MALTA

Court of Magistrates (Malta)
Magistrate
Dr. Gabriella Vella B.A., LL.D.

Application No. 74/11VG

Christine Kay Treglown

Vs

Nicholas Calleja

Today, 4th February 2016

The Court,

After having taken cognizance of the Application filed by Christine Kay Treglown on the 9th March 2011 by virtue of which she requests the Court to condemn Nicholas Calleja to pay her the sum of nine thousand and eighty four Euro and fifty six cents (€9,084.56) representing the deposit paid by her to the said Nicholas Calleja pursuant to the promise of sale agreement dated 5th June 2006 relative to the transfer of flat 4 in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, which promise of sale agreement expired thus making said deposit refundable to her, with legal interest to be calculated from June 2008, the date when the said deposit was released in favour of Nicholas Calleja, till date of actual payment and costs against Nicholas Calleja;

After having taken cognizance of the Reply by Nicholas Calleja by virtue of which he pleads that: (i) the request by the Plaintiff for the refund of the sum indicated in the Application be rejected, with costs against her, since it is unfounded in fact and at law in view of the fact that the Plaintiff herself is his debtor for an amount which exceeds the amount being claimed by her; (ii) the Plaintiff had authorized the release of the deposit in his favour after the promise of sale agreement dated 5th June 2006 had expired and this on the understanding that he would not sell the immovable being flat 4, in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, but would sell said immovable to her when she would be in a financial position to purchase the said immovable; (iii) even though he stood by his obligation,

after a period of two years from the date of the release of the deposit in his favour, the Plaintiff informed him that she is no longer interested in purchasing the immovable property in issue; (iv) in order to honour the agreement reached with the Plaintiff he incurred a number of expenses and suffered loss of sales and a depreciation in the value of the property, for which expenses and losses the Plaintiff is solely responsible; (v) the claim against the Plaintiff is being duly put forth by virtue of a Counter Claim filed together with the Reply;

After having taken cognizance of the Counter Claim filed by the Defendant on the 4th April 2011, that is together with his Reply to the main action, by virtue of which he is asking the Court to declare that the Plaintiff is solely responsible for the breach of the agreement reached between them pertinent to the sale of flat 4 in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, and consequently condemn her to pay him the sum of eleven thousand six hundred and forty six Euro and eighty seven cents (€11,646.87) or such other sum which may be liquidated by the Court, representing damages suffered by him, consisting said damages in the depreciation in the value of the property forming the subject of these proceedings caused by the fact that in view of the agreement with the Plaintiff, in spite of the fact that the promise of sale agreement had expired, he had refrained from entering into negotiations with third parties relative to the immovable forming the subject-matter of these proceedings, and of expenses and interests incurred by him in favour of third parties as a consequence of the fact that the Plaintiff breached the agreement she had entered with him, with legal interest due till date of actual payment and costs against the Plaintiff;

After having taken cognizance of the Plaintiff's Reply to the Defendant's Counter Claim by virtue of which she pleads that: (i) she had signed a promise of sale agreement on the 5th June 2006 for the purchase of flat 4 in a block of apartments which was yet to be constructed in Triq ix-Xatt, Kalkara, and which apartment it was agreed was to be constructed within a period of twenty four months; (ii) when the promise of sale agreement was signed she paid the sum of Lm3,900, equivalent to €9,084.56. Before the two years had expired she was informed that no development permits were granted for the development of the second floor and thus the flat to be purchased by her could not be built legally. At the time she was in the United Kingdom but when she came over to Malta she went to MEPA offices together with the Defendant to determine if and how the issue could be determined and the Defendant was informed that he had to make some amendments to the plans submitted to the Authority. Eventually she was informed that the permits had been issued by MEPA; (iii) the property was nowhere near ready in June 2008 and she was prepared to wait and kept coming over to Malta from time to time and noticed that no particular progress was being made on the development. In July 2009 the existing building had just been demolished and the site excavated and preparatory works for the foundations had started. There was just a hole on the site; (iv) she kept asking the Defendant to know when the property would

