- *Defenition of fraud*
- *Fraud committed by a party to the contract in collusion with a third party*
- *dolus bonus*
-*dolo incidente*
-*admissibility of an action for damages*
-*Articles 981(1), 1031 and 1049 of the Civil Code (Maltese)*
-*Article 1440 of the Italian Civil Code* (*of 1942)*

CIVIL COURT FIRST HALL

THE HON. MR. JUSTICE GRAZIO MERCIECA

Sworn Application Number 175/2013

HSBC Bank Malta plc (C-3177)

v

Alexander Boiciuc

and

Thomas Mikalauskas as special mandatory of Kristina Ilcenkaite

Sitting of the 2nd April, 2019

The Court:

I. The dispute:

Having taken cognizance of the Sworn Application filed by HSBC Bank Malta p.l.c on the 21st of February, 2013, by virtue of which and for the reasons therein mentioned, it was requested that this Court:

1) declare that the consent of the Bank to the granting of a loan granted to co-defendant **Kristina Ilcenkaite** was procured by fraud of the defendants;

2) liquidate the balance owed from the amount given on loan to the defendant Ilcenkaite and order the defendants *in solidum* to return the said balance;

3) liquidate all the damages suffered by the plaintiff Bank as a consequence of the fraudulent actions of the defendants or either of them;

4) condemn the defendants or either of them to pay the damages liquidated.

Having taken cognizance of the sworn reply filed by defendant Alexander **Boiciuc** on the 18th March, 2013, whereby he claimed that:

1) an action based upon an alleged consent obtained with fraud and deceit, can potentially lead to an action for an annulment of contract but would hardly lead to damages. He did not do any wrongful or illicit deed which could lead to any responsibility on his part, and he did not have any contractual relationship with the bank that could lead to a contractual infringement;

2) there was no indication of any legal rule or principle which could lead to the responsibility of Boiciuc or any joint and several

responsibility; The sworn application is factual, but does not identify the applicable law or principle;

3) That without prejudice to the foregoing, Boiciuc did not deceive the Bank and did not do any willful wrongdoing; the Architect's valuation was submitted for the Bank's consideration, which valuation the Bank was not obliged to accept. Boiciuc only involvement was that of a seller;

4) That the Bank is a professional, and certainly not a novice or consumer, in granting loan facilities, and obviously, has all the means with which to make an assessment and due diligence before granting home loans. In terms of established banking practice, the Bank has the discretion to accept or not a loan application. If the Bank opted not to send his own architect to make assessments of the adequacy of the guarantees, which he had every right to do, it was his sole choice, discretion and responsibility. If there was any internal failure in the procedure of the Bank, provided there was one, Boiciuc should not be held responsible for such;

5) Moreover, the Bank enjoys a real warranty upon the property which the Bank can enforce. Rather abusively, the Bank issued a precautionary garnishee order against Boiciuc and seized a deposit whichBoiciuc had entrusted to the Bank. With regards to this method, Boiciuc is reserving his rights;

Having taken cognizance that defendantMikalauskas nomine duly notified did not file any reply[1];

Having ruled by decree made during the hearing of the 14th May, 2013, on a request to that effect by counsel to defendant Alexander

[1]Fol 40-41.

Boiciuc, that all proceedings of this case would henceforth be conducted in English;

Having appointed by decree made during the hearing of the 14thMay, 2013, A&CE Alan Saliba as a technical expert to provide an evaluation of the property in question;

Having taken cognizance of the sworn report by technical expert A&CE Alan Saliba on 21 January 2014;

Having examined all the relevant documents in the records of the case including the notes of submissions by both parties;

Having considered that in the course of this case, the plaintiff Bank, filed a separate action against the defendant Ilcenkaite in the names 'HSBC Bank Malta p.l.c. v DrCallejaLentine and Legal Procurator Gerald Bonello who were appointed deputy curators to represent Ilcenkaite Kristina who is absent from Malta by a decree of the 15th June 2017 (437/17) where it was decided that Ilcenkaite is debtor of HSBC Bank Malta plc in the sum of €239,910.02 and was condemned to pay such a sum with further interest rate of 8% per annum from the 9th March 2017 until actual payment plus expenses. This judgment was not appealed and therefore is*res judicata*;

