

**COURT OF MAGISTRATES (GOZO)  
SUPERIOR JURISDICTION  
GENERAL SECTION**

**MAGISTRATE DOCTOR PAUL COPPINI LL.D.**

Sworn Application Number: 10/2018 PC

**Henry sive Harry Braithwaite**

vs

**Dr. William Cuschieri, in his own name and  
as mandatory of Catherine Elizabeth Braithwaite,  
residing abroad**

Today Friday, 18<sup>th</sup> January 2019

The Court,

Having seen the Sworn Application filed by plaintiff Henry Braithwaite, whereby after submitting and declaring on oath, whilst confirming that he had personal knowledge of the following:

1. That on the 14th February 2016, - Document A – he signed an agreement with defendant Dr. William Cuschieri as agent for Catherine Elizabeth Braithwaite wherein *inter alia* it is stipulated that:

*“Catherine Braithwaite acknowledges that as a fact, all the funds for the acquisition, the refurbishment and finishing and the maintenance and upkeep of the property at “Il-Merill”, Triq Birbuba Gharb were provided by Henry Braithwaite.*

*She is therefore acknowledging the validity of the note of hypothec registered on that property in favour of Henry Braithwaite, pursuant to the deed published by the said Notary on the nineteenth (19th) September two thousand and five (2005), Hypothec number H21577/2005 (twenty one thousand five hundred and seventy seven of the year two thousand and five) registered in the Public Registry, Valletta.*

*The parties agree that Catherine Braithwaite's indebtedness towards Henry Braithwaite shall be paid off through the sale of the property under the following terms and conditions:*

*Catherine Braithwaite is hereby authorising Henry Braithwaite to continue in the sole and exclusive possession of the property under the terms and conditions herein set out; and is moreover granting an irrevocable power of attorney to Henry Braithwaite authorising him to continue in possession of the property; to use the property as he best deems appropriate; and to dispose of the property under any title and under those terms and conditions as he may deem appropriate from time to time. It shall therefore lie within the absolute discretion of Henry Braithwaite to decide if and when to dispose of the property, for what consideration, and under what conditions to do so.*

*Catherine Braithwaite may not revoke or withdraw this power of attorney for any reason whatsoever. Should she violate this particular condition she shall incur a penalty in favour of Henry Braithwaite of five hundred thousand euro (€500,000). For all intents and purposes of law, and particularly for the purposes of section one thousand one hundred and twenty two (1122) et sequiture of the Civil Code of Malta, the parties expressly agree that this penalty is being agreed upon by way of pre-liquidated damages payable to Henry Braithwaite and accordingly such penalty shall not be subject to any abatement or reduction by any court or other tribunal.*

*Henry Braithwaite is hereon paying unto Catherine Braithwaite, who accepts and tenders receipt, the sum of ten thousand euro (€10,000) in full and final settlement of all her rights, and claims of whatsoever nature relating to the property forming the subject matter of this agreement, and consequent to the fact that she appeared as prestanome on behalf of Henry Braithwaite for the acquisition of that same property or, in general, in any other manner related to the property. This payment is being made by cheque number 261 on HSBC Bank Malta plc account number 71219521001.*

*Henry Braithwaite shall remain solely and exclusively responsible for the payment on behalf of Catherine Elizabeth Braithwaite of any capital gains tax and any other costs and liabilities that may become due as a consequence of the transfer of the property. He shall be entitled to retain all the balance of the proceeds from the transfer in full and final settlement of all his rights and claims against Catherine Braithwaite relating to or in any way connected with the acquisition, finishing, refurbishment and maintenance of the property, or, in general, in any other manner related to the property.*

*All benefits, costs and responsibilities related to or arising out of the continued use of the property shall accrue to the benefit and be at the responsibility solely and exclusively of Henry Braithwaite.*

*Upon the transfer of the property, Henry Braithwaite shall give his consent for the total cancellation of the note of hypothec registered in his favour thereon and above referred to.*

*Furthermore Henry Braithwaite shall hold and keep Catherine Braithwaite free from any responsibility and liability related to or arising from the continued ownership of the property and the eventual sale or transfer thereof.*

*Both parties are binding themselves to withdraw any and all judicial proceedings related to the request for the sale by auction above referred to and this by not later than fifteen (15) days from the date of signing of this agreement.*

