



CIVIL COURT (FIRST HALL)
MADAME JUSTICE
HON. AUDREY DEMICOLI LL.D.

Sworn Application Nr **690/2021**

DR MARISA VELLA (ID 397979M)
AS A SPECIAL MANDATORY OF
MICHAEL ANDREW WELLS AND LINDSAY SUZANNE WELLS

VS

IAN CLAGUE (ID 120417A)

Sitting held on Friday, 13th January 2023

The Court:

1. This is a final judgement regarding:

- (a) the claim raised by the plaintiff noe by virtue of a sworn application dated sixteenth (16th) July 2021 for the rescission of the deed of sale dated 25th May 2020 published in the acts of Notary Andre Farrugia by virtue of which the plaintiffs Wells purchased from the defendant Clague the property bearing official numbers 276, 277 and 278 in St

Ursola Street, Valletta, and this due to the fact that the Property purchased by the applicants does not result as being in conformity with the guarantees stipulated in the public deed of sale, and therefore is not of the promised quality;

- (b) the counter-claim filed by the defendant on the tenth (10th) September 2021 in the acts of the sworn application above-mentioned, requesting damages including interest at the rate of 8% per annum on the sums belonging to the defendant deposited in the Registry of this Court as a result of garnishee order number 985/2021.

Preliminaries

2. By virtue of a sworn application filed on the sixteenth (16th) of July 2021, the plaintiff **Dr Marisa Vella** in her capacity as special mandatory of Michael Andrew Wells and Lindsay Suzanne Wells, submitted and confirmed on oath:
- a. That the plaintiff nomine instituted these proceedings on behalf of Michael Andrew Wells and Lindsay Suzanne Wells on the basis of the power of attorney attached to the sworn application and marked **Doc A**;
- b. By means of a public deed dated 25th September 2020 published in the acts of Notary Andre Farrugia, the plaintiffs Michael Andrew Wells and Lindsay Suzanne Wells acquired from the defendant Ian Clauge the house bearing official numbers 276, 277 and 278 in St Ursola Street, Valletta ("***the property***"), for the total price of €2,700,000¹;

¹ Copy of the deed marked **Doc B** is attached to the sworn application.

- c. Amongst the terms and conditions in the same deed, the defendant guaranteed in the plaintiffs' favour that (i) the property is built according to law; and that (ii) the property is free from any litigation and claims by third parties. The relevant parts of the deed in fact read as follows:

“iii. The Property is constructed in accordance to law and in accordance to all the necessary permits, including building and sanitary permits and in compliance with all the plans approved by the competent authorities.

...

v. The Property is not subject to any pending or threatened legal disputes or to any claims made by third parties”;

- d. As would be proven during these proceedings, the Property is not built according to law, since the defendant built railings in the common wall in default of the provisions contained in Article 419(a) of Ch 16 of the Laws of Malta, pictures of which were annexed to the sworn application and marked **Doc C**;
- e. Additionally, and as would be proven during these proceedings, the defendant Ian Clague was more than aware that there existed threatened litigation and claims made by third parties, namely Mr Bonello Bianco and/or the Company J. Bianco Ltd (C 59737). From information made available to the plaintiffs, J. Bianco Ltd is the owner of the property numbered 24 and 252 in Battery Street, Valletta, which is situated immediately behind the property. These arguments and claims by the third party were made right around the time before the promise of sale between the plaintiffs and the defendant was executed, which promise of sale was dated 16th December 2019, a copy of which was annexed to the sworn application and marked **Doc D**. These claims kept on going without the plaintiffs' knowledge until the date of

the final deed of sale. This is evident through letters exchanged between the parties and dated 30 May 2019, 28 October 2019 and 30 January 2020 respectively, in terms of which J. Bianco Ltd notified the defendant that, amongst other things, he had constructed structures in the common wall between the Property and the property belonging to J. Bianco Ltd, and in default of the defendant removing these structures within the stipulated time period, legal action would be taken against the defendant. The latter replied to these letters by means of two letters dated 9 December 2019 and 21 February 2020, where, amongst other things, he refused the allegations made against him, since according to him, the wall belonged to him in its entirety. A copy of these five letters was attached to the sworn application and marked **Doc E**;

- f. Whether or not the defendant was right, these claims should have been made known to the plaintiffs. This notwithstanding, not only did he keep everything concealed, but he also made the guarantees stipulated above in the final deed of sale;
- g. These claims became known to the applicants when a notice was affixed to the façade of the property at 24/25 Battery Street, Valletta, with which the Property in question shares a common wall². From investigations carried out by the applicants, it resulted that J. Bianco Ltd applied for works to be carried out on the said railings. It also resulted that a petition was lodged in terms of Article 77 of Ch 504 of the Laws of Malta and Article 80 of Ch 552 of the Laws of Malta, wherein J. Bianco Ltd requested that the planning authority permits numbered PA 1488/15 and PA 751/20, pursuant to which the defendant had made works in the house which he subsequently sold

² By virtue of a decree dated third (3rd) February 2022, this Court authorised a correction to the seventh paragraph of the sworn application in terms of Article 175 of Ch 12 of the Laws of Malta, in such a manner that the words “*meta mal-faccata tad-dar tagghom raw imwahhal avviz*” were cancelled and replaced by “*meta mal-faccata tal-proprejta’ li maggha jmiss il-hajt klokmuni li tinsab fi 24/25 Battery Street, il-Belt Valletta, raw imwahhal avviz*”.

to the plaintiffs and through which he obtained a permit to build the railings, are declared null. A copy of the petition was attached to the sworn application as **Doc F**. The consequence of this petition is extremely serious to spouses Wells since this would entail that the house purchased and in which the defendant had made several works, would not be furnished with the necessary permits since the permits which regulate those works are being contested as null;

- h. It therefore results that the guarantees given by the defendant in the public deed dated 25th May 2020 are untrue and the defendant concealed the fact that there were legal disputes and claims being made by third parties in relation to the Property;
- i. Therefore the applicants had no choice other than to institute these proceedings;
- j. In light of the foregoing, there exist all the elements required for an action in terms of Article 1390 of Ch 16 of the Laws of Malta in the sense that the Property purchased by the plaintiffs does not result as being in conformity with the guarantees stipulated in the public deed of sale, and therefore is not of the promised quality; and
- k. Consequently, the plaintiffs were depositing their keys to the Property under the authority of this Court and were formally expressing their refusal of this property;

3. The plaintiffs therefore requested this Court to:

- i. Decide and declare that the defendant breached the guarantees above-mentioned when he declared that (i) the Property is built according to law and/or (ii) that the Property is not subject to any active or threatened litigation or any claims against the same;