be finalized and he kept on delaying thus causing her great frustration because each time she was coming over to Malta and the Defendant kept delaying her plans. Eventually the Defendant informed her that the apartment and underlying garage which she was going to purchase would be built ready in shell form by January 2010; (v) in January/February 2010 the Defendant informed her that the property was ready in shell form and so she came over to Malta and informed the Defendant accordingly. The Defendant had already set a date with the Notary, Dr. Pierre Cassar, for the singing of the relative deed of sale but upon inspecting the property she noted that there was no roof on the apartment and none of the common parts were finished and there was no ramp to the garage. The stonework wasn't pointed and the property was nowhere near ready, not even in shell form. She immediately contacted Notary Pierre Cassar for advice and he told her that in the circumstances of the case it was not in her interest to acquire the property seeing it in that condition. She informed the Defendant accordingly; (vi) she met the Defendant and after a brief discussion between them he promised that the property would be ready by March and that she could return to Malta then in order to finalize the deed. However after consulting her accountant in the United Kingdom and taking stock of the situation, by letter dated 2nd March 2010 addressed to Notary Pierre Cassar, which letter was e-mailed to the Defendant and duly received by him, she informed the Notary that for the reasons explained in the letter she was no longer interested in purchasing the property; (vii) if anyone has suffered any damage as a consequence of this whole issue it is her since she repeatedly came to Malta on the Defendant's suggestion only to find that what he stated to her was not the case. The last time she visited the property was in September 2010 and even then the common parts were still not finished and the property could not be said to be finished in shell form; (viii) the Defendant's assertion that he held off the sale of the property because of her is totally unfounded. This claim was never put forth by the Defendant except when she requested the refund of the deposit transferred to him; (ix) there wasn't any binding agreement between them which compelled the Defendant from not selling the property in question to any third party. She never agreed with the Defendant that he would keep the property off the market, the Defendant merely wanted to sell the property to her and she was willing to purchase it within the timeframe agreed upon. When she authorized the Notary to forward the deposit to the Defendant this was done as a gesture of good will on her part on the hope that eventually the Defendant, whom she thought was short of funds, would complete the property as soon as possible; (x) on the basis of the above the Counter Claim by the Defendant should be rejected;

After having taken cognizance of the Plaintiff's affidavit and the documents attached to it submitted by the Plaintiff herself on the 27th May 2012 at folio 15 to 18 of the records of the proceedings, of the Defendant's affidavit and the documents attached to it marked as Doc. "X1" to Doc "X12" submitted by a Note filed on the 20th October 2011 at folio 20 to 70 of the records of the proceedings, after having heard the testimony by the Defendant during the

sittings held on the 20th October 2011[1], on the 9th January 2012[2] and on the 17th January 2013[3] and considered the documents submitted by the Defendant marked Doc. "N1" to Doc. "N5" at folio 73 to 106 of the records of the proceedings, the documents submitted by the Defendant marked Doc. "X1" and Doc. "X2" by means of a Note filed on the 21st February 2012 at folio 116 to 120 of the records of the proceedings and the documents marked Doc. "X1" to Doc. X "10" submitted by means of a Note filed on the 17th January 2013 at folio 134 to 144 of the records of the proceedings, after having heard the testimony by the Plaintiff during the sittings held on the 21st February 2012[4] and on the 23rd April 2012[5] and after having taken cognizance of the documents submitted by the Plaintiff during the sitting held on the 23rd April 2012 marked as Doc. "GV1" at folio 126 to 128 of the records of the proceedings;

After having heard final oral submissions by the parties;

After having taken cognizance of all the records of the proceedings;

Considers:

By virtue of these proceedings the Plaintiff is requesting the Court to condemn the Defendant to pay her the sum of €9,084.56, equivalent to Lm3,900, representing the deposit paid by her to the Defendant pursuant to the promise of sale agreement dated 5th June 2006 relative to the transfer of flat 4 forming part of a block of apartments without name and official number in Triq ix-Xatt, Kalkara, which promise of sale agreement has expired. The Defendant contests the Plaintiff's claim for the refund of the said deposit on the grounds that the same is totally unfounded in fact and at law and that the Plaintiff is his debtor in an amount which by far exceeds her claim, representing said amount the damages suffered by him as a consequence of the Plaintiff's breach of the agreement between them pertinent to the transfer of flat 4 forming part of a block of apartments without name and official number in Triq ix-Xatt, Kalkara, when she withdrew from the said agreement at the eleventh hour. By means of a Counter Claim the Defendant requests that following a declaration that the Plaintiff is solely responsible for the breach of the agreement between them relative to the transfer of flat 4 in a block of apartments without name and official number in Triq ix-Xatt, Kalkara, and consequent damages suffered by him, the Plaintiff be condemned to pay him the sum of €11,646.87 or such other sum which may be liquidated by the Court, representing losses suffered by him, namely a depreciation in the value of the property and expenses and

[1] Folio 71 of the records.

[2] Folio 113 and 114 of the proceedings.

