikun se jbiegh jirritorna kull depositu li jkun ircieva. Fil-kawza fl-ismijiet **Alexandra Jenkins v. Emanuel Bianco et**, deciza mill-Prim'Awla tal-Qorti Civili, fit-30 ta' Mejju, 2001, intqal illi:
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> > "Fis-sentenza **Brownrigg vs Camilleri** (Appell Civili 22 ta' Frar, 1990) gie deciz illi jekk parti f'konvenju ma taghmilx il-proceduri indikati fl-Artikolu 1357 tal-Kap. 16 il-konvenju jispicca u ma tistax tinsisti fuq l-ezekuzzjoni tieghu kif lanqas ma tista' taghmel talba ghall-konsegwenti danni f'kaz li kuntratt ma jkunx jista' isir. Skond is-sentenza fl-ismijiet **L. Abela vs. T. Spiteri** (Appell 30 ta' Ottubru, 1989) jekk il-formalitajiet rikjesti f'dan l-artiklu ma jigux osservati, il-konvenju jitlef l-effikacja tieghu u dakinhar li jiskadi l-partijiet jergghu lura ghall-posizzjoni li kienu qabel sar il-konvenju. F'kaz fejn konvenju jiskadi minghajr hadd

> mill-kontendenti ma jimplimenta dak il-konvenju fit-terminu tal-validita` tieghu u lanqas ma jiehu mizuri gudizzjarji li trid il-ligi biex jinfurzaw id-drittijiet u obbligi reciproki stipulati fil-konvenju jfisser li l-partijiet jirritornaw ghall-istatus quo ante. Ghalhekk il-kompratur jista' jitlob lura minghand il-venditur id-depositu li jkun hallas fuq il-konvenju (ara wkoll **A. Ciantar vs A. Vella** LXII - pt ii-pagna 828 u **J. Cassar vs V. Farrugia**: XXVII - pt ii-pagna 316)."
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> "Biex dak li jkun jiehu lura jew izomm dak li hu intitolat ghalih taht il-konvenju, irid, fl-ewwel lok, izomm fis-sehh l-istess konvenju, ghax altrimenti, kif qalet il-Prim'Awla tal-Qorti Civili, kawza **Cauchi v. Vassallo**, deciza fil-11 ta' Dicembru 2003, "Fejn konvenju jiskadi minghajr hadd mill-kontendenti ma jimplimenta dan il-konvenju fit-terminu tal-validita` tieghu, u lanqas ma jiehu mizuri gudizzjarji li trid il-ligi biex jinfurzaw id-drittijiet u obbligi reciproki stipulati fil-konvenju, ifisser li l-partijiet jirritornaw ghall-istatus quo ante. Ghalhekk il-kompratur jista' jitlob lura minghand il-venditur id-depozitu li jkun hallas fuq il-konvenju."

"Tant hi importanti din il-procedura, li l-htiega taghha giet rikonoxxuta anke f'kaz li d-depozitu moghti fuq il-konvenju jkollu n-natura ta' kapparra. Dan il-punt kien diskuss funditus minn din il-Qorti (Sede Inferjuri) fil-kawza **Spiteri v. Xuereb**, deciza fit-23 ta' Gunju 1994, u l-Qorti kienet enfasizzat li ebda parti ma tista' tirreklama xi beneficcju taht konvenju, jekk qabel xejn ma tkunx zammet fis-sehh l-istess konvenju tramite l-procedura kontemplata fil-ligi.

"Is-socjeta` konvenuta targumenta li meta hi spediet ittra ufficjali lill-attrici, poggiet lill-istess attrici in mora, u ma kellhiex taghmel izjed minn hekk. Issostni, li l-ittra ufficjali kienet titfa' l-oneru fuq l-attrici li tipprocedi biex tiggustifika n-nuqqas taghha, u ladarba dan ma ghamlitux, allura d-depozitu jintilef kif stipulat fil-konvenju.