- ii. Consequently, declare that the Property sold to the applicants was not in terms of the stipulated quality as agreed in the deed of sale above-mentioned;
- iii. Rescind the deed of sale dated 25 May 2020 published by Notary Andre Farrugia to which the plaintiffs and defendants are a party;
- iv. Appoint a Notary Public to publish the relative notarial act of rescission of the deed of sale and give instructions on the time, date and place of publication of the relative notarial act and nominate curators to appear on such act in default of the defendant's appearance on the same;
- v. Declare that the defendant is responsible for damages, including but not limited to a refund of the purchase price of the Property, notarial and legal fees and other expenses which the plaintiffs incurred and are still incurring as a result of the foregoing, even if necessary through the appointment of an expert;
- vi. Liquidate the amount due by the defendant for damages suffered; and
- vii. Order the defendant to pay the damages liquidated;

With costs and interest until date of effective payment;

4. Having seen the sworn application filed by the plaintiff on the sixteenth (16th) July 2021, by virtue of a decree dated eleventh (11th) August 2021, the Court ordered that the defendant be served with the relative documentation, and granted the defendant a term of twenty (20) days during which he had to file a sworn reply. The first sitting was scheduled for Tuesday, fifth (5th) October 2021;
5. By virtue of a sworn reply dated fourteenth (14th) September 2021, the defendant pleaded that the claims of the plaintiffs are manifestly unfounded

in fact and at law, and that they ought to be rejected with costs against them, for the following reasons:

- i. That the property subject of the deed dated twenty-fifth (25th) September 2020 was at the time of the publication of the deed built according to law and all the necessary permits, including building and sanitary permits and in compliance with all the plans approved by the competent authorities;
- ii. That the railings that are referred to in the fourth premise of the sworn application were built on a wall which, at the time, pertained exclusively to the defendant, and now belongs to the plaintiffs. The installation of these railings was further sanctioned through planning permit PA 751/2020;
- iii. That the property subject of the deed dated twenty-fifth (25th) September 2020 was not at the time of the publication of the deed subject of any pending or threatened legal disputes or claims against it;
- iv. That Michael Andrew Wells and Lunsay Suzanne Wells could have been aware, before the publication of the deed, that the owners of the neighbouring properties had requested the issue of a planning permit. The defendant never guaranteed that third parties would not obtain planning permits for their own properties;
- v. That the request made for the revocation of planning permits PA 1488/15 and PA 751/20 by third parties was never mentioned before or by the date of the publication of the deed, that is, the 25th September 2020. This request was a new request, made subsequent to the publication of the said deed, that is, on the 28th December 2020. The defendant was only made aware that the request for the revocation of the permits had been made from the documents that were annexed to

the sworn application and never before. This even if it seems that Michael Andrew Wells and Lindsay Suzanne Wells, or their architects were aware of this request at least as at the 21st February 2021, and this as appears from the watermark on Document F attached to the sworn application, this was never brought to the attention of the defendant;

- vi. That consequently the defendant did deliver on the warranties he had provided to the plaintiffs on the deed dated 25th September 2020 and consequently no breach can be found of the guarantees he had provided;
- vii. That the property was sold in accordance with the quality promised;
- viii. That the property was delivered to the plaintiffs on the publication of the said deed and the plaintiffs have retained it for just under a year. In view of this they are no longer in a position to reject the thing and demand damages. Consequently there is no valid reasons at law why this Court should order the rescission of the deed dated 25th September 2020 in the acts of Notary Andre Farrugia;
- ix. That, in effect, this entire case is a mere fabrication intended solely to obfuscate the fact that Michael Andrew Wells and Lindsay Suzanne Wells are disappointed that planning permits were obtained for development on a neighbouring tenement that could limit their views of the Grand Harbour, that is PA/04226/20. The defendant had no control over the issue of such permits, yet the plaintiffs are, through these proceedings, trying to create *fumus boni juris*, for reasons known only to them, to try to get out of a transaction that in their eyes went sour for reasons that are in no way attributable to the defendant. These proceedings, as well as the accompanying garnishee order, are only manifestly abusive and at no point, prior to the issue of the neighbour's planning permit, was the defendant, ever even made aware that a

dispute had been raised by them, after the publication of the final deed of sale;

- x. That no damages have been caused to the plaintiffs and consequently there are no damages to be liquidated or that the defendant should be condemned to pay;
 - xi. That the plaintiffs' actions, namely the filing of a garnishee order through which deposits have been made in the Registry of this Court, have caused substantial damages to the defendant who is in terms of Article 396 of Chapter 12 of the Laws of Malta setting up a counter-claim against the plaintiffs;
 - xii. Saving any further pleas that may be raised according to law;
6. By virtue of a counter-claim filed concurrently with the sworn reply, the defendant claimed:
- a. That plaintiffs Michael Andrew Wells and Lindsay Suzanne Wells have acquired from defendant Ian Clague the property indicated on the deed of Notary Andre Farrugia dated 25th September 2020;
 - b. That Ian Clague has delivered this property in accordance with all the warranties that he had provided in terms of the said deed;
 - c. That despite this, Michael Andrew Wells and Lindsay Suzanne Wells have lodged against Ian Clague a claim for the rescission of the said deed and the payment of damages allegedly caused to them, which was accompanied by a garnishee order;
 - d. That as a result of the said garnishee order the global sum of €1,125,437.15 has been deposited in the Registry of this Court, namely as the sum of € 8,497.26 that were deposited by Bank of Valletta through a schedule of deposit dated 20th July 2021 and the sum of

€1,116,939.89 that were deposited by Lombard Bank Malta plc through a schedule of deposit dated 22nd July 2021;

- e. That consequently, Ian Clague has been deprived of these funds, for no valid reason at law;
 - f. That this has caused him, and will continue to cause him substantial damages as would be shown in the course of these proceedings which were expected to last for at least three years. Interest at 8% per annum on the amount so deposited would amount to €90,034.97 per annum, meaning that, as a minimum, the damages caused to Ian Clague would amount to €270,104.91;
7. The defendant therefore requested that Michael Andrew Wells and Lindsay Suzanne Wells indicate why this Court should not:
- i. Declare that Michael Andrew Wells and Lindsay Suzanne Wells are responsible for damages including interest at the rate of 8% per annum on the sums belonging to Ian Clague that have been deposited in the Registry of this Court for no valid reason at law;
 - ii. Liquidate the amount due from Michael Andrew Wells and Lindsay Suzanne Wells for the damages suffered in the sum of €270,104.91, or any such greater sum as this Court may deem opportune;
 - iii. Condemn Michael Andrew Wells and Lindsay Suzanne wells to pay the damages so liquidated;

With costs and legal interest until the date of effective payment;

8. By virtue of a reply filed by Dr Marisa Vella noe on the fourth (4th) October 2021 to the counter-claim filed by the defendant, the plaintiffs submitted that:

The Defence

- a. On a preliminary basis, the counter-claim is null as this does not satisfy the requisites of Article 396 of Chapter 12;
- b. Also on a preliminary basis, and without prejudice to the above, in terms of Article 836(9) of Chapter 12, a person against whom a precautionary warrant would have been issued, has a right to claim damages only in those specific cases contemplated under Art 836(8) of Chapter 12. By means of a decree of 2nd August 2021, this Court decided that none of those situations as contemplated in Article 836(8) of Chapter 12 apply, and that the garnishee order was therefore a valid one executed in terms of law. In fact, the Court has denied all requests of the revocation of the said garnishee order, it refused the request for the imposition of penalties and also Ian Clague's request for the provision of adequate security by Mr & Mrs Wells. This decree is final and not subject to any appeal. In addition, and without prejudice, a request for damages suffered as a result of the issuance of the garnishee order can only be done in terms of Article 836(9) of Chapter 12. For this reason, these proceedings cannot be brought;
- c. Preliminarily and without prejudice, this claim is premature. The damages which are being sought from Ian Clague in the counter-claim are hypothetical and/or in the best case scenario future damages which have not yet been incurred;
- d. On the merits and without prejudice to the preliminary defences, Mr and Mrs Wells have not caused any damages and are not responsible for any damages which Clague alleges he is suffering. In addition, in this counter-claim, Clague is not even alleging that there exist the circumstances or the necessary requirements which are necessary in terms of consistent jurisprudence such that a person who would have

requested the issue of a garnishee order be found responsible in damages;

- e. On the basis of the afore-mentioned defences, it clearly results that the counter-claim filed by Clague is frivolous and vexatious;
- f. Save any other defences in terms of law;
- g. With costs;

The Facts

- h. Mr and Mrs Wells agree with the facts as set out in the first paragraph of the counter-claim;
- i. With respect to the facts as set out in the second paragraph, Mr and Mrs Wells do not agree with the facts and state that for those reasons set out in detail in their sworn application, Clague breached the warranties which he had given them on the public deed in question and namely the warranty that (i) the Property is constructed in accordance with the law; and (ii) the Property is not subject to any pending or threatened legal dispute or any claims made by third parties;
- j. With respect to paragraphs 3 and 4, Mr and Mrs Wells state that it is the case that they have justifiably requested the issuance of a garnishee order with number 674/2021 and that consequently there were deposits by Bank of Valletta plc and Lombard Bank Malta plc;
- k. Mr and Mrs Wells do not agree with the facts in paragraphs 5 and 6. Mr and Mrs Wells had every right to request the issuance of the garnishee order in question and they always complied with the law. This has also been confirmed by this Court which found that Mr and Mrs Wells were justified in requesting the issuance of the garnishee

order in question and that they acted in terms of law. Therefore, Mr and Mrs Wells cannot be found responsible for any damages which allegedly may be suffered by Clague as a result of the garnishee order in question;

9. During the sitting held on the fifth (5th) October 2021, the defendant declared that he does not understand the Maltese language, and requested that proceedings be conducted in the English language. In the absence of any objection on the plaintiffs' part to this request, this Court upheld the request and ordered that proceedings henceforth be conducted in the English language.

The Court

10. Having seen the sworn application filed by **Dr Marisa Vella as special mandatory of Michael Andrew Wells and Lindsay Suzanne Wells** on the 16th July 2021, as well as the documents attached thereto, namely: (a) a power of attorney dated 14th April 2021 (marked as **Doc A** a fol 8 *et seq* of the case file); (b) the public deed dated 25th September 2020 published in the acts of Notary Andre Farrugia (marked as **Doc B** a fol 10 *et seq* of the case file); (c) photos of railings (marked as **Doc C** a fol 31 *et seq* of the case file); (d) a copy of the promise of sale dated 16th December 2019 (marked as **Doc D** a fol 37 *et seq* of the case file); (e) a number of legal letters dated between 5th May 2019 and 21st February 2021 exchanged between the defendant and J. Bianco Limited (marked as **Doc E** a fol 41 *et seq* of the case file); (f) a copy of the petition filed in terms of Article 77 of Ch 504 of the Laws of Malta and Article 80 of Ch 552 of the Laws of Malta (marked as **Doc F** a fol 54 *et seq* of the case file);
11. Having seen the copy of the full development permit published by the Planning Authority on the 5th May 2021 filed by the plaintiff noe by virtue of

a note filed in the Registry of this Court on the 14th September 2021 (marked **Doc H** a fol 93 *et seq* of the case file);

12. Having seen the sworn reply filed by **Ian Clague** dated 14th September 2021;
13. Having seen the counter-claim filed by **Ian Clague** on the 14th September 2021;
14. Having seen the reply filed by **Dr Marisa Vella noe** to the counter-claim filed by Ian Clague, on the 4th October 2021, and the document annexed thereto, namely a decree given by this Court in the names *Av Marisa Vella noe vs Ian Clague* (Appl Nr 674/2021), marked as **Doc A** a fol 124 *et seq* of the case file;
15. Having heard the testimony on oath given by **Joseph Bonello Bianco** during the sitting held on the 2nd December 2021³. Cross-examination of the same witness was also carried out by the defendant during the same sitting, and suspended;
16. Having heard the testimony on oath given once again by **Joseph Bonello Bianco** during the sitting held on the 21st January 2022⁴, and a document exhibited by the same witness showing correspondence sent to Mr Ian Clague in relation to the development application which was submitted on the 13th March 2020, marked as **Doc AD1** a fol 181 *et seq* of the case file;
17. Having seen the affidavit sworn by **Lindsay Suzanne Wells** a fol 188 *et seq* of the case file⁵, to which are attached the following documents: (a) a copy of the e-mail dated 22nd September 2020 informing the plaintiffs that the amendments which Ian Clague had applied for had been approved by the Planning Authority (marked as **Doc LSW1** a fol 199 of the case file);

³ Transcript of this testimony can be found a fol 161 *et seq* of the case file.

⁴ Transcript of this testimony can be found a fol 179 *et seq* of the case file, erroneously dated 1st January 2022.

⁵ This is a copy. The original affidavit can be found a fol 371 *et seq* of the case file.