That so the Bank declared that it has no outstanding interest in its second request for the liquidation of the outstanding balance of loans granted to the defendant against the defendant Ilcenkaite only; but that it still has an interest in the first, third and fourth request;

Having considered:

II. The facts:

That the relevant facts are as follows:

1) On the 6th September 2011, the Bank informed defendant Kristina Ilcenkaite that she qualified for a loan (home loan facility) in the amount of €176,000, consisting as to €126,000 on account of the purchase of the apartment internally marked 3, in the block known as 'Rose Flats', in Annetto Caruana Street, Saint Paul's Bay and as to €50,000 in the cost of works to be carried out in the apartment. The seller of the apartment was the defendant Alexander Boiciuc, who exercises trade as an estate agent under the name "Alexander Estates". As guarantee of the repayment of loan, Ilcenkaite constituted a special hypothec and special privilege in favour of the Bank over the property acquired in the deed.

2) Plaintiff Bank gave its consent to the loan facility *inter alia* on the basis of a valuation provided by defendant Ilcenkaite, which valuation made by Architect Karl Borg in 2011 and on the basis of a promise of sale agreement drawn up by Notary Dr Keith Calleja dated 29th August 2011 which indicated that the property was being acquired for the global price of €220,000, €44,000 of which defendant Ilcenkaite had allegedly already paid on the promise of sale agreement. For reasons of caution, the Bank generally concedes loan facilities which are substantially lower that the total value of property. The contract of loan and purchase was published on the 19th September 2011 in the records of Notary Keith Ryan Calleja.

3) During a meeting held on the 20th December 2012 between the defendant Ilcenkaite accompanied by her partner Thomas Mikalauskas and bank officials, Ilcenkaite explained that she knew Boiciuc as an estate agent and it was only when she was going to sign the promise of sale agreement that she realized that he was transferring his own property. She also admitted that she had never met Architect Karl Borg and that it was not true that she had paid €44,000 as stated in the promise of sale agreement. Boiciuc never explained to her why in the preliminary agreement it was stated this. She had only paid under €5,000 including the 1% stamp duty in cash to Alexander Boiciuc at his estate agents office before the preliminary agreement took place. Those were the only payments made relating to the promise of sale. According to Ilcenkaite, the agreed price was of €180,000 but Boiciuc had told her not to say anything about this and to let him negotiate the loan with the Bank. When she applied for the loan she had already left her previous employment in Lithuania and was working in Malta as a waitress. However for some reason or another, her income from her employment in Lithuania was the income quoted in the loan application. Before she went to the Bank, Boiciuc told her that he knew exactly what to say to the Bank and that she was to keep silent and that he would handle this application as he knew the Bank manager in charge. All the facts and details given to the Bank in the loan application were provided by Alexander Boiciuc on Kristina Ilcenkaite's behalf.

4) Ilcenkaite informed that Bank that in the meantime she had also requested another estate agent – Joseph Cardona, to value the property and that he had estimated its value at €90,000. She tried to

speak to the notary and the architect after she found out that the price of the property was inflated but both refused contact.

5) In the context of an internal investigation carried out by the Bank it resulted that Boiciuc had negotiated a number of other facilities with the plaintiff Bank for the purchase of property, allegedly in the names of clients of his agency. In each case it resulted that the valuation of the property had been carried out by Architect Karl Borg and was inflated, and that in the respective promise of sale, all of which were signed before Notary Dr Keith Calleja, it was declared that a substantial deposit had already been paid.

6) Having found all this, the Bank asked its Architect A&CE Edgar Caruana Montaldo to draft a report after visiting the apartment in question and it resulted that the property was built in breach of sanitary regulations and shown on approved permit plan. Its triangular shaped backyard was much smaller than what is requested by sanitary law. Infact it had a clear distance of 3 feet and 4 feet 7 inches directly in front of the windows of the two back bedrooms, when by sanitary law this should be a minimum of 16 feet long. This made the two back bedrooms into two non-habitable rooms. Also, silver apertures were noted on site when these were not permissible by the Planning Authority. Due to these illegalities the apartment was valued €80,000. However faced with this information, Ilcenkaite declared that she was not aware that the property was built in breach of regulations.

