



Court Of Appeal

Judges

**THE HON. CHIEF JUSTICE MARK CHETCUTI
THE HON. MR. JUSTICE CHRISTIAN FALZON SCERRI
THE HON. MADAME JUSTICE JOSETTE DEMICOLI**

Sitting of Thursday, 19th October, 2023.

Number: 5

Application Number: 690/21/1 AJD

**Dr Marisa Vella as a special mandatory of Michael Andrew Wells
and Lindsay Suzanne Wells**

v.

Ian Clague

The Court:

1. This decision concerns an appeal filed by the plaintiff Dr Marisa Vella *nomine*, from a judgment delivered by the Civil Court, First Hall on the 13th of January, 2023, wherein it: (i) upheld the eighth plea of the defendant Ian Clague and thus rejected all the requests made by the plaintiff *nomine* on the grounds that the plaintiffs forfeited their right to file

an action for the rescission of the contract entered into with the defendant on 25th of September, 2020 and seek damages in terms of **Article 1390 of the Civil Code**; (ii) rejected the counter-claim raised by the defendant; and (iii) ordered that the costs of this case are to be borne by the plaintiff *nomine*.

Preliminaries:

2. By a sworn application filed on the 16th of July, 2021, the plaintiff *nomine* explained that on the 25th of September, 2020, plaintiffs Michael Andrew and Lindsay Suzanne Wells purchased the house bearing official numbers 276, 277 and 278 in St Ursola Street, Valletta for the total price of €2,700,000. On this contract of purchase, published in the acts of Notary André Farrugia, defendant Clague guaranteed in the plaintiffs' favour that the property was: (i) built according to law; and (ii) free from any litigation and claims by third parties.

3. Notwithstanding this, according to the plaintiff *nomine*, the abovementioned guarantees turned out to be spurious since the house purchased by plaintiffs Wells was actually not built according to law, and furthermore defendant Ian Clague was aware that the same place was subject to threatened litigation and claims made by third parties before the public deed of 25th of September, 2020 was signed.

4. The plaintiff *nomine* claimed that defendant Clague had failed to divulge all of the above to plaintiffs Wells, leaving the latter no choice other than to institute an action against him in terms of **Article 1390 of the Civil Code** since the property purchased by the plaintiffs was not in conformity with the guarantees stipulated in the public deed of sale, and therefore not of the promised quality.

5. Consequently, the plaintiffs deposited the keys to the property under the authority of the Court and formally expressed their refusal of this property. In light of the above, they also requested the Civil Court, First Hall, to:

«i. Decide and declare that the defendant breached the guarantees abovementioned 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 abovementioned;

iii. Rescind the deed of sale dated 25 May [recte: September] 2020 published by Notary André 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»

6. The defendant, Ian Clague, replied to the abovementioned sworn application on the 14th of September, 2021, by which he pleaded that the plaintiffs' claims are manifestly unfounded in fact and at law, and that such claims ought to be rejected with costs against them. In particular, the eighth plea of the defendant reads as follows:

«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 are no valid reasons at law why this Court should order the rescission of the deed dated 25th September 2020 in the acts of Notary André Farrugia.»

7. Concurrently with his sworn reply, defendant Ian Clague also filed a counter-claim against plaintiffs Wells, in which he claimed that he had suffered damages due to a garnishee order which was filed against him by the plaintiffs. He therefore requested the Civil Court, First Hall, to:

«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. The plaintiff *nomine* replied to the defendant's counter-claim on the 4th of October, 2021, wherein she submitted that the defendant's requests should be rejected, and that he should bear the costs of the counter-claim.

9. By judgment delivered on the 13th of January, 2023, the Civil Court, First Hall decided on the plaintiffs' action and on the defendant's counter-claim in this manner:

*«(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.»

10. The First Court reached the above decision after making the following considerations:

«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:

«If the thing which the seller offers to deliver is not of the quality

promised, or is not according of 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 noe is requesting the rescission of the contract by virtue of which the property in question was acquired, proves that the plaintiff noe 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;

...