(b) a map showing the location of the plaintiffs' property and property bearing address 23/25 Battery Street, Valletta (marked as **Doc LSW2** a fol 200 of the case file); (c) a copy of the notice affixed to the property pertaining to Joseph Bonello Bianco relative to planning application number PA/04226/20 (marked as **Doc LSW3** a fol 201 of the case file); (d) a photo showing the dividing wall between the plaintiffs' property and Mr Bonello Bianco's property (marked as **Doc LSW4** a fol 202 of the case file); and (e) a letter written by AP Valletta on behalf of the plaintiffs regarding Planning Application Nr PA/4226/20, registering the plaintiffs as interested parties to the same planning application (marked as **Doc LSW5** a fol 203 of the case file);

18. Having seen the affidavit sworn by **Michael Andrew Wells** a fol 205 *et seq* of the case file⁶, and the attached e-mail dated 16th October 2020 (marked as **Doc AMW1** a fol 211 of the case file);

19. Having seen the affidavit sworn by **Notary Dr Andre Farrugia** a fol 213 of the case file, and the documents attached thereto, namely: (a) a copy of the original promise of sale agreement (marked as **Doc AF1** a fol 214 *et seq* of the case file); (b) a copy of the extensions of the promise of sale agreements (marked as **Doc AF2** a fol 216 and 217 of the case file); (c) a copy of the final deed of sale dated 25th September 2020 (marked as **Doc AF3** a fol 218 *et seq* of the case file);

20. Having seen the affidavit sworn by **Perit Charlene Jo Damanin** a fol 221 *et seq* of the case file, and the documents attached thereto, namely: (a) a full development permit with reference number PA/1488/15 for the property in question (marked as **Doc CJD1** a fol 225 *et seq* of the case file); (b) a full development permit with reference number PA/751/20 for the property in question (marked as **Doc CJD2** a fol 232 *et seq* of the case file); (c) development application filed by Joseph Bonello Bianco bearing reference

⁶ This is a copy. The original affidavit may be found a fol 380 *et seq* of the case file.

number PA/4226/20 regarding the property with address 24/25, Battery Street, Valletta (marked as **Doc CJD3** a fol 240 *et seq* of the case file); (d) a photo showing the railings in question (marked as **Doc CJD4** a fol 253 of the case file); (e) a letter sent to the Planning Authority by AP Valletta on the plaintiffs' behalf, requesting that the plaintiff be registered as interested parties to PA/4226/20 (marked as **Doc CJD5** a fol 254 of the case file); (f) a photo taken on 23rd December 2020 showing damage to JBL's property allegedly caused by Clague (marked as **Doc CJD6** a fol 256 of the case file); (g) a series of photos showing remedial action taken by JBL after the tenement allegedly suffered significant damage throughout the course of works undertaken by Ian Clague (marked as **Doc CJD6a** a fol 257 *et seq* of the case file); (h) a planning application filed by Joseph Bonello Bianco to raise the common party wall, bearing reference number PA/04226/20 (marked as **Doc CJD7** a fol 261 *et seq* of the case file); (i) elevation and plans showing the impact that the approval of application number PA/04226/20 will have on the plaintiffs' property (marked as **Doc CJD8** a fol 268 of the case file); (j) a superimposition of the effects of the proposed development following application number PA/04226/20 on the existing party wall (marked as **Doc CJD8a** a fol 269 of the case file);

21. Having seen the schedule of deposit exhibited by the plaintiff noe showing that the keys to the property in question were deposited in the Registry of this Court (a fol 270 of the case file);
22. Having seen that, by virtue of a note filed in the Registry of this Court on the 24th February 2022, the plaintiff noe declared that she had no further evidence to produce;
23. Having heard the defendant **Ian Clague** testify on oath during the sitting held on the 4th March 2022⁷, and having seen the documents exhibited by

⁷ Transcript of this testimony may be found a fol 273 *et seq* of the case file

him in open court, namely: (a) a development permit for the property in question, bearing application nr PA/01488/15, marked as **Doc IC1** a fol 285 *et seq* of the case file; (b) a restoration method statement for the property in question, marked as **Doc IC2(i) and Doc IC2(ii)** a fol 291 *et seq* and 322 *et seq* respectively of the case file; (c) a compliance certificate relative to the property in question, marked **Doc IC3** a fol 325 and 326 of the case file; (d) a letter of objection filed by Joseph Bonello Bianco regarding Application Nr PA/00751/20, marked **Doc IC4** a fol 354 *et seq* of the case file; (e) a letter sent to J Bianco Ltd on the defendant's behalf, dated 21st February 2020, marked as **Doc IC5** a fol 357 and 358 of the case file; (f) an e-mail sent by Perit Thomas Abela to the defendant regarding the letter marked Doc IC5, marked **Doc IC6** a fol 359 and 360 of the case file; (g) a promise of sale agreement marked as **Doc IC7** a fol 361 of the case file; (f) two extensions to the original promise of sale agreement, marked **Doc IC8 and Doc IC9** a fol 365 and 366 respectively of the case file; and (g) the final deed of sale dated 25th September 2020 marked **Doc IC10** a fol 367 *et seq* of the case file;

24. Having heard **Magistrate Dr Leonard Caruana** testify on oath and cross-examined by the plaintiff noe during the sitting held on 3rd May 2022⁸, and having seen the set of photos exhibited by the witness and marked **Doc LC1 to LC9** a fol 411 *et seq* of the case file;

25. Having heard the cross-examination of **Perit Charlene Jo Darmanin** by the plaintiff noe during the sitting held on 3rd May 2022⁹;

26. Having heard **Ian Galea** testify on oath in representation of the **Planning Authority**, and cross-examined by the plaintiff noe, during the sitting held on 28th June 2022¹⁰, and having seen the four sets of documents exhibited by the witness, namely full development permit for application number PA

⁸ The transcript for this testimony can be found a fol 390 *et seq* of the case file.

⁹ The transcript for this witness' cross-examination can be found a fol 417 *et seq* of the case file.

¹⁰ The transcript for this testimony can be found a fol 441 *et seq* of the case file.

1488/15 (marked **Doc IG1** a fol 460 *et seq* of the case file), full development permit for application number PA 751/2020 (marked **Doc IG2** a fol 553 *et seq* of the case file); permit for application number PA 4226/2020 (marked **Doc IG3** a fol 604 *et seq* of the case file); and compliance certificate number 136/2019 (marked **Doc IG4** a fol 641 *et seq* of the case file);

27. Having heard **Marica Cutajar** testify on oath in representation of **MaltaPost plc**, and cross-examined by the plaintiff *noe*, during the sitting held on 28th June 2022¹¹, and having seen the tracking history exhibited by the same witness and marked **Doc MC1** a fol 665 of the case file;

28. Having heard **Perit Thomas Abela** testify on oath during the sitting held on 28th June 2022¹², and having seen the documents exhibited by the witness and marked **Doc TA1 to Doc TA8**, a fol 684 *et seq* of the case file;

29. Having seen the judicial copies of the schedules of deposit bearing reference numbers 1362/2021 and 1377/2021 exhibited by the defendant during the sitting held on 28th June 2022, and marked **Doc CG1** and **CG2** respectively, a fol 709 *et seq* of the case file;

30. Having heard the cross-examination of **Joseph Bonello Bianco** by the defendant during the sitting held on the 15th July 2022¹³;

31. Having seen that the defendant declared, during the sitting held on the 15th July 2022, that he had no further evidence to submit in relation to the claim and counter-claim;

32. Having heard the cross examination of **Perit Thomas Abela** by the plaintiff *noe* during the sitting held on the 15th July 2022¹⁴, and seen the

¹¹ The transcript for this testimony can be found a fol 657 *et seq* of the case file.