*All the judicial costs and fees relating to or arising out the proceeding of the court case bearing sworn application number 32/2011/JD in the names Caroline Veranneman Braithwaite bhala mandatarja tal-imsiefer Harry Braithwaite v. L-Avukat Dottor William Cuschieri bhala mandatarju tal-imsiefra Catherine Elizabeth Braithwaite and the sale by auction shall be borne by Henry Braithwaite. These costs which amount to four thousand three hundred and seventy euro (€4,370) are being paid hereon by Henry Braithwaite to Dr. William Cuschieri noe who accepts and tenders due receipt in accordance to law. This payment is being made by cheque number 262 on HSBC Bank Malta plc account number 71219521001.”*

2. That recently in execution of this agreement, he succeeded in finding a sale for the property “Il-Merill”, Triq Birbuba, Għarb, Għawdex, and effectively signed a promise of sale for the sale of this property – Document B – which promise of sale was duly registered with the Inland Revenue Department – Document C;
3. That however when Notary Maria Vella Magro, briefed with the publication of this deed, started preparations for the publication of this deed, she requested that an updated power of attorney be produced because that utilised by Dr. William Cuschieri to sign the agreement of the 14th February 2016 had been released in 2008, more than nine years prior to the scheduled date for publication of the deed. She also requested that Catherine Elizabeth Braithwaite present the required documentation to satisfy the requirements of the FIAU (Financial Intelligence Analysis Unit);
4. That this notwithstanding, the fact remains that Dr. Cuschieri was, and as far as plaintiff knows, still represents Catherine Elizabeth Braithwaite, and had been expressly authorised by her to appear on her behalf and sign the agreement of the 14th February 2016, so much so that subsequently, all the lawsuits and appeals filed on behalf of Catherine Elizabeth Braithwaite were withdrawn, in terms of that agreement and with her approval, so much so that in the intervening period of almost two years after that agreement was signed, she has not in any way impugned her agent’s actions;
5. That apparently, however, Dr Cuschieri is nowadays finding difficulties in contacting Catherine Elizabeth Braithwaite, and although he has always declared himself willing to appear on the deed of sale and sign that same deed on her behalf, on the other hand he has also declared that his efforts to obtain from her the documents necessary according to law and the requirements of FIAU (Financial Intelligence Analysis Unit) have been unsuccessful;
6. That plaintiff desires to finalise the sale of the property “Il-Merill”, Triq Birbuba, Għarb so that the obligations assumed by Catherine Elizabeth Braithwaite towards him by virtue of the agreement of the 14th February 2016 are fulfilled;

7. That in order for this to be done it is necessary that Catherine Braithwaite provides a copy of her passport or other official means of identification which is still valid, as well as a copy of a utility bill or bank statement which is not older than six months prior to the publication of the deed of sale;

He therefore requested respondents to state why this Court should not:

1. Declare that Dr. William Cuschieri was duly authorised by the other defendant Catherine Elizabeth Braithwaite to sign on her behalf the agreement of the 14th February 2016 and assume the obligations effectively assumed by him by virtue thereof;
2. Consequently declares that for all intents and purposes of law that agreement is binding on Catherine Elizabeth Braithwaite;
3. Orders Catherine Elizabeth Braithwaite to provide the documents required in terms of law for the publication of the deed of sale of the “Il-Merill”, Triq Birbuba, Għarb – that is to say a copy of her passport or other official means of identification which is still valid, as well as a copy of a utility bill or statement of a bank accounts which is not older than six months prior to the deed of sale;
4. Orders Dr. William Cuschieri as agent of Catherine Elizabeth Braithwaite, and, failing him, a curator appointed by the court, to appear on the deed of sale and sign that deed on her behalf in execution of the promise of sale already signed and registered with the Inland Revenue Department, warrants the peaceful possession and quiet enjoyment of the property being sold in terms of law in Malta, receive the sale price and give due receipt for such price, and, in terms of the compromise agreement above mentioned pays the proceeds of that sale to Harry Braithwaite after the deduction of all taxes due on that transfer;
5. Should Catherine Elizabeth Braithwaite fail to provide those documents mentioned in request number 3 above, declare that Notary Vella Magro and move2Gozo Real Estate will have effectively executed their duties in terms of the FIAU legislation and consequently order the publication of the deed of sale even in the absence of those documents.

With costs, including those of the protest in the names “Harry Braithwaite vs Avukat Dottor William Cuschieri”, Protest Number /2017; and with reference to your oath.

With express reservation of plaintiff’s right to seek damages and the payment of the penalty stipulated in the agreement of the 14th February 2016.