"Din il-Qorti tosserva, pero`, li l-effett ta' l-ittra ufficjali mhux dak sottomess mis-socjeta` konvenuta. L-effett ta' l-ittra ufficjali hu biss biex jestendi l-effetti tal-konvenju ghal perijodu ta' xahar, pero`, qabel ma jiskadi dan it-terminu hekk imgedded, biex il-konvenju jibqa' jgorr l-effetti tieghu, trid issir il-kawza opportuna kif trid il-ligi. Dan qalitu din il-Qorti fil-kawza **Bianchi v. JMA Developments Ltd**, deciza fis-26 ta' Mejju 2006, meta accettat l-interpretazzjoni ta' l-ewwel Qorti fis-sens li a tenur ta' l-Artikolu 1357(2) tal-Kap. 16 gialadarba tigi pprezentata ittra ufficjali qabel ma jiskadi t-terminu tal-konvenju, dan l-att gudizzjarju jestendi l-effetti tal-konvenju ghal perjodu ta' xahar sakemm jew l-accettant jaghzel li jersaq ghall-kuntratt entro dak ix-xahar jew altrimenti sakemm tigi prezentata l-azzjoni fejn jintalab li l-accettant (ossia dak li jkun wieghed) iwettaq il-weghda li jkun ghamel permezz tal-konvenju."

"**…Talba ghad-"danni" ghax parti ma resqitx ghall-pubblikazzjoni ta' l-att finali, tesigi, kif qalet din il-Qorti fil-kawza Brownrigg v. Camilleri imsemmija aktar qabel, iz-zamma fis-sehh tal-konvenju**

> **bil-proceduri kontemplati fl-Artikolu 1357 tal-Kodici Civili;**" (emphasis made by this Court)

Moreover, in a more recent judgement by the First Hall Civil Court, dated 31st October, 2011, in the names **Avant Garde Design and Management Technologies Limited v. E & M Bajada Limited,** which also had a claim for damages following the expiration of a promise of sale agreement and which had a background of circumstances similar to the one under examination, it was held:

> "Illi fir-rigward tad-danni pero` ma jistgħax jingħad l-istess ħaġa u dan għaliex kif sewwa eċċepew il-konvenuti, kif per eżempju ntqal fis-sentenza **"Jenkins vs Bianco"** fuq riportata, min ma jimxix skond l-Artikolu 1357 ma jistgħax imbagħad jitlob danni. F'dan is-sens wieħed anke jista' jirreferi għas-sentenza **"Brownrigg vs Camilleri"** (Appell Ċivili 22 ta' Frar 1990) u s-sentenzi fl-ismijiet **"Ciantar vs Vella"** u **"Cassar vs Farrugia"** ġia` msemmija. Fil-fatt anke jekk wieħed japplika verbatim dak li hemm fil-konvenju, it-talba attriċi ma hijiex sostenibbli għaliex id-danni huma pagabbli f'każ li l-futuri bejjiegħa ma jersqux għall-att finali. Naturalment f'dan il-każ kienu l-atturi u allura x-xerrejja li ma resqux għall-kuntratt, purke għal raġunijiet ġusti. Il-fatt allura jibqa' li din l-eventwalita' indikata fil-konvenju xorta ma seħħitx u naturalment wieħed għandu japplika strettament dak li hemm miktub. Dan japplika mhux biss għall-ħlas tal-għaxart elef lira (Lm10,000) meqjusa fil-konvenju bħala danni pre likiwidati, iżda anke għal flus li s-soċjeta' attriċi ħallset biex joħorġu l-permessi. L-argument tal-atturi propost fin-nota ta' sottomissjonjiet tagħhom, li dan jikkostitwixxi arrikkiment mhux ġustifikat da parti tas-soċjeta' konvenuta ma jreġġix għaliex dan il-kunċett legali jrid ikollu ċerti rekwisiti legali li f'dan il-każ kjarament ma japplikawx; infatti trattandosi ta' talba li għandha ssir bl-hekk imsejjħa actio de in rem verso, ma jridx ikun hemm rimedji oħra legali biex din tiġi proposta meta huwa ċar li fil-fatt hija talba għal danni."

This Court confirmed this position in a recent judgment delivered on the 29th May, 2015, in the case **Gerit Co. Ltd. v. A M Developments Ltd**.

In view of the foregoing, it is held that the first grievance put forward by the appellant defendants is justified and consequently merits being upheld.