¹² The transcript for this testimony can be found a fol 668 *et seq* of the case file.

¹³ The transcript for this witness' cross-examination can be found a fol 721 *et seq* of the case file.

¹⁴ The transcript for this witness' cross-examination can be found a fol 730 *et seq* of the case file.

correspondence exhibited by the witness and marked **Doc TA9** a fol 732 *et seq* of the case file;

33. Having heard further cross-examination of **Perit Thomas Abela** by the plaintiff noe during the sitting held on the 27th September 2022¹⁵;

34. Having heard cross-examination of the defendant **Ian Clague** by the plaintiff noe during the sitting held on the 27th September 2022¹⁶;

35. Having seen the note of final submissions filed by the plaintiff noe on the 31st October 2022¹⁷;

36. Having seen the note of final submissions filed by the defendant on the 1st December 2022¹⁸;

37. Having seen that the case was adjourned for final judgement to be delivered today;

38. Considers as follows:

Legal Considerations made by the Court

The Claim

A. The Action being brought by the Plaintiff noe

39. The action being brought by the plaintiff noe is the action envisaged by Article 1390 of Chapter 16 of the Laws of Malta, namely:

¹⁵ The transcript for this witness' cross-examination can be found a fol 743 *et seq* of the case file.

¹⁶ The transcript for the defendant's cross-examination can be found a fol 750 *et seq* of the case file.

¹⁷ A fol 755 *et seq* of the case file

¹⁸ A fol 789 *et seq* of the case file

*If the thing which the seller offers to deliver is not of the quality promised, or is not according to the sample on which the sale was made, the buyer may elect **either to reject the thing and demand damages**, or to accept the thing with a diminution of the price upon a valuation by experts.*

The fact that the plaintiff now is requesting the rescission of the contract by virtue of which the property in question was acquired, proves that the plaintiff now instituted this action on the basis of the first option, that is, in rejection of the property in question and with a clear demand for payment of damages;

40. In the eighth paragraph of his sworn reply, the defendant submits that since the property had been delivered to the plaintiffs on the publication of the deed, and they had retained it for just under a year, they were no longer in a position to reject the thing and demand damages;

41. It has been stated by this Court as otherwise presided in **Louis Farrugia vs S&R (Handaq) Limited**¹⁹ that:

Illi huwa mgħallem li d-dmirijiet mistennija mil-ligi dwar xerrej li ma jridx iżomm il-ħaġa mibjugħa lilu minħabba r-raġunijiet imsemmija fl-artikolu 1390 huma daww "attivi" tal-effettiv rifjut u mhux daww "passivi" li wieħed joqgħod jistenna li l-bejjiegħ jirtira l-ħaġa mhux aċċettabbli, l-iżjed meta l-ligi trid li l-ispejjeż tal-ġarr tal-ħaġa mibjugħa jbatuha x-xerrej [Art 1383(4) tal-Kap 16];

¹⁹ App Nr 467/2000/1, First Hall Civil Court, Hon Judge Joseph R Micallef, 12th March 2012 (not appealed)

*Illi minbarra dan, ir-radd lura lill-bejjiegħ tal-ħaġa mixtrija misjuba mhix tal-kwalita' miftehma huwa rekwiżit kruċjali għas-suċċess tal-azzjoni ta' tħassir tal-kuntratt ta' bejgħ u xiri maħsuba fl-artikolu 1390, u huwa l-element li jagħraf dik l-azzjoni mill-azzjoni estimatorja (vel quanti minoris), fejn ix-xerrej ikun qiegħed jippretendi biss it-tnaqqis fil-prezz u mhux it-tħassir tal-kuntratt. Minn dan l-aspett, l-għażla mogħtija lix-xerrej fl-artikolu 1390 tista' tixxiebah mal-għażla mogħtija lix-xerrej dwar il-garanzija tad-difetti mistura fil-ħaġa mixtrija, għalkemm iż-żewġ għamliet ta' azzjoni huma msejsin fuq kuncetti għal kollox differenti. Dwar dan, ingħad mill-Qrati tagħna li "Fundamentali ... hu l-prinċipju li l-actio redhibitoria kienet timponi fuq il-kompratur 'li jagħti lura l-ħaġa' u cjoer-restituzzjoni ta' l-oġġett mixtri mill-venditur u kontestwalment li 'jitlob ir-radd tal-prezz'. Il-liġi ma tippermetti allura l-ebda alternattiva oħra lill-kompratur li jagħżel li jaġixxi bl-azzjoni redibitorja. Fil-verita' allura l-kompratur ma kellux id-dritt li jibqa' jżomm l-oġġett f'idejh u li jirrilaxxjah biss lill-venditur meta dan iroddlu l-prezz tiegħu. Hu kellu l-obbligu li minnufih appena jirrifjuta l-oġġett mibjugħ għaliex ikun irriskontra d-difett latenti jagħti lura l-ħaġa lill-venditur" [**Busietta noe vs Borg Cardona et noe**, App Ċiv., 6.10.2000]. Dan it-tagħlim jgħodd ukoll fejn l-azzjoni (jew l-eċċezzjoni) tkun dwar ħaġa mressqa mill-bejjiegħ li ma tkunx tal-kwalita' miftehma [**L & D Attard Co Ltd vs Eurometal Co Ltd**, App. Ċiv., 28.1.2005];*

Illi l-ħarsien ta' dan l-obbligu tax-xerrej (ladarba jkun għażel li ma jridx l-oġġett) jaf il-ħtieġa tiegħu għall-fatt li l-effett tal-azzjoni redibitorja huwa wieħed li jħassar in-

negozju u li jerga' jqiegħed lill-partijiet fl-istess qagħda li kienu qabel intlaħaq il-ftehim [Art 1209(1) tal-Kap 16]. Dan jingħad għaliex l-oġġett ikun irid jintradd lura fl-istess kundizzjoni u stat li kien meta ntlahaq il-ftehim. Għalhekk, jekk kemm-il darba l-ħaġa ddum f'idejn ix-xerrej u tilħaq titgħarraq, ma jkunx jista' jintlaħaq l-għan tar-rexissjoni. Dan jingħad b'qawwa akbar jekk it-tgħarriq iseħħ bil-fatt tal-imġiba tax-xerrej [Ricci, Diritto Civile, Vol VII par 183, u Borsari, Commentario del Codice Civile Italiano, Vol IV];

Illi huwa minħabba f'hekk li l-awturi jisħqu li ż-żamma min-naħa tax-xerrej tal-ħaġa mixtrija meta ma tkunx tal-kwalita' miftehma "preclude l'azione di risoluzione, non per la sola materiale impossibilita' di rimettere le parti nelle condizioni nelle quali si trovavano nel momento del contratto, bensì in quanto costituisca una non equivoca dimostrazione di un comportamento incompatibile con la volonta' e con la finalita' di provocare lo scioglimento del vincolo ed una dimostrazione del fatto che l'acquirente abbia inteso accettare la res compravenduta nonostante la presenza dei vizi o difetti" [Cassaz 8.11.1965 nru 2327];