*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 v. Peter Muscat Scerri**. 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-dispożizzjoni tal-Artikolu 1390 jekk ma jirrifjutax l-oġġett u minflok jagħżel li jzommu 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, però, mhux dejjem giet 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:

«Illi problema li minn dejjem tqanqal f'dawn l-azzjonijiet u l-proponibbiltà tagħhom huwa dak dwar jekk il-ħaġa mixtrija kinitx konsenjata jew le. Jidher li din il-kwestjoni giet solvuta fis-sens li l-azzjoni taħt l-artikolu 1390 tista' tinneksi 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 dubju illi l-Artikolu 1390 tal-Kodiċi Ċivili jqis bħala rilevanti l-kwalità jew kwalitajiet li huma essenzjali għall-użu tal-ħaġa jew li jiffurmaw l-oġġett ta' xi impenn kuntrattwali 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, pag 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 mhumiex xi ingredjenti sine qua non għall-esperibbiltà jew is-suċċess tal-azzjoni. Il-każijiet ivarjaw u huma dipendenti fuq iċ-ċirkostanzi speċjali tal-każ konkret. Dan hu hekk rikonoxxut anke mill-ġurisprudenza tagħna.»

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

«... jekk il-kompratur jagħżel 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-kwalità 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 mhijiex 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 jirriżulta 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 2020, and that, together with her husband, they asked AP Valletta to look into the matter on the same day;

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 resolved;

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 application 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 Abela;

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." This is not disputed by **Lindsay Suzanne 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.";

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.»

*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." **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.";*

*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 2020, which **Ian Galea**, testifying on behalf of the **Planning Authority**, confirms was uploaded on the Planning Authority system on the 13th January 2021;*

*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 2021. 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 affidavit that since the submission period for third party objections was over, the plaintiffs could not be registered as third party objectors to the application. 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 date, 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", 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 are founded on the very fact that there is a possibility that the permits covering the property in question may 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 2021, 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". 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 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 v. Carmelo sive Charles Scerri et**, 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 prinċipju aċċettat li jekk persuna tiftaħ kawża in buona fede għax

ġenwinament t'foss 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 min'habba biża' reali li jitlef kawża, u kwindi li jkollu jhallas id-danni. Il-possibbiltà li persuna titlef kawża dejjem teżisti, sod kemm ikun sod it-titolu pretiż minn parti jew oħra.»

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.»*

11. The plaintiff *nomine* felt aggrieved by the above-cited decision, and through an appeal application filed on the 19th February, 2023, she requested this Court to vary the decision of the First Court by: (i) dismissing the defendant's eighth plea; (ii) either proceeding to determine the rest of the case and accepting the demands of plaintiffs Wells or sending the court file back to the First Court so that it decides the case on its merits; (iii) confirming the judgment of the First Court insofar it rejected the defendant's counter-claim; and (iv) ordering that plaintiffs Wells do not bear all the costs of the case.

12. By means of a reply filed on the 4th of April, 2023, the defendant, Ian Clague, argued that the appeal of the plaintiff *nomine* ought to be dismissed, and this for the reasons set forth therein. The defendant did not file a cross-appeal from the First Court's rejection of his counter-claim; therefore, that part of the judgment of the First Court has now become *res iudicata*.

13. Having observed that the written pleadings concerning this appeal have been closed, and after taking cognisance of all the acts of the case, this Court finds no reason at law to set a sitting for hearing this appeal, and on this basis, it is therefore proceeding to deliver its judgment according to **Article 152(5) of the Code of Organisation and Civil Procedure**.

Considerations:

14. The main grievance of the plaintiff *nomine*, which is elucidated in detail in her **first two grounds of appeal**, is directed towards the First Court's conclusion that plaintiffs Wells had forfeited their right to file an action in terms of **Article 1390 of the Civil Code** as a result of their failure to bring forward any evidence that they actively reacted in support of their claim against defendant Ian Clague, despite knowing that they had a

claim against him for at least seven months before instituting the action. The First Court was also of the opinion that plaintiffs Wells had failed to reject the property they had purchased from the defendant in a timely manner since they should have done so in December 2020, that is, immediately after becoming aware that they had a claim against the defendant. Instead, according to the First Court, they actively exercised their rights as property owners and therefore prejudiced their situation through their inaction.