7) A meeting was also held with architect Karl Borg on the 21st January 2013 and was informed that after the Bank engaged an

independent architect namely A&CE Edgar Caruana Montaldo, it resulted that the finishes of the property in question were highly inflated in his valuation report. Architect Borg stated that he declares what the customers tell him to declare. He was advised that the Bank's appointed architect noted that the said property was not built in accordance with sanitary regulations and as a result the value of the property amounted to €80,000 and he answered that he must have overlooked this fact unless alterations had been carried out after he visited the property.

8) The technical expert A&CE Alan Saliba appointed by the Court drafted a report where it transpired that no works were carried out following acquisition of the property in question. Hence, the condition and finisihing of the apartment as seen during the on-site inspection was also considered to be the same condition and finishing of the apartment in the year 2011. Due to the akward shape of the triangular backyard it was doubtful wheather the apartment was according to sanitary law regulations, it was valued €110,000;

Having considered that:

III. Legal considerations:

1) Fraud is not defined by the Civil Code. In general it is any form of deception which alters the contractual will of the victim. **Labeone**'sdefenition "***omniscalliditas, fallacia, machination ad circumveniendum, fallendum, decipiendumalterumadhibita"***is still accurate in our law.Fraud, according to **Trabucchi,"***consiste inqueiraggiri e artifizichevengonoadoperati per ingannareuna persona e*

*per approfittaredell'errorenel quale, in conseguenza di questi, essa e` caduta, alloscopo di farlecompiere un negozio".*[2]The same author says that *"L'espressione 'dolo' viene qui` usata in sensospecifico, come illecitoinganno. E` una specie, cioe`, delgenerepiu` vasto,'dolo' che e` qualificazionesubiettivadell'attoillecito.*Therefore, there is no doubt that like any other illicit act, fraud may be either contractual or extra-contractual.

2) Only when dealing with vice of consent (that is, with reference to contracts) does **Article 981(1)**of our Civil Code attempt to define fraud by referring to its effect: "**Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted**".

3) The means used must be capable of deceiving the victim. This capacity must be valued concretely, not in abstract, that is, relative to the circumstances, the personality and the fisiopsychic conditions of the victim. According to **Bianca,** this requirement does not pose a limit on the protection of the victim because it is applicable independently of whether the error into which the victim has been led is excusable or not. The victim may invoke vice of consent even if a normally alert person would not have succumbed to the fraud. The requirement points to the causality that must exist between the fraudulent action and the stipulation in the contract or its alteration. It is enough if the means used suffice, in the circumstances, to actually deceive the contracting party.[3]

4) Exaggerating the qualities of a thing or a service is not fraudulent, so much so that it is referred to as *dolus bonus,* because the normal

[2]Alberto Trabucchi, Istituzioni di Diritto Civile, 48th ed., 2017, page 133
[3]C. Massimo Bianca, Diritto Civile, 2nd ed., Vol 3, Il Contratto

incapacity of such a practice to deceive the client leads to the presumption that the latter has not in fact been deceived.

5) The Civil Code in **Article 981(1)** abovementioned refers to artifices practisedby one of the parties.Third parties are therefore excluded. If one of the parties is in collusion with a third party, the fraud would fall within the parameters of this provision, and so the contract can still be annulled on the ground of vice of consent.

6) If the deception is executed by a third party alone, the contract is validly concluded. However, it would amount to a tort, being a violation of another person's liberty of contract. According to **Article 1031 of the Civil Code**, "**every person… shall be liable for the damage which occurs through his fault**" and the perpetrator would be liable in damages.If one of the contracting parties has colluded in the fraud with the third party, then both would be liable for damages *ex delicto*. According to **Article 1049(1) of the Civil Code**: "**where two or more persons have maliciously caused any damage, their liability to make good the damage shall be a joint and several liability**".

7)**Article 981** deals with the situation in which the fraud was such that without it, the victim would not have contracted. It does not deal with the contingency that the victim would have contracted just the same, but under different conditions. The **Codice Civile Italiano of 1942**states that in such a case (which is referred to as *doloincidente*), the party in bad faith would be liable for damages: "**1440** (*Doloincidente – Se iraggiri non sonostatitali da determinareilconsenso, ilcontratto e` valido, benche` senza di essisarebbestatoconclusoa condizioni diverse*: *ma ilcontraente in mala federispondedeidanni".* Since our legislator is silent, there is nothing to impede this Court to apply the notion of *doloincidente* to this

case, where the Bank, had it been aware of the true value of the property, would have agreed to grant a smaller loan. According to legal author **Bianca**:

"Il doloincidente… rileva come viziodellavolonta`, ma ilrimedio e` solo quello delrisarcimento del danno.