42. It is thus a well-established principle that in order for an action for rescission of contract under Article 1390 of Ch 16 to succeed, the buyer must return the object bought to the vendor, thus showing rejection of the same due to the fact that it is not of the quality agreed upon. However, the Maltese Courts have also been called upon to determine at which moment in time the buyer loses the right to file the action in question on the basis of not having rejected the object at the opportune time. Should refusal be immediate? Can the buyer seek to settle the matter with the vendor prior

to rejecting the object? Or would the period of time spent attempting to resolve the issue render the buyer unable to file an action such as the present one? This was the issue examined in **Medcomms Ltd vs Peter Muscat Scerri**²⁰. Although this judgement dealt with different merits than those of the case under examination, the Court of Appeal (Superior Jurisdiction) delved into the legal principles generally propounded by the Maltese Courts when the issue of rejection of an object which is not of the quality agreed upon is raised:

*Biex tirnexxi din l-għażla [that is, rescission of the contract under Article 1390], irid ikun hawn “ir-rifjut” tal-oġġett, u hemm ġurisprudenza fis-sens li x-xerrej ma jistax jinvoka favur tiegħu din id-disposizzjoni tal-Artikolu 1390 jekk ma jirrifjutax l-oġġett u minflok jagħżel li jżommu minkejja l-oġġezzjonijiet tiegħu (ara, per eżempju, **Abela v. Cutajar**, deċiża mill-Prim’Awla tal-Qorti Ċivili fis-6 ta’ Frar 1998, u **Schembri v. Abela**, deċiża mill-istess Qorti fis-27 ta’ Lulju 2000). Il-pożizzjoni, pero’, mhux dejjem ġiet trattata b’dan l-istess mod oġġettiv, u n-nuqqas ta’ depożitu u ż-żamma tal-oġġett mhux dejjem wasslu inkondizzjonatament għat-telf tad-dritt għax-xerrej (ara per eżempju, **Camilleri v. Migneco**, deċiża mill-Qorti tal-Kummerċ fid-9 ta’ Ottubru, 1995 u **Debono v. Burmarrad Commercials Ltd** deċiża mill-Prim’Awla tal-Qorti Ċivili fit-28 ta’ Jannar, 2010).*

*Riċentement, il-Prim’Awla tal-Qorti Ċivili fil-kawża **Marina Aquasport Ltd v. Eastern Star Ltd**, deċiża fil-31 ta’ Mejju 2012, għamlet din l-osservazzjoni fir-rigward:*

²⁰Appl Nr 727/2000/1, Court of Appeal (Superior Jurisdiction), 31st January 2014

“Illi problema li minn dejjem tqanqal f’dawn l-azzjonijiet u l-proponibbilta’ tagħhom huwa dak dwar jekk il-ħaġa mixtrija kinitx konsenjata jew le. Jidher li din il-kwestjoni ġiet solvuta fis-sens li l-azzjoni taħt l-artikolu 1390 tista’ tirnexxi u jista’ jintalab it-tħassir tal-kuntratt, ukoll jekk tkun saret il-konsenja tal-ħaġa, dment li x-xerrej ma jkunx tilef tali dritt bil-fatt tiegħu stess (per eżempju, jekk ikun bieġn il-ħaġa jew ikun biddlilha n-natura tagħha) jew sakemm ma jkunx wera li qiegħed japprovaha. Jidher li l-użu tal-ħaġa u l-ilment mingħajr dewmien tax-xerrej lill-bejjiegħ dwar x’għara waqt tali użu huwa wkoll miżmum bħala element siewi biex jgħin lil wieħed jiddetermina jekk l-azzjoni taħt il-kuntratt hijiex miftuħa lix-xerrej.”

*Hekk ukoll, din il-Qorti, Sede Inferjuri, fil-kawża **Debono v. Uskin Ltd**, deċiża fit-28 ta’ Marzu 2008, osservat a propożitu:*

*“Ma hemmx dubbju illi l-Artikolu 1390 tal-Kodiċi Ċivili jqis bħala rilevanti l-kwalita’ jew kwalitajiet li huma essenzjali għall-użu tal-ħaġa jew li jiformaw l-oġġett ta’ xi impenn kontrattwali speċifiku, u li, in mankanza, jintitolaw lix-xerrej li jaġixxi għar-riżoluzzjoni jew għar-riduzzjoni tal-prezz. Huma dawn anke skont id-dottrina legali r-rimedji ġenerali esperibbli mix-xerrej fil-każ ta’ inadempiment. (Ara **Bianca “La Vendita e la Permuta”**, Unione Tipografica – Editrice Torinese, 1972, pac 845 et sequitur). Min irid jaġixxi b’xi waħda minn dawn mhux bilfors u dejjem irid jgħaddi għar-radd lura jew depożitu tal-oġġett li hu jqis difformi għaliex*

dawn ma humiex xi ingredjenti sine qua non għall-esperibbilita' jew is-suċċess tal-azzjoni. Il-każijiet ivarjaw u huma dipendenti fuq iċ-ċirkostanzi speċjali tal-każ konkret. Dan hu hekk rikonoxxut anke mill-gurisprudenza tagħna.”

*Din il-Qorti, fil-kawża **Dalli v. Patiniott**, deċiża fid-19 ta' Meju 2000, kienet osservat illi:*

“... jekk il-kompratur jagħzel li jzomm l-oġġett lilu konsenjat u bl-ebda mod ma jirreaġixxi skont kif trid il-liġi għall-fatt li dak l-oġġett ma jkunx skont il-kampjun jew tal-kwalita' pattwita, il-kompratur ikun qiegħed jippreġudika irrimedjabbilment il-pożizzjoni tiegħu.”
(Sottolinear ta' din il-Qorti).

Isegwi mill-premess li ż-żamma waħedha min-naħa tax-xerrej tal-ħaġa mixtrija m'hijiex ta' xkiel għas-suċċess tal-azzjoni taħt l-Artikolu 1390. Hija ż-żamma tal-oġġett mingħajr reklam ta' nuqqasijiet, jew mingħajr impenn serju dirett lejn soluzzjoni li tista' twassal għat-telfien tal-azzjoni kontemplata fl-Artikolu 1390. Irid jirrizulta li x-xerrej “tilef dan id-dritt bil-fatt tiegħu stess”, u dan jiddependi miċ-ċirkostanzi tal-każ u mhux biss mill-fat li x-xerrej żamm għandu l-oġġett in vendita.

