



**CIVIL COURT  
FIRST HALL**

**THE HON. MR. JUSTICE  
ANTHONY ELLUL**

Sitting of the 13 th January, 2014

Citation Number. 503/2008

**Michael Denis Newton in his personal name and on  
behalf of his son Paul Howard Newton**

**Vs**

**Joseph and Alexandra sive Sandra spouses  
Camenzuli and Michael and Maria Lourdes Spiteri<sup>1</sup>.**

The case relates to apartment 7, Michelou Flats, Triq il-Bilbel, Qawra, limits of St Paul's Bay which plaintiff bought with his wife in terms of a contract dated 15<sup>th</sup> June 2005 published by Notary Dr Joseph Lia. The plaitiff claimed that it was only after the sale that he got to know that the

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<sup>1</sup> Spouses Spiteri were joindered into the case following a court order dated 29<sup>th</sup> March, 2011 on the request of spouses Camenzuli.

apartment was built without building permits and an Enforcement Notice had been issued by the competent authority.

The plaintiffs also contend that the lack of a building permit tantamounts to a latent defect, which purchasers got to know about after the purchase of the property. Furthermore, the defects cannot be remedied and prior to the sale the defendants knew of such facts. They further claim that Michael Denis Newton's and Mary Newton's consent, at the time of sale, was vitiated due to defendant's fraud and as a result of which they suffered damages. They are therefore requesting the court to:

1. Declare that plaintiff's and his wife's consent, at the time of purchase, were vitiated by fraud.
2. Declare that the premises had a latent defect and defendants were aware of such a fact prior to the sale of the property.
3. Rescind the contract of sale and appoint a day, time and place for the publication of the relative deed.
4. Condemn the defendants to pay back the purchase price.
5. Condemn the defendants to pay a sum of money, to be liquidated by the court, as damages which the plaintiffs suffered due to the fraud exercised by the defendants.

Defendants Camenzuli replied (fol. 43):-

1. There was no fraud, and they invoked prescription in terms of Article 1222 of the Civil Code<sup>2</sup>.
2. The plaintiff's complaint does not constitute a latent defect, and in any case the action is time barred in terms of Article 1431 of the Civil Code.
3. Plaintiff's requests are unfounded in fact and law.

Defendants Camenzuli replied:-

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<sup>2</sup> An additional plea filed by Camenzuli on the 18<sup>th</sup> May 2012 states: "*That he is raising the additional plea of prescription according to Article 1222 of the Civil Code regarding the alleged fraud or bad faith claimed by the plaintiff.*".

1. The action is not clear since the plaintiffs cannot institute two actions to safeguard rights which are separate and totally different.
2. The claims in the sworn application are not directed against them and hence they are not answerable and so they are to be declared non-suited.
3. Plaintiffs' first claim is time-barred by the lapse of two years, in terms of Article 1222 of the Civil Code. Therefore defendants are non-suited.
4. With regards to plaintiffs' second claim, the action is also barred by the lapse of one year from when the sale in question took place, and this in terms of Article 1431 of the Civil Code. Therefore defendants' are non-suited.
5. Defendants plead that all plaintiffs claims should be dismissed since there was ratification of the obligation on the part of plaintiffs since from what they declared in the sworn application, they tried to sanction the irregularities which they are complaining of, and hence defendants are to be declared non-suited.
6. Defendants are to be declared non-suited with regards to plaintiffs third claim since there exists no juridical relationship between them since they were not parties to the contract in question.
7. Defendants are to be declared non-suited since they did not cause any damage to plaintiffs, since they did nothing against the law.

The plaintiffs are claiming:-

- (a) Vice of consent due to fraud by defendants Camenzuli (Article 981 of the Civil Code);
- (b) Latent defect since the apartment had no building permit and at time of sale there was an Enforcement Order (Article 1424 of the Civil Code);

The court is of the view that these claims are contradictory to one another. The plaintiffs are requesting the annulment of the contract due to fraud and at the same time invoking the guarantee granted by law for latent

defects. The contract is either null or valid. The claim based on the provisions concerning latent defect depends on the existence of a valid contract. The principle is that *electa una via non datur recursus ad alteram*. However, this matter has no consequence on the outcome of the case due to what will be declared on the issue concerning the plea that the the action is time-barred.