The defendant appellant companies then sustain that the only damages which can be claimed in the case of a promise of sale is the deposit and that this can be claimed solely if the procedure in Article 1357 (2) is duly followed. The Court observes that this grievance departs from the original position adopted by the defendant companies' statement of defence, whereby they had stated that they were prepared to release the indicated deposit. This Court, in any case, disagrees with this line of argument put forward at this stage, due to the fact that as the effects of the promise of sale have come to an end, the respective parties should be reinstated into the same position before they entered such promise of sale, and thus any deposit paid should be released (not by way of damages). As stated by the First Hall Civil Court in its judgement of the 5th October 2007, in the names **Salvatore Coppola et v. Gerolama Busuttil**:

> "Illi skond il-gurisprudenza tal-Qrati taghna jekk il-formalitijiet rikjesti f'dan l-artikolu ma jigux osservati, l-konvenju jitlef l-efficacja tieghu u dak in nhar li jiskadi, **l-partijiet jergghu lura ghal posizzjoni li kienu qabel sar il-konvenju.**
>
> "F'kaz fejn konvenju jiskadi minghajr hadd mill-kontendenti ma jimplimenta dan il-konvenju fit-terminu tal-validita` tieghu, u lanqas ma jiehu mizuri gudizzjarji li trid il-ligi biex jinfurzaw id-drittijiet u obbligi reciproki stipulati fil-konvenju jfisser **li l-partijiet jirritornaw ghall istatus quo ante.** Ghalhekk il-kompratur jista' jitlob lura minghand il-

> venditur id-depozitu li jkun hallas fuq il-konvenju." (Ara sentenzi A.Ciantar vs A.Vella LXX11 p 11 p828; L.Abela vs T.Spiteri Vol Vol LXX111 p11 p 403; J.Cassar vs V Farrugia LXXV11 p11 p316.)"

The Court retains this position as its own and consequently rejects defendants' grievance in this respect, and decides that the defendant companies should reimburse the deposit paid on the promise of sale to the plaintiff, and in this respect the First Court's decision is to be confirmed.

Defendants further argue that in any case, the said companies are not responsible for damages, as it was the plaintiff who brought about the current situation upon herself, since she was aware or should have been aware that the contract would only be published following attainment of the relative building permits, which were not yet in hand, otherwise there would have been no reason to extend the promise of sale agreement further. Moreover, they sustain that there is no causal link between their actions and the damages being claimed, by way of expenses incurred by the plaintiff. Given this Court's decision to accept the appellants' grievance to reject plaintiff's claim for damages as aforesaid, it is retained that there is no need to delve further into the matter of damages be they general or specific, into the defendants' bad faith, or as to the level of proof brought forward by the parties in this regard.

The last grievance of the appellant defendant companies relates to the award of interests on the sum paid as deposit. The defendants contest the plaintiff's request for payment of interest from date of payment as unfounded, in that they sustain that in terms of jurisprudence a judicial act ought to have been presented requesting payment. On the other hand, the plaintiff sustains that the deposit paid remained her property, consequently, once this has to be returned, the fruits or interests generated from such deposit have to be returned as well, the more so in the case of the defendants, who are traders. The plaintiff argues that the deposit would have become property of the defendants only had the contract taken place. Once the deposit was the property of the plaintiff, which was to be duly reimbursed, any interests which accrued were also to be paid to the plaintiff. The plaintiff also highlights the fact that a judicial letter had in fact been filed in Court on the 30th of April, 2010.

With respect to these arguments, the Court considers the fact that it results that while the defendant companies originally stated that they would be willing to refund the deposit, they never actually released the deposit in favor of the plaintiff. As stated before, the plaintiff was entitled to the deposit once the promise of sale fell through. Thus it would not be just for the defendant companies to take advantage from their own default to release the said deposit which was lawfully due to the plaintiff.

The First Court considered that interests were due to the plaintiff, by way of damages, from the date of the promise of sale, which fell through as a result of the defendants' own default.