43. In this case, the plaintiffs acquired the property on the 25th September 2020. Subsequently:

- i. **Lindsay Suzanne Wells** recalls that she learnt of the application for development filed by Joseph Bonello Bianco on the 28th September

2020²¹, and that, together with her husband, they asked AP Valletta to look into the matter on the same day²²;

- ii. **Michael Andrew Wells** states that he confronted the defendant about Bonello Bianco's application on the 29th September 2020, when he met with the defendant to apply for change in consumer for the utilities of the property in question. He states, however, that the defendant denied that there were any issues with Bonello Bianco at the time, and that there had previously been issues, which had been resolved²³;
- iii. Despite being back in the United States, **Michael Andrew Wells** states that he continued to discuss the matter in further detail with their architects, as well as with Ian Clague, during the month of October 2020, thus making it very clear, in the Court's opinion, that he had concerns about Bonello Bianco's application²⁴ and the effect that it would have on the property he had acquired together with his wife;
- iv. **Perit Charlene Jo Darmanin** also confirms that AP Valletta was instructed by the plaintiffs to look into Bonello Bianco's application, and discuss matters with the defendant's architect Perit Thomas Abela²⁵;
- v. **Perit Darmanin** also states that on the 24th November 2020, she was informed by Perit Sammut Alessi that, "*Mr Bonello Bianco was about to file a court case against Mr Ian Clague on the basis that Mr Clague had created a servitude which Bonello Bianco was opposing [...].*" She also states that, "*I communicated this to Mr and Mrs Wells who were incredibly surprised and asked me to set up a meeting with Mr Bonello Bianco and his architect.*"²⁶ This is not disputed by **Lindsay Suzanne**

²¹ Vide para 6 of her affidavit, a fol 191 of the case file

²² Ibid, para 7

²³ Vide paras 4-7 of his affidavit, a fol 205-206 of the case file

²⁴ Vide paras 10-12 of his affidavit, a fol 207-208 of the case file

²⁵ Vide para 7-8 of her affidavit, a fol 222 of the case file

²⁶ Ibid, para 11 a fol 223 of the case file

Wells, who expressly states that, “*This is where it became very clear to us that Ian Clague did not disclose material information ahead of the sale of the property.*”²⁷;

- vi. During the meeting held on the 2nd December 2020, the plaintiffs were represented by Perit Darmanin and Perit David Drago from AP Valletta, as well Dr Henri Mizzi. **Perit Darmanin** explains,

*During this meeting, Dr Grech and JBL informed us that there had been long standing disputes over the Property and that these claims had been raised by JBL early in 2019. JBL maintained that the balcony railings in the Property were illegally affixed to the wall given that the wall was co-owned by both Parties and that in terms of the Civil Code, no railings could be affixed to a common wall. Additionally, Clague had installed some ducts to a wall situated in the Property and the neighbouring tenement which he and JBL owned in common. This was done without JBL’s consent and JBL asked Clague to remove this. Dr Grech informed us that the correspondence was on-going and he promised to send a copy of these to Dr Mizzi. [...] Dr Grech also informed us that he had been instructed by JBL to file an application before the Planning Authority under Article 77 of Cap 504 of the Laws of Malta and Article 80 of Cap 552 of the Laws of Malta requesting the revocation of permits PA 1488/15 and PA 751/20 that had been obtained by Clague for the Property. Dr Grech had said he had held off from filing the application because of our request for a meeting, but was intent on pursuing his clients’ rights.*²⁸

²⁷ Vide para 13 of her affidavit, a fol 194-195 of the case file

²⁸ Ibid, para 12 a fol 223 of the case file

The plaintiffs seem to have been well-informed of what went on during this meeting. In fact, **Lindsay Suzanne Wells** states in her affidavit that, *“Mr Bonello Bianco and his team informed our team that there had been a long-standing dispute with Mr Clague in relation to the Property which dated back to early 2019, even prior to us signing the Preliminary Agreement.”*²⁹ **Michael Andrew Wells** confirms the same, stating in his affidavit that, *“In a meeting which took place on December 2nd 2020 with Mr Bonello Bianco, his lawyer and architect as well as our architects and lawyers, our team became aware of the fact that the long-standing dispute with Mr Clague in relation to the Property which dated back to early 2019, even prior to us signing the preliminary agreement for the acquisition of the Property in 2019.”*³⁰;

- vii. Bonello Bianco initiated proceedings in terms of Article 77 of Ch 504 of the Laws of Malta and Article 80 of Ch 552 of the Laws of Malta by virtue of a letter dated 28th December 2020³¹, which **Ian Galea**, testifying on behalf of the **Planning Authority**, confirms was uploaded on the Planning Authority system on the 13th January 2021³²;
- viii. Furthermore, **Ian Galea** testifying on behalf of the **Planning Authority**, also confirms that the plaintiff *noe* attended Planning Commission sittings regarding PA 4226/2020, that is, Bonello Bianco’s application to raise the alleged common wall, held on the 2nd March 2021 and 23rd March 2021³³. Galea also explains that the submission period for third party objectors was between 19th August 2020 and 22nd September 2020. **Doc CJD5** a fol 254 is a letter dated 19th November 2020 submitted by AP Valletta on the plaintiffs’ behalf, objecting to the application submitted by Bonello Bianco. **Perit Darmanin** states in her

²⁹ Vide para 14 of her affidavit, a fol 195 of the case file

³⁰ Vide para 14 of his affidavit, a fol 209 of the case file

³¹ Vide Doc 139a forming part of **Doc IG1**, a fol 537 *et seq* of the case file

³² Vide testimony given by Ian Galea, a fol 443 of the case file

³³ Vide testimony given by Ian Galea, a fol 450 of the case file

affidavit that since the submission period for third party objections was over, the plaintiffs could not be registered as third party objectors to the application³⁴. This notwithstanding, the plaintiffs were still represented at the meeting as owners of the property in question, albeit as interested parties and not as officially-recognised registered objectors;

44. The Court notes that this action was instituted on the 16th July 2021, and the keys to the property were deposited in Court on the same date³⁵, in formal rejection of the property;

45. The Court observes that the plaintiffs' claims are based on allegations that Ian Clague acted in bad faith when he neglected to inform them of Bonello Bianco's claims, thus voiding the guarantees he had given them on the deed of acquisition by virtue of which he guaranteed that the Property is constructed according to law and all necessary permits, and that it is not subject to any pending or threatened legal disputes. Nevertheless, in spite of the fact that the plaintiffs became aware of Bonello Bianco's claims in November / December 2020 (at the latest), they did not bring forward any action, file any claim, or file any judicial act against the defendant until July 2021;

46. **Michael Andrew Wells** states in his affidavit that, "*Over the course of the next few months, we continued to investigate matters to see whether there could be any way around the situation*"³⁶, thus implying that this was the reason why no action was taken by the plaintiffs prior to July 2021; however, the Court cannot help but note that in the meeting held in December 2020, it seems to have become evident that there was no way forward. The plaintiffs' claims in this action is founded on the very fact that there is a possibility that the permits covering the property in question may