Defendants contend that plaintiff's claims are time-barred in terms of Article 1222 and 1431 of the Civil Code. The relevant facts are the following:-

- i. The property was purchased on the 15<sup>th</sup> June 2005;
- ii. On the 28<sup>th</sup> April 2006 plaintiff signed an agency agreement with Dhalia Real Estate Services for the sale of the property for Lm75,000.
- iii. Plaintiff's wife passed away on the 13<sup>th</sup> June 2006.
- iv. Plaintiff stated that Dhalia representatives had informed him that a prospective buyer had made an enquiry. However he had discovered that there was an Enforcement Order on the property and lost interest; "*I was informed about this by Dhalia whilst I was in the UK on around the 17<sup>th</sup> June, 06.*" (fol. 115).
- v. The lawsuit was filed on the 15<sup>th</sup> May 2008.
- vi. Defendants Spiteri were made party to the lawsuit by a court order dated 29<sup>th</sup> March 2011 and were notified on the 27<sup>th</sup> April 2011.

On the basis of these facts the court concludes that when the lawsuit was filed:-

(a) The two year prescriptive period had not lapsed. In terms of Article 1222 the two years start running from the date when the fraud is discovered. Defendants Camenzuli claim that "*Negligence on the part of those investigating does not exonerate from the running of the prescriptive time.*". In the court's view the prescriptive period commenced when the purchasers were informed by Dhalia that a prospective buyer had discovered that the apartment was not built in terms of a building permit issued by the competent authority. The evidence shows that plaintiff became aware of the problem in June 2006.

Since the lawsuit was filed on the 15<sup>th</sup> May 2008, the two years had not elapsed.

(b) The one year period for the filing of a lawsuit based on the guarantee for latent defects, had lapsed (Article 1431 of the Civil Code). In June 2006 the purchasers became aware of the problem relating to the building permit and the existence of an enforcement order. Therefore in any case by application of Article 1431(2), when the lawsuit was filed (15<sup>th</sup> May 2008) the action was already time-barred.

With regards to defendants Spiteri, in the court order dated 29<sup>th</sup> March 2011 it is clearly stated that they were made a party to the lawsuit with regards to the claim relating to latent defects<sup>3</sup>. When they were notified with the sworn application, 27<sup>th</sup> April 2011, the claim based on the guarantee for latent defects was certainly time-barred.

As to the claim that plaintiffs consent was vitiated due to fraud, the evidence shows that:-

1. On the 26<sup>th</sup> July 1993 a certificate was issued by the Planning Directorate that the building conforms to the permit 4054/91/2395/81 (fol. 47).
2. On the 5<sup>th</sup> May 2004 an enforcement order was issued (fol. 71) wherein it is stated that the penthouse was built without a building permit.
3. In clause 5 of the deed of sale it is stated: *"The vendors guarantee that the property to be sold is built according to law and according to the building permits as issued by the competent authorities."*
4. The enforcement notice was addressed to defendant Joseph Camenzuli. On the 17<sup>th</sup> May 2004 it was delivered by registered post at Honey Lane, Dawret Ghaxaq, Ghaxaq. Defendant Joseph Camenzuli

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<sup>3</sup> *"As plaintiffs correctly pointed out, their allegation of fraud is being made against defendants personally, and the third party is not a proper defendant to contest that allegation. The third party is however a proper defendant insofar as the action is one based on latent defects..... Plaintiff's objection that they have no legal relationship with defendants' vendor is not correct; when they purchased the property from defendant they acquired it cum omni causa, including defendants' rights against the first vendor."*

confirmed that at the time the premises were his residence.