"Il diritto al risarcimento del danno ha la suafonteneldolo quale attoillecito, e precisamente quale attolesivoallaliberta` negoziale"[4];

Having further considered that:

IV. Application of the legal considerations to the facts:

1) in the case of consent to a contract vitiated by fraud, it is possible not only to ask for the annulment of the contract according to the law regulating contracts, but also to file an alternative action for damages under the law regulating tort. Thus even though defendant Boiciuc was not a party to the contract of loan, he can still be sued if he caused the Bank to sign the contract by fraudulent means. Even though defendant does not have a juridical relationship with plaintiff *ex contractu*, there is no impediment for the subsistence of a juridical relationship *ex delicto*. The first plea of defendant Boiciuc is therefore legally untenable.

2) all that our law of procedure requires of a plaintiff in his Sworn Application is to recite the facts upon which his claim is based and then to list his claims in a clear and comprehensible manner in such a way that the defendant clearly understands the case being put forward against him in such a way that he can properly defend himself. Plaintiff Bank has

[4]C. Massimo Bianca, Diritto Civile, 2nd ed., Vol 3, Il Contratto, para. 360, at page 667

fulfilled this requirement. There is no need to cite explicitly particular legal norms or principles. Indeed the law discourages plaintiffs from doing so, in accordance with the ancient legal principle of *da mihi factum, dabotibiius.*The second plea of defendant Boicius is therefore also not tenable at law.

3)Boicius was not only the seller, as he states in his third plea. He took the initiative to present to the Bank an grossly undervalued estimate of the property which he was selling, made at his bidding and in clear collusion with the Architect. Thus third plea cannot be upheld.

4) The fact that the Bank could have become aware of the fraud had it made an independent valuation of the property does not exonerate defendant of fraud. It suffices that the artifices used were capable of deceiving the victim, and that they actually deceived him, as results from the legal principles outlined above in Section III para (3). The Bank was not acting blindly, it was relying upon the professional opinion certified in writing by an architect, who was presumably honest and competent.

5) Regarding the last plea, which is not enumerated, the plaintiff amply proved the inadequacy of the security.

6) In his note of submissions, defendant argues that plaintiff instituted his case prematurely (intempestivament) because he should first sell the property held as security for the loan and then sue for the shortfall, if any. This however is another plea, which according to our rules of civil procedure must be given at the beginning of the case in the Sworn Reply, and not at the end.

7) In his note of submissions, defendant further argues that there was nothing wrong in exaggerating the price; this being normal commercial practice. Again this is a defence which must be put up during the initial

stage of the proceedings. In any case the way defendant acted goes beyond *bonus malus* and bears all the hallmarks of a fraudulent action as defined above. To achieve his end he colluded with an architect and falsely stated that a deposit had been paid simultaneously with the signing of a promise of sale agreement. The declared value went well beyond acceptable variations due to the element of subjectivity: it amounted to approximately double the real market price;

V. LIQUIDATION OF DAMAGES

The abovementioned judgement delivered by this Court on the 15th October 2018 against defendant**Ilcenkaite**declared that plaintiff Bank is her creditor for €239,910.02 with 8% interest from 9th March 2017. The highest valuation given for the tenement held as security is €110,000. So the Court is liquidating as damages (without taking into account interests accrued and costs) the sum of €129,910.

VI. DECIDE:

For these reasons, the Court rejects all pleas put up by defendant Boiciuc, and upholds the claims of plaintiff as follows:

1) declares that the consent of the Bank to the granting of a loan granted to co-defendant **Kristina Ilcenkaite** was procured by fraud of the defendants.

2) abstains from considering the second claim.

3) liquidatesthe sum of €129,910, as damages suffered by the plaintiff Bank as a consequence of the fraudulent actions of the defendants.

4) condemns the defendants *in solidum* to pay the liquidated sum of €129,910, with legal interest from the date of this judgement until the date of eventual payment.

With costs payable by the defendants *in solidum.*

Mr. Justice GrazioMercieca