³⁴ Vide para 10 of her affidavit, a fol 222 of the case file

³⁵ Vide schedule of deposit a fol 270 of the case file

³⁶ Vide para 15 of his affidavit, a fol 210 of the case file

be revoked, which possibility came to their knowledge in December 2020. All evidence brought forward by the plaintiff points to the fact that Bonello Bianco was adamant to take action in support of his claims, and he actually did so by instituting proceedings in terms of Article 80 of Ch 552 of the Laws of Malta, a mere month after he had informed the plaintiffs that he would be doing so. **This should have been the point at which the plaintiffs rejected the property as not being of the quality agreed upon.** Even if, for argument's sake, the plaintiffs wanted to wait until the application submitted by Bonello Bianco (that is, PA 04226/20) was decided upon by the Planning Commission, the Court notes that full development permission was granted to Bonello Bianco on the 20th April 2021 and published on 5th May 2021³⁷, that is, over two months prior to their formal rejection of the property in July 2021;

47. The plaintiffs submit in their final note of submissions that they would not have invested over two million Euro in property if they had known that, *“(i) the permits which sanction the property would be subject to possible revocation owing to the seller’s failure to take action when requested to do so by his neighbour; (ii) that several claims had been made by a neighbour which had been shrugged off by the seller and which had led the neighbour to consider opening legal proceedings and was indeed on the verge of doing so prior to being notified that the Property had been sold; (iii) that as a result of the aforementioned, the neighbour now has a permit in place which allowed him to raise the common wall; and (iv) that as a result of all this fiasco, he would not even get to enjoy the property purchased”*³⁸. On the same assertion, however, the Court cannot help but note that the fact that the plaintiffs had invested over two million Euro in the property in question should have been the very reason which should have compelled them to take action in a timely manner, or rather, as early as December 2020. On the contrary, they continued to seek information about the

³⁷ Vide Doc 219a forming part of **Doc IG3** a fol 635 *et seq* of the case file

³⁸ Vide para 4.3 a fol 781-782 of the case file

property, and exercising their rights as property owners (as evidenced by the fact that they attended Planning Commission meetings as interested parties), notwithstanding the fact that they already had a claim against the defendant;

48. The Court acknowledges that, from a practical perspective, the plaintiffs could not have been expected to act without weighing their options further, and/or without first seeking a solution with Bonello Bianco which would not be as drastic as instituting the present proceedings for rescission of contract; however, the Court is of the opinion that the meeting held in December 2020 sufficiently proved that the only way forward would be through the Courts. Thus, the claims brought forward by the plaintiffs in this action could have been brought forward late 2020 or early 2021, as, at this point in time, the plaintiffs were already aware of the possibility that the permits covering their property would be revoked, of the high potentiality that the Property would be the subject of further legal action, and of the claims being brought by Bonello Bianco;

49. The plaintiffs did not bring forward any evidence proving that they actively reacted in support of their claim that Clague had acted in bad faith prior to the institution of this case, and this despite the fact that they had a claim at least 7 months prior to the institution of this action. Furthermore, in spite of their claim, they did not reject the property between January and July 2021, but rather, actively exercised their rights as owners of the property. Thus, in view of the line of jurisprudence examined above, the Court is of the opinion that the plaintiffs' delayed action rendered them ineligible to file judicial action in terms of Article 1390 of Ch 16 of the Laws of Malta, as their rights in terms of this provision at law had been prejudiced by their own inaction;

50. Consequently, the Court upholds the plea raised by the defendant in paragraph 8 of his sworn reply, and rejects the plaintiffs' requests in their entirety, on the basis that they forfeited their right to file judicial action to

seek rescission of a contract in terms of Article 1390 of Chapter 16 of the Laws of Malta.

The Counter-Claim

51. The defendant is seeking damages including interests at the rate of 8% per annum on the sums belonging to him which have been deposited in the Registry of this Court as a result of the precautionary garnishee order filed by the plaintiffs;
52. The Court refers to the judgement given by the Court of Appeal (Superior Jurisdiction) in the names **Joseph Sammut et vs Carmelo sive Charles Scerri et**³⁹, also referred to by the plaintiffs in their final note of submissions. Although the merits of this judgement differed from those of the case under deliberation, the legal principles emanating therefrom are the same, as it dealt with a claim for damages allegedly suffered as a result of the fact that a precautionary act was filed to safeguard a plaintiff's interests pending judicial proceedings. The Court of Appeal (Superior Jurisdiction) made it clear that,

Huwa principju aċċettat li jekk persuna tiftaħ kawża in buona fede għax ġenwinament tħoss li għandha raġun u tikkatwela l-pretensjoni tagħha bi ħruġ ta' mandat kawtelatorju, jekk għal xi raġuni jew oħra titlef kawża, ma jfissirx li bilfors tkun passibbli għad-danni. Altrimenti jista' jitbiegħed min ikun fis-sewwa li jitlob rimedju mill-Qorti u dan minħabba biża' rejali li jitlef kawża, u kwindi li jkollu jħallas id-danni. Il-possibilita' li persuna titlef kawża dejjem teżisti, sod kemm ikun sod it-titolu pretiż minn parti jew oħra.

³⁹ Appl Nr 753/2013, Court of Appeal (Superior Jurisdiction), 6th October 2020

53. In spite of the fact that the Court is rejecting the plaintiffs' requests, the Court is of the opinion that the plaintiffs instituted this action in good faith. As the Court has already had the opportunity to point out in the decree dated 2nd August 2022 following a request by the defendant for a revocation of the said garnishee order, the Court has been given no reason to believe that the plaintiffs acted capriciously and/or in bad faith when they chose to exercise the right afforded to them by law to file a precautionary garnishee order to safeguard their interests pending proceedings. The amount they sought to recover had their action been successful was quite substantial, and the Court acknowledges that they therefore had a valid reason for which to file the garnishee order;

54. Without prejudice to the above, the Court also notes that the defendant did not bring forward proof to substantiate his claim that he suffered any damages due to the precautionary garnishee order filed by the plaintiffs. Indeed, the only proof brought forward by the defendant related to the actual merits of the case, and not to the counter-claim *per se*;

55. Thus, the Court is hereby **rejecting** the counter-claim raised by the defendant.

Decide

56. For these reasons, the Court:

- (i) Upholds the plea raised by the defendant in the eighth (8th) paragraph of his sworn reply, and **rejects** the requests made by the plaintiff *noe*, on the basis that the plaintiffs forfeited their right to file an action for rescission of contract and seek damages in terms of Article 1390 of Ch 16 of the Laws of Malta;

(ii) **Rejects** the counter-claim raised by the defendant.

Costs of this case to be borne by the plaintiff nomine.

Read in open Court.

Hon Madam Justice Dr Audrey Demicoli LL.D.

**LP Carina Abdilla
Deputy Registrar**