After considering the matter thoroughly, this Court deems that the deposit was advanced to the defendant companies, as an inherent part of a promise of sale agreement, for the purposes of the transfer of immoveable property, which is a civil matter. Furthermore, the plaintiff conceded to all the extensions which took place following the promise of sale agreement of the 27th November, 2008, out of her own free will, as she was intent on acquiring the property in question. Thus at that point in time, the defendant companies were holding said deposit lawfully, in terms of the agreement between both parties. It is only from the moment when the promise of sale fell through that the defendants were no longer entitled to withhold such deposit and benefit therefrom, this coinciding with the day that the plaintiff issued a judicial letter intimating defendants. However, the defendants contend that such judicial letter only intimated them for the purposes of appearing on the contract in terms of Article 1357. On the other hand, the sworn application which undoubtedly constitutes a judicial act, did request defendants to pay back the deposit to the plaintiff. Thus the interests should accrue as

from the date of notification of defendants with the sworn application, that is the 21st of October, 2010.

It is thus held that Article 1141 (2) of the Civil Code should be applied in this regard. The said article provides that: "(*2) In any other case, interest shall be due as from the day of an intimation by a judicial act, even though a time shall have been fixed in the agreement for the performance of the obligation*". This matter was in fact delved upon by the Court of Appeal in its Inferior Jurisdiction, on the 6th of October 2010, in the case in the names **Martin Chetcuti et v. Rosario Gatt et,** whereby it was held that:

> "Meta tali hu l-kwadru kif jinzel mill-atti istruttorji, kien doveruz fuq l-atturi appellanti illi fejn l-imghax ma jkunx miftiehem dan jibda jghaddi mid-data li fiha l-kreditur gudizzjarjament jinterpella lid-debitur tieghu ghall-hlas. "Per far decorrere gli interessi deve essere una interpellazione specifica pel pagamento dei lucri e non una semplice intimazione al debitore di eseguire la sua obbligazione" ("**O'Connor -vs- Bruno Olivier**", **Kollez. Vol. XVI P I p 84**). Dan ghaliex il-kreditu jsir esegwibbli u l-interessi jkunu dovuti appena l-kreditur jirreklama l-hlas b'att gudizzjarju [Artikolu 1141 (2) Kodici Civili u s-sentenzi fl-ismijiet "**Rita Coleiro -vs- Joseph Coleiro**", Appell, 5 ta' Ottubru 1998 u "**Silvio Mifsud -vs- Neville Mifsud et**", Appell Inferjuri, 24 ta' Marzu 2000]."

In view of the foregoing, this last grievance should be limitedly upheld, in the sense that the appealed judgement should be reformed, so that interests should run from the 21st October, 2010.

Therefore, for the reasons explained above, the Court disposes of the appeal filed by the defendants in that it grants the appeal limitedly in the sense that:

(1) revokes that part of the appealed judgement, whereby the defendant companies' first plea was rejected, and under the third head whereby the defendants were declared responsible for damages due to the breach of the preliminary agreement and the defendants were condemned *in solidum* to pay damages as decided under paragraph (b) of the fourth head, and instead dismisses plaintiff's relative requests and accedes to the said plea;

(2) confirms the first judgement in so far as the first two heads are concerned, whereby it declared that the plaintiff was justified in refusing to purchase the penthouse in Urban Court, Triq it-Tiben, Swieqi, and that the defendants are responsible *in solidum* to refund the deposit paid by the plaintiff;

(3) varies the first judgement to the extent that under paragraph (a) of the fourth heading, while confirming the decision to condemn the defendants to pay the plaintiff the sum of €11,000, representing the deposit paid by the plaintiff; on the other hand, revokes that part of the judgement by means of which it was decided that interests would

accrue from the 27th November, 2008 and instead decides that interests should accrue in favour of the plaintiff, as from the 21st of October, 2010, date of the plaintiff's judicial letter, up to the date of payment, and consequently condemns the defendants to pay the plaintiff such deposit and accrued interest *in solidum* as decided herein.

As for the costs, whereas the defendant companies shall bear two thirds of the total costs of both proceedings *in solidum* between them, the plaintiff shall bear one third of the total costs of both proceedings.

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| Silvio Camilleri<br>Chief Justice | Tonio Mallia<br>Judge | Joseph Azzopardi<br>Judge |

Deputy Registrar
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