Having seen the Sworn Reply filed by respondent Dr. William Cuschieri, in his own name, who declared on oath that:

1. That by way of preliminary plea the defendant pleads the *privilegium fori* and says that this Honourable Court does not have the competence to take cognisance of this law suit and this, amongst others, in accordance to articles 50, 741 (c), 767 and 768 of Chapter 12 of the Laws of Malta;
2. That without prejudice to the above and by way of preliminary plea, plaintiff could not institute the instant case against the instant defendant as mandatary of the absent Catherine Elizabeth Braithwaite as well as against Catherine Elizabeth Braithwaite in her personal name and this fact is recognised by the plaintiff himself when he summoned Catherine Elizabeth Braithwaite in her personal name and therefore the plaintiff's claims should be dismissed in so far as directed against the defendant as mandatary of Catherine Elizabeth Braithwaite who should reply to the claims made directly against her;
3. That without prejudice to the above, as regards the merits the defendant answers the first claim made by the plaintiff by saying that the case in his regard was made uselessly because the plaintiff knows that the defendant was duly authorised by means of a special power of attorney annexed to the agreement attached to the sworn application and in fact plaintiff makes specific reference to it in the premises of the sworn application;
4. That without prejudice to the above, defendant answers the second claim made by the plaintiff by saying that due to the fact that the said claim was not made in his regard he is not the proper defendant to answer the same;
5. That without prejudice to the above, defendant answers the third claim made by plaintiff by saying that (i) due to the fact that the said claim was not made in his regard he is not the proper defendant to answer the same and that (ii) in any case and as regards the merits of that claim, neither the other plaintiff nor the instant defendant in her name ever obliged themselves to provide the documentation therein mentioned which is nowhere mentioned in the agreement attached to the sworn application and thus this Honourable Court should dismiss the third claim as completely unfounded in fact and at law;
6. That furthermore and without prejudice to the above, defendant answers the fourth claim made by plaintiff b saying that it is completely unfounded in fact and at law and should be dismissed with costs against the plaintiff due to the fact that the agreement attached to the sworn application never contemplated the subject matter of that claim and on the other hand plaintiff was specifically authorised to appear himself for the eventual transfer;
7. That furthermore and without prejudice to the above the defendant cannot be obliged in any manner to appear on any deed of transfer in the name of the other defendant or carry out other acts as mentioned by plaintiff;
8. That furthermore and without prejudice to everything above, the defendant answers the fifth claim made by plaintiff by saying that the said claim is completely unfounded in fact and at law and should be dismissed with costs against plaintiff as (i) it is being made in the interests of Notary Maria Vella Magro

and move2Gozo Real Estate who are not parties to the instant case and with regards to the FIAU which is not a party to this case and due to the fact (ii) that this Honourable Court is certainly not competent to and cannot exempt from obligations imposed by the FIAU and the relative law;

9. That defendant further answers that he should have never been cited as a defendant and that which actually happened was that he was approached by plaintiff's lawyer who asked him for the documentation mentioned in the sworn application and a new power of attorney to, amongst other things, a correction to the deed of acquisition of the property mentioned in the sworn application could be carried out and that this was also necessary as the same lawyer was concerned that plaintiff was going to institute proceedings against him due to the fact that a doubt had arisen if the agreement attached to the sworn application, which was drawn up by in its entirety by the plaintiff's lawyer, was valid due to what is contemplated by article 1719 of Chapter 16 of the Laws of Malta and that in any case the document was lacking as it did not contemplate an obligation to give the documentation mentioned in the case;
10. That in any case and without prejudice to the above, the defendant answers also that he should certainly not suffer the judicial costs in connection with this case, he never received the protest mentioned in the sworn application and that the reservation made does not apply to him or the other defendant;

Having noted that the other respondent Catherine Elizabeth Braithwaite, duly notified with the Sworn Application in terms of Regulation 1393/2007 on the 13<sup>th</sup> June 2018,<sup>1</sup> failed to reply within the prescribed period.

Having seen the Note of the 7<sup>th</sup> December 2018 whereby plaintiff renounced the case against Dr. William Cuschieri in his own name and as mandatory for Catherine Elizabeth Braithwaite.<sup>2</sup>

Having seen all the documents attached to the records of the case.

Having noted that the case was put off for judgement for today.

Considers that:

Plaintiff is seeking an execution of a promise of sale agreement of an immovable property in Gharb, Gozo, whereby he bound himself, on behalf of his daughter, respondent Catherine Elizabeth Braithwaite, the present owner of this property, to sell it to third parties.<sup>3</sup>

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<sup>1</sup> Vide relative documents a fol. 43 (recto & tergo)

<sup>2</sup> Vide Note on page 67

<sup>3</sup> Vide a copy of this agreement exhibited as Doc. B a fol. 13 – 15 and various extensions of the same agreement a fol. 16 - 23

The notary briefed with the publication of the final deed cannot proceed before she is provided with some documentation from the seller, respondent Catherine Elizabeth Braithwaite, which for some reason or other she is refusing to supply.