5. Prior to the sale the purchasers did not make any enquiries with regards to building permits. Furthermore, the purchasers were not informed that an enforcement order had been issued which was still in force on the date of the publication of the deed of sale.

6. From a planning perspective the penthouse has various irregularities. These are listed in two report written by architect Edgar Caruana Montaldo on plaintiffs request (fol. 22 and 135)<sup>4</sup>.

Defendants Camenzuli claim that on date of sale they were not aware that an enforcement notice had been issued on the property and in any case they had a compliance certificate. In the note filed on the 26<sup>th</sup> September 2013 they argued: "*Guilty knowledge is not presumed. It has to be proven.*". Defendants said that they were not notified with the Enforcement Notice. The court does not believe such a statement. The notice of receipt of the enforcement notice is dated 17<sup>th</sup> May 2004 and signed by S. Camenzuli. It is evident that the signature on this document is identical to defendant's Sandra Camenzuli signature on the affidavit filed in the case **Carmelo Barbara vs Joseph Camenzuli et** (35/2002) [fol. 151] and the signature on her identity card (fol. 138). Therefore the court concludes that the enforcement notice was delivered to defendant Sandra Camenzuli. Defendants emphasized that Joseph Camenzuli never

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<sup>4</sup> The irregularities are:-

"a) *The front terrace of the penthouse is less than 14'-0".*

b) *The backyard of the property on average is less than 14'-0".*

c) *The back balcony of the property is larger than 2'-6".*

d) *The layout of the back bedroom is different from the approved drawings.*

e) *The penthouse has a staircase to the roof over the penthouse.*

f) *The staircase of the common area has an access to the roof of penthouse having a normal stairwell.*

g) *The property includes a room at the roof of penthouse level.*

h) *The parapet wall (opramorta) over the penthouse is higher than 1 course (filata).*

i) *The penthouse has projecting roof slabs at roof level at the back of the penthouse.*

j) *The approved permit PAPB 4054/91/2395/81 was not approved in the right location of the site in question."*

received the enforcement order. Although it is evident that Joseph Camenzuli did not sign the document confirming service of the notice, this notwithstanding the court has no reason to doubt that his wife informed him and showed him the document. Defendants Camenzuli were not honest with the court. Both defendants claimed that the enforcement notice might have been notified to defendant's mother, Salvina Camenzuli. The documents above-mentioned show otherwise.

Therefore the court concludes that prior to the sale defendants Camenzuli knew that an enforcement notice had been issued, deliberately chose not to inform the purchasers and deliberately declared that the penthouse was built according to a building permit, which at the time did not exist. Consequently spouses Camenzuli were not *bona fide* vendors and maliciously declared the existence of a building when they knew of the existence of an enforcement notice that stated that the penthouse had no building permit. As vendors they had a duty to make a full disclosure of such a matter to any prospective buyer. A duty which exists irrespective of whether the purchaser asks specific questions to the vendor or has the possibility to make an independent enquiry. The court finds that on the part of the vendors there was a reckless disregard for the truth. The vendors failed miserably in their duty and went to the extent of making a misrepresentation by the inclusion of clause 5 in the deed of sale. Although prior to the purchase the purchasers could have made enquiries about the property, this cannot justify vendors actions. The vendors expressly warranted that the “[...] *the property to be sold is built according to law and according to the building permits as issued by the competent authorities.*”, thereby producing a false impression on the minds of the purchasers. The court understands that this express guarantee was an essential feature of the sale, and certainly not a matter on which the buyers were prepared to take any risk. It results that on date of sale the premises had no building permit as permit number 4054/91/2395/81 dated 16<sup>th</sup> October 1991 (fol. 46)

referred to another site<sup>5</sup>. A fact which without doubt would have dissuaded the purchasers from purchasing the property. It is evident that the compliance certificate was incorrect. A conclusion based on the fact that a building permit was years after issued on the site (6759/06)<sup>6</sup>.