15. In her appeal, the plaintiff *nomine* argues that even though the defendant had advanced a renunciation defence on the grounds that plaintiffs Wells had retained the property for just under a year after the contract of purchase, according to Maltese jurisprudence the retention of the property alone, even if proved, is not enough to sustain a renunciation defence in an action based on **Article 1390 of the Civil Code**. Furthermore, she maintains that the evidence submitted before the First Court does not reach the required standard to sustain such a defence since the plaintiffs' retention of the property should not be interpreted as being tantamount to acceptance of the property on their part. In fact, she claims that between September 2020 and July 2021, plaintiffs Wells had: (i) investigated the matter thoroughly and, as a consequence, discovered the defendant's deception, (ii) sought a solution that could have led to a settlement, and (iii) as a measure of last resort, planned to take legal

action against the defendant. Hence, she contends that this defendant's defence ought to have been dismissed by the First Court.

16. On the other hand, the defendant, Ian Clague, asserts that the answer to the plaintiffs' appeal lies in the judgment of the First Court, wherein it affirmed that despite having a claim against the defendant, plaintiffs Wells chose to hold on to the property that they had purchased and actively exercised their rights as owners of the property. He continues to explain that following the signing of the final deed, the same plaintiffs had kept the property as their own for nine months and at the same time, they engaged in discussions with their neighbour through their architects and attended hearing and board meetings concerning the development application submitted by their neighbour. According to the defendant, plaintiffs Wells proceeded in this manner, even though they knew that they had a claim against him. This meant they had irremediably prejudiced their right to file an action against the defendant under **Article 1390 of the Civil Code**. In fact, the defendant accuses the plaintiffs of having only instituted this action once their neighbour had, against all odds, managed to secure a permit for his intended development – a course of action to which they would not have resorted had their neighbour failed to obtain the abovementioned permit.

17. The defendant further claims that for the plaintiffs to be in a position

to file this action, they were required to reject the immovable before they signed the final deed of purchase. He argues that in this case, by signing the deed of purchase, the plaintiffs had accepted delivery of the immovable, and although they had eventually deposited the keys to the property under the authority of the Court, their belated reaction cannot amount to a refusal of the property on their part. The defendant concludes that the issue at hand is not one where the plaintiffs abandoned or renounced their right to institute this action, but rather, one where the plaintiffs had prejudiced this right due to their behaviour.

18. Bearing all these arguments in mind, this Court considers that this is an action filed by the plaintiff *nomine* on behalf of spouses Wells in which the latter are seeking to rescind the contract dated 25th September, 2020, by means of which they purchased an immovable property in Valletta from the defendant, Ian Clague. On this public deed of sale, the defendant had guaranteed in the plaintiffs' favour that the property, (i) was built in accordance with the law and the necessary permits and (ii) was free from litigation and claims made by third parties. Plaintiffs Wells claim that the defendant had deceived them when the contract was signed since the immovable property they purchased was actually not built according to law. Furthermore, according to the plaintiffs, the defendant was clearly aware that the same immovable property was subject to threatened litigation and claims made by third parties before

the public deed was signed.

19. The Court states that an individual who finds himself in the plaintiffs' shoes may avail himself of various remedies at law: (i) he may file an action for the warranty of the quiet possession of the immovable which he purchased (see **Renato Iannace et v. J & T Co Ltd** delivered by the Court of Appeal on the 7th of July, 2006), (ii) he may file an action on the basis that the purchased property is not of the promised quality, as the plaintiff *nomine* has opted to do in this case (see **Karl Francica v. Luke Piscopo et** decided by the Court of Appeal (Inferior Jurisdiction) on the 9th of January, 2009), or (iii) he may file an action based on a breach of the conditions of the contract (see **Joseph Mallia Bonello v. Paul Camilleri et** delivered by the Court of Appeal (Inferior Jurisdiction) on the 1st of February, 2008 and **Jean Vella v. Paul Camilleri et** decided by the Civil Court, First Hall on the 19th of June, 2014).