From another document, a compromise agreement, attached to the Sworn Application, on which Dr. Cuschieri had appeared on behalf of Catherine Elizabeth Braithwaite being duly authorized to do so by means of a general power of attorney,<sup>4</sup> it transpires that the funds for the purchase of this property by respondent Catherine Elizabeth Braithwaite, had been provided by plaintiff, and this was acknowledged by his daughter in the same document in the following words:

*“Catherine Braithwaite acknowledges that as a fact all the funds for the acquisition, the refurbishment and finishing and the maintenance and upkeep of the property at ‘il- Merill’.Triq Birbuba, Gharb, were provided by Henry Braithwaite.”*<sup>5</sup>

By means of the same document, she gave her father an irrevocable power of attorney *“to dispose of the property under any title and under those terms and conditions as he best deems appropriate from time to time.”*<sup>6</sup>

Plaintiff's requests are now directed solely against his daughter, respondent Catherine Elizabeth Braithwaite, after these were renounced in so far as they were directed also against Dr. William Cuschieri *proprio et nomine*. In view of this irrevocable power of attorney, the Court fails to see the need of a curator to appear on the final deed of sale on behalf of respondent, as plaintiff could do so himself without any difficulty. Nevertheless, as it seems obvious that said respondent is not willing to cooperate any further with her father in this matter, and the request has been made, the Court will accede to it and appoint a curator, however at plaintiff's expense. However nowhere from the stated document does it result that Catherine Elizabeth Braithwaite, was in any way obliged to provide her father with any other documentation as is being requested for the purpose of the signing of the final deed of sale. Still it is evident that these proceedings would have been avoided had her cooperation been forthcoming. The other request for the Court to exempt the notary and the estate agent involved in the sale from the documentation required from the seller by the Financial Intelligence and Analysis Unit (FIAU), certainly cannot be acceded to, as it is not within its powers to do so. In this regard plaintiff himself ought to seek such exemption from the above-mentioned Unit, should he be in possession of all evidence regarding the origin of funds for the purchase of this property by his daughter.

The case is consequently being decided as follows:

1. The Court accedes to the first part of the first request and declares that Dr. William Cuschieri was duly authorised by the other respondent Catherine Elizabeth Braithwaite to sign on her behalf the agreement of the 14<sup>th</sup> February 2016, and rejects the second part of this request as the case against Dr. Cuschieri was renounced;

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<sup>4</sup> Vide original document filed by Dr. Cuschieri on the 7.12.2018 a fol. 64 -66

<sup>5</sup> Vide agreement of the 14<sup>th</sup> February 2016, a fol.7 - 12 (and particularly the 2<sup>nd</sup> paragraph on page 10)

<sup>6</sup> Ibid. (5<sup>th</sup> paragraph on page 10)

2. It accedes to the second request and consequently declares that for all intents and purposes of law, that agreement is binding on Catherine Elizabeth Braithwaite;
3. It rejects the third request as Catherine Elizabeth Braithwaite was not obliged to provide any documentation for the purposes of the sale of her property;
4. It rejects the fourth request in so far as it is directed against Dr. Cuschieri, and accedes to it by appointing, at plaintiff's expense, advocate Dr. Nadine Stivala as curator to appear on the final deed of sale of the property at "Il-Merill", Birbuba Steet, Gharb, Gozo, on behalf of respondent Catherine Elizabeth Braithwaite, in execution of the promise of sale agreement already signed and registered with the Inland Revenue Department, and to warrant the peaceful possession and quiet enjoyment of the property being sold in terms of law in Malta, receive the sale price and give due receipt for such price, and in terms of the compromise agreement mentioned above, pays the proceeds of the sale to plaintiff Henry Braithwaite after the deduction of all taxes due in the transfer;
5. It rejects the fifth request as it is not within its powers to provide an exemption from the provision of any documentation required by the Financial Analysis Intelligence Unit.

Expenses, besides those already stated, are, in the circumstances, to be borne equally by plaintiff and respondent Catherine Elizabeth Braithwaite.

(sgd.) Paul Coppini  
Magistrate

(sgd.) Silvio Xerri  
D/Registrar

True Copy

F/Registrar