Furthermore as stated in the judgement **Carmelo Barbara vs Joseph Camenzuli et** (35/2002) delivered by this court<sup>7</sup>:

*“Min jixtri oggett, m’ghandux ikollu jivverifika mal-awtoritajiet kompetenti jekk dak l-oggett huwiex konformi mal-ligi; la qed jigi offrut ghal-bejgh, kull xerrej ghandu jassumi li dak l-oggett jista’ jinxtara minghajr xkiel u problemi ‘l quddiem. Kull min jixtri oggett ghandu dritt jippretendi li dak l-oggett hu tajjeb ghall-uzu, u li kwindi konformi mal-ligi..... F’kaz ta’ bini, huwa d-dover tal-venditu, anke jekk ma kienx hu l-kostruttur, li jara li l-bini jkun tajjeb ghall-iskop li ghalih se jinbiegh, f’dan il-kaz, ta’ residenza. L-obbligu li jara li kollox hu sewwa u in regola hu mixhut fuq il-venditur u mhux fuq ix-xerrej li, hlief ghac-cirkostanzi li jidhru ictu oculi ghandu dritt jhalli f’idejn il-venditur dwar il-vijabilita’ tal-oggett.”*

Defendants Camenzuli also referred to the *proces verbal* of the sitting of the 22<sup>nd</sup> May 2013 and argue that plaintiffs declared that the lawsuit is based on the guarantee for latent defects. The sworn application shows otherwise. Furthermore, in the *proces verbal* it is stated: *“With regards to the additional plea (fol. 153) plaintiffs submit that the defendants have failed to refer to article 1223(1) where the period of limitation in case of error and fraud starts to run from the day of discovery of the defect.”* Had plaintiffs renounced to the claim that their consent was vitiated due to fraud, such a statement would not have been made.

Towards the end of the proceedings the parties agreed that an attempt should be made to try and regularize the

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<sup>5</sup> Vide architect’s E. Caruana Montaldo’s testimony (21<sup>st</sup> October 2011).

<sup>6</sup> Vide architect’s Edgar Caruana Montaldo’s testimony.

<sup>7</sup> Mr Justice T. Mallia.



illegal development. On their request the court appointed the court expert (architect Alan Saliba) to file an application in this respect. The agreement by the parties to the lawsuit was obviously made without prejudice to either parties right and on the clear understanding that none of them was renouncing to any of his rights. On the 14<sup>th</sup> March 2013 the court expert filed an application informing the court that *“Some of the changes might not be sanctioned by MEPA, particularly the back balcony, and hence this back balcony might have to be demolished before the issue of the said permits.”* (fol. 184). Plaintiffs did not agree that alterations be effected (vide reply dated 8<sup>th</sup> April 2013). In the courts view they had a right to object since the agreement related to the sanctioning of the structures in the apartment that were not according to the building permit, and not their removal.

Defendants Camenzuli also claimed that fraud has to be proven *“[...] proven, before a court ‘established by law’, which in our case are the courts of criminal jurisdiction.”*. The issue of fraud within a civil law context is within the jurisdiction of this court. Article 3 of the Criminal Code provides that every offence gives rise to a criminal action and civil action.

The plaintiffs are also claiming damages. During the sitting held on the 13<sup>th</sup> March 2009, defence counsel to plaintiffs declared:

*“[...] d-danni sofferti huma l-valur tal-appartament li kieku dan seta’ jinbiegh illum u l-ispejjez sborzati li dwarhom diga’ gew esibiti diversi dokumenti senjatament Dok. K, L, N, O, P, b’rizerva ta’ xi spejjez ohra sborzati mill-attur fit-tentattiv [biex] jara jistax jirregolarizza u jissanzjona d-difetti tal-MEPA.”* (fol. 54).

Plaintiffs requested the court to appoint an architect to give an estimate of the value of the apartment. The court expert reported:-

*“After having considered the above, the location and the value of the property in the year 2007, I estimate this*

*property as freehold at the amount of one hundred and twelve thousand Euro (€112,000).” [fol. 158].*

In the sitting of the 16<sup>th</sup> April 2012 the court expert stated: *“I consider the value of property in Malta to have reached a peak, with regards to similar properties to the one in question.”* (fol. 164).