20. In this case, the plaintiff *nomine* elected to file an action for the rescission of the public deed of sale of the 25th of September, 2020 because the immovable property purchased in virtue of such public deed was not of the promised quality. Such an action for a repudiation of the contract of sale must be filed within two years from the day of the contract (see **Article 1407 of the Civil Code**). This two-year period is both one of decadence and a peremptory one, and therefore, cannot be interrupted

or suspended. Failure to bring an action in terms of **Article 1390 of the Civil Code** within this period of time would extinguish one's right to rescind the contract of sale on the grounds that the object bought is not of the promised quality (see *Noel Curmi v. Dottor Joseph Ellis* delivered by the Court of Appeal on the 27th of February, 2004).

21. In this case, filing an action either on the grounds that the defendant breached his contractual obligations or an action for the warranty of the quiet possession of the immovable, would have been wiser alternatives for the plaintiff *nomine* since she would have neither been bound by the above-mentioned two-year peremptory period, nor by the particular elements of **Article 1390 of the Civil Code**.

22. The above-mentioned article of the law states that if the thing which the seller offers to deliver is not of the promised quality, the buyer may opt either to reject the thing and demand damages, or to accept the thing with a diminution of the price upon valuation by experts.

23. This Court acknowledges that throughout the years, various Maltese Courts have failed to agree on the moment or time until which the choice to reject the object being sold is still afforded to the buyer. Some Courts have held that if the thing being sold is not of the promised quality, the buyer should reject it before or immediately at the moment of

delivery. This rejection should occur by physically returning the thing being sold to the seller or by placing the object under the authority of the Court by way of a schedule of deposit. If the buyer fails to adhere to the above, he would be forfeiting his right to reject the thing being sold to him (see ***Emmanuele Calleja v. Joseph Grech*** decided by the Civil Court, First Hall on the 10th of June, 1965, ***Avv. Dr Louis Cassar Pullicino noe v. Pauline Buhagiar noe*** delivered by the Court of Appeal on the 28th of April, 2000, ***Andrew Camilleri et v. Daniel Edwin Sayles*** decided by the Civil Court, First Hall on the 27th of June, 2003, ***David Pace v. Tony Vella*** decided by the Civil Court, First Hall on the 12th of November, 2013 and ***Dr Louis Buhagiar v. UCIM CO Limited*** delivered by the Court of Appeal on the 12th of July, 2019).

24. This consequence arises from the premise that the thing sold must be returned to the seller in the same condition and state at the time of the contract of sale. It is self-evident that the objective of an action of rescission under **Article 1390 of the Civil Code** cannot be reached if the thing sold is damaged or marred while being in the buyer's possession (see ***Av. Richard Galea Debono noe v. Arcidiacono Limited*** decided by the Civil Court, First Hall on the 14th of December, 2006). Thus, the above principles typically apply when the object sold is perishable or if its value reduces with its use, for example, when the thing sold is a car, decorative paint, a blade or other consumables, such as groceries.

25. Indeed, other Courts have held that when it is not practicable to examine the thing being sold at the moment of delivery, the buyer may reject it by returning it to the seller or by depositing it under the authority of the Court after the delivery takes place. Each case is different and depends on the unique circumstances that shape it.

26. In some exceptional cases, the return of the thing sold to the vendor is physically impossible. In such cases, if the thing sold is not of the promised quality, it is not mandatory to return the thing to the seller or to deposit it under the authority of the Court and therefore, failure to do so on the buyer's part, does not forfeit his right to reject the thing sold to him (see ***Nazzareno Sive Ronnie Cauchi noe v. Joseph Baldacchino noe*** delivered by the Court of Appeal on the 7th of October, 1997, ***Apex Interiors Limited v. Martin Camilleri*** decided by the Court of Appeal (Inferior Jurisdiction) on the 20th of October, 2004, ***Joseph Debono et v. Uskin Limited*** delivered by the Court of Appeal (Inferior Jurisdiction) on the 28th of March, 2008, ***Medcomms Limited v. Peter Muscat Scerri*** decided by the Court of Appeal on the 31st of January, 2014 and ***Tar-Robba Limited v. Kalabardi Construction Limited*** delivered by the Court of Appeal on the 28th of November, 2008). Some examples of these cases include situations wherein a sold garage door had already been installed, and a batch of sold concrete had already been used and

placed on site.