Plaintiffs are requesting the loss of profit. The purchase price was €93,174. Therefore, it seems that the plaintiffs maintain that they are entitled to claim as damages the sum of €18,826, that is the difference between the purchase price and the present value of the premises had the penthouse been built according to permit. The court does not concur:-

- i. The lawsuit is not based on breach of an express warranty given by the vendor (clause 5 of the deed of sale), but on a vice of consent due to fraud;
- ii. The damages that plaintiffs are entitled to claim are those suffered as a result of the illegal conduct of the defendants. Plaintiffs are entitled to recover damages caused by the wrong and no more.

Loss of profit in the value of the property has nothing to do with this since the plaintiffs have requested the court to order the rescission of the contract of sale. The plaintiffs had to prove that they suffered actual economic injury because they relied on the fraudulent assertion made by defendants Camenzuli. The court is of the view that the increase in the value of the property has nothing to do with economic injury based on the assertion made by the defendants in clause 5 of the deed of sale, since the plaintiffs are requesting the rescission of the contract of sale the consequence of which is to put the parties in the position they were prior to the publication of the deed of sale.

Plaintiffs are also claiming as damages the sum of €908.45 they paid to the notary that published the deed and the sum of €4,658.75, duty paid on publication of the deed. The court concludes that the plaintiffs have a right

to recover these amounts, since they would have not been paid had the purchasers been informed of the problems above-mentioned. Therefore the plaintiffs have a right to recoup the sum of €5,567.20. Plaintiffs are also claiming the duty paid on the declaration *causa mortis* published on the 26<sup>th</sup> November 2006 (fol. 29) following the death of Mary Newton. The court concludes that the payment was made when the plaintiffs were already aware that the problem existed.

**For these reasons the court:-**

- 1. Rejects the first plea of defendants Spiteri. Costs at their expense.**
- 2. Rejects the second plea of defendants Spiteri due to what was stated in the court order dated 29<sup>th</sup> March 2011. Costs at their expense.**
- 3. Upholds the defence made by all defendants that the case is time-barred in terms of Article 1431 of the Civil Code with regards to the claim based on the guarantee for latent defects. Therefore the court dismisses plaintiffs' second demand. Plaintiffs are to pay the costs of Camenzuli and Camenzuli are to pay costs of defendants Spiteri since they were made a party to the lawsuit on their request<sup>8</sup>.**
- 4. Declares that in view of what was stated in the court order dated 29<sup>th</sup> March 2011 there is no need of any further decision with regards to defendants Spiteri.**
- 5. Rejects defendants Camenzuli defence that the lawsuit is time-barred with regards to the claim based on a vice of consent due to fraud. Costs to be paid by these defendants.**
- 6. Declares that Michael Denis and Mary Newton's consent was vitiated by fraud.**
- 7. Orders the rescission of the contract dated 15<sup>th</sup> June 2005 published by notary Joseph Lia. Appoints notary Dr John Spiteri to publish the appropriate deed**

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<sup>8</sup> See the application filed by Spiteri on the 11<sup>th</sup> January 2011 (fol. 92).

and Dr Maxilene Pace to appear for any party who does not attend for the publication of the relative deed. The deed is to be published on the 10<sup>th</sup> March 2014 p.m. at the Courts of Justice.

8. Condemns spouses Camenzuli to pay the plaintiffs the sum of ninety three thousand one hundred and seventy four euro and ninety four cents (€93,174.94).

9. Condemns defendants Camenzuli to pay plaintiffs the sum of five thousand five hundred and sixty seven euro and twenty cents (€5,567.20) as damages.

Saving what has already been stated with regards to costs, defendants Camenzuli are to pay 85% of costs and 15% are at the charge of the plaintiffs. Expenses for the report of the court appointed expert are at the sole charge of the plaintiffs.

< Final Judgement >

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