27. Notwithstanding this, the above principle does not apply if the buyer forfeits his right to return the object sold to him due to his behaviour. It is undisputed that if the buyer uses the thing or disposes of it, or even if he hands it over or sells it to someone else, it would no longer be possible for him to return the thing to the vendor. The use of the thing and the complaint without delay by the buyer to the seller regarding the troubles encountered during such use is considered a valuable element which assists the Court in determining if an action under **Article 1390 of the Civil Code** is still available to the buyer at that particular stage (see ***Ignazio Anastasi Ltd v. Maresco Trading Ltd*** decided by the Civil Court, First Hall on the 27th of June, 2001, ***Maria Lourdes Fenech v. Carmelo sive Charles Meilaq*** decided by the Civil Court, First Hall on the 15th of October, 2001, ***Dr. John Cassar nomine v. Carmen Grech*** decided by the Civil Court, First Hall on the 25th of February, 2002, ***Dr. Mario Falcone noe v. Regina Bianca Ltd*** delivered by the Civil Court, First Hall on the 1st of April, 2003, ***Louis Farrugia v. S&R (Handaq) Ltd*** decided by the Civil Court, First Hall on the 12th of March 2012 and ***Marina Aquasport Ltd v. Eastern Star Ltd*** delivered by the Civil Court, First Hall on the 31st of May, 2012).

28. Thus, if after becoming aware that the object bought is not of the

promised quality, the buyer chooses to hold on to the object delivered to him without reacting accordingly by raising the necessary complaints with the seller, and consequently defiles such object, he would be irrevocably prejudicing his right to return that object and claiming his money back from the seller (see ***John Mary Dalli nomine v. Grezzju Patiniott*** delivered by the Court of Appeal on the 19th of May, 2000).

29. In this case, plaintiffs Wells seek to rescind the public deed of sale dated 25th September, 2020, by which they bought an immovable property in Valletta from the defendant, Ian Clague. They are alleging that the above property is not of the quality promised by the defendant on the public deed.

30. Plaintiffs Wells first learned of the development application filed by their neighbour, Joseph Bonello Bianco, a few days after the public deed of sale in question was signed, precisely on the 28th of September, 2020. Upon becoming aware of the potential troubles concerning the property they had just purchased, they immediately sought to confront the defendant, Ian Clague, with their discovery on the 29th of September, 2020. From a reading of the affidavits presented by plaintiffs Wells, this Court gathers that despite voicing their worries with the defendant, the latter was rather nonchalant to their concerns and brushed them off lightly. On the 2nd of October, 2020 plaintiffs Wells left the Maltese islands

and never visited the property again. When they called the defendant from abroad on the 17th of October, 2020, he simply referred them to his architect and instructed them to acquire all the necessary information from him. However, he failed to reveal to them that in the past, several issues had arisen between him and the neighbour, Joseph Bonello Bianco, which directly concerned the property.

31. From that day onwards, through their architects, plaintiffs Wells sought to obtain the necessary information from the defendant's architect and Bonello Bianco's architects. After a while, it became clear to plaintiffs Wells that before the contract of purchase was signed, there had been a long-standing dispute between the defendant and Joseph Bonello Bianco on particular works the defendant had undertaken and on a planning application he had obtained. Eventually, Bonello Bianco took action in support of his claims before the Planning Authority, and despite the efforts of the plaintiffs' architects to counteract his applications during the first months of the year 2021, in May 2021, he emerged successful. Consequently, in July 2021, plaintiffs Wells deposited the keys to the property under the authority of the Court in rejection of the property and proceeded to file this action.

32. According to plaintiffs Wells, the defendant had concealed from them material information relating to the property and was thus in breach

of the guarantees he had afforded to them on the deed of sale. At this point in time, it is not this Court's duty to assess if this allegation is correct. Rather, this Court's task is to determine if by holding on to the property until July 2021, plaintiffs Wells renounced to their right to file an action for the rescission of the contract of sale of the property in question in terms of **Article 1390 of the Civil Code**.

33. After dwelling on the matter at considerable length, the Court considers that this is not a case in which the plaintiffs continued to make use of the object sold without complaining to the vendor (see also **Arthur Valletta v. Mario Cutajar nomine** decided by the Court of Appeal on the 1st of February, 2008). In the case under examination, plaintiffs Wells immediately brought their concerns to the defendant's attention. Despite this, the defendant failed to address their worries adequately. In light of this, the plaintiffs diligently followed a route that could have provided an indirect resolution to the issue: even though they live hundreds of miles away from the Maltese islands, they proceeded to engage their architects to assist them in fending off their neighbour's planning applications, and this without the defendant's aid and support. By doing so, they acted in good faith and certainly did not forfeit their right to rescind the deed of sale of the immovable property. Then, two months after their attempts proved futile, they filed this action against the defendant. At that point, plaintiff Wells had been the property owners for just under ten months.

Therefore, their action was filed well within the peremptory period of two years, as required in **Article 1407 of the Civil Code**.

34. The Court also considers that: (i) plaintiffs Wells only became aware of the potential troubles concerning the property after the deed of sale had already been signed; (ii) that plaintiffs Wells did not make use of the property, albeit for a handful of days; (iii) that in the acts of the case there exists no proof that plaintiffs Wells defiled the property or that the latter suffered a devaluation between September 2020 and July 2021 as a result of the plaintiffs' actions; (iv) that it is legally impossible to return an immovable property to the vendor without his consent or without obtaining a declaration from the Court for the rescission of the contract of sale; and (v) that it was physically impossible for plaintiffs Wells to deposit the immovable property under the authority of the Court. Indeed, the issue of when the keys of such property were deposited under the authority of the Court is of little relevance to the matter since it is still possible for the plaintiffs to retain a copy of such keys. After all, the object sold to the plaintiffs was the property itself and not the keys which grant access to it. Consequently, it follows that through their actions, plaintiffs Wells did not forfeit their right to file an action for the rescission of the contract of sale dated 25th September, 2020 in terms of **Article 1390 of the Civil Code**.

35. Therefore, in light of all the above considerations, the first two grounds of appeal propounded by the plaintiff *nomine* are being upheld. The Court thus revokes the judgment of the First Court insofar it upheld the defendant's eighth plea and rejected the requests made by the plaintiff *nomine*, and instead dismisses the defendant's eighth plea and orders that the acts of the case be remitted to the Civil Court, First Hall in order for the case to be decided on its merits.

36. Finally, this Court needs to examine the **third and last ground** of the plaintiff's appeal, which relates to the issue of which party should bear the expenses of the case. Considering: (i) that the main grievance of the plaintiff *nomine* is being upheld while the eighth plea of the defendant is being dismissed, and (ii) the fact that the defendant did not file a cross-appeal from the rejection of his counter-claim, this Court is of the opinion, that in accordance with **Article 223(1) of the Code of Organisation and Civil Procedure**, the defendant, being the party cast, should bear both the costs concerning the judgment of the First Court and also those relating to this appeal.

Decision

Given the considerations made above, the Court **upholds** the appeal of Dr Marisa Vella *nomine* and, therefore: (i) **confirms** the judgment

delivered by the First Court on the 13th of January, 2023 insofar as Ian Clague's counter-claim was rejected; (ii) **varies** the same judgment by **revoking** it insofar as the Civil Court, First Hall upheld Ian Clague's eighth plea and rejected the requests made by Dr Marisa Vella *nomine*, and instead **rejects** Ian Clague's eighth plea and **orders** that the acts of the case be remitted to the Civil Court, First Hall in order for the case to be decided on its merits; and (iii) **orders** that the costs of this case, both those concerning the judgment of the 13th of January, 2023 and those relating to this appeal, are to be borne by Ian Clague.

Mark Chetcuti
Chief Justice

Christian Falzon Scerri
Judge

Josette Demicoli
Judge

Deputy Registrar
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