[3] Folio 145 to 147 of the records of the proceedings.

[4] Folio 121 to 124 of the records of the proceedings.

[5] Folio 129 to 131 of the records of the proceedings.

interests paid to third parties, as a consequence of the Plaintiff's breach of their agreement. The Plaintiff contests the Defendant's Counter Claim on the grounds that it was the Defendant's failure to honour the agreement between them, that is to transfer to her flat 4 in the block of apartments without name and official number in Triq ix-Xatt, Kalkara, in shell form state, which led to her losing interest in purchasing the property in 2010.

From the evidence submitted by the parties during the hearing of these proceedings there result the following facts:

- The Defendant and the Plaintiff entered into a promise of sale agreement on the 5th June 2006[6] by virtue of which the Defendant bound himself to sell and transfer unto the Plaintiff, who bound herself to purchase and acquire, *(a) the airspace measuring approximately 95 square metres which shall be occupied by the apartment which when constructed shall be internally marked number 4 in a block of apartments externally unnumbered and unnamed, in Marina Street (Triq ix-Xatt), Kalkara, including a share in ownership of the common parts including the lift and the right of use over the roof which right of use means that the purchaser has the right to install and keep a television aerial/satellite dish and a water tank with the consequential right of access in case of maintenance and repairs. … (b) the garage externally unnumbered and unnamed in a private drive way in Marina Street, Kalkara, at basement level in a which shall be built* (herein after referred to as the Property), in consideration of the price of Lm39,000, today equivalent to €90,845.56, from which price the sum of Lm3,900, equivalent to €9,084.56, was to be paid by way of deposit on account of the sale price and the balance paid on the final deed of sale;
- The deposit on account was to be paid within three weeks from the date of the promise of sale agreement and was to be held by Notary Pierre Cassar until such time when the searches in the liabilities and transfers of the Vendor, that is the Defendant, would be completed and the building permits by MEPA issued;
- The said payment of account was forfeitable in favour of the Defendant in the eventuality that the Plaintiff fail to appear for the final deed of transfer without a valid reason at law;
- The agreement was subject to the purchaser obtaining within four months from date of the promise of sale agreement a building permit for the construction of a block of four apartments, two ground floor maisonettes and basement garages;
- The promise of sale agreement was valid up until the 30th June 2007;
- By means of another agreement dated 6th June 2006[7] the Plaintiff commissioned the Defendant as Contractor, who accepted, to carry out

[6] Doc. "X2" at folio 26 to 28 of the records of the proceedings.

[7] At folio 29 to 34 of the records of the proceedings.

the works stipulated in the said agreement that is: *1. application and issue of the building permits; 2. construction in shell form of the garage complex at basement level shown in the plan attached hereto; 3. construction in shell form of the apartment and the block of apartments shown in the plan attached hereto; 4. completion and finishing off the common parts of the garage complex having the specifications herein mentioned: Electricity operated gate to the garage complex with optional remote control unit, Automatic sensor lighting, Lighting points, Trunking systems for water and electricity services to the garage, Plastering and pointing of the garage common parts and garage*;

- The said works were to be completed by the Defendant in so far as concerns the apartment within 24 months from the date of the agreement and in so far as concerns the finishing of the common parts of the garage complex also within 24 months from the date of the agreement;
- The said contract of works was entered into for a consideration of Lm11,000, today equivalent to €25,623.10, which amount was to be paid when the architect responsible for the works issues a certificate declaring that the apartment and garage common parts have been completed as provided for in the agreement;
- The development permit was issued by MEPA on the 29th January 2008[8], by which date the promise of sale agreement dated 5th June 2006 had expired;
- In spite of the fact that the promise of sale agreement had expired without being extended or superseded by another promise of sale agreement between the Plaintiff and the Defendant, the Plaintiff by means of an e-mail dated 16th June 2008[9] authorized Notary Pierre Cassar to release in favour of the Defendant the sum of Lm3,900 she had previously placed under his custody and this *as soon as the contracts are 'drawn up'*;
- The money was effectively released in favour of the Defendant in July 2008[10];
- Several months passed before the Defendant, towards the end of 2009, informed the Plaintiff that the Property was nearly ready in shell form and therefore they could proceed with the transfer of the said Property sometime in early January 2010[11];
- On the 26th January 2010[12] the Plaintiff transferred the necessary funds to finalize the purchase of the property in issue and came over to Malta

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[8] Doc. "X1" at folio 117 to 119 of the records of the proceedings.

[9] Doc. "X3" at folio 35 of the records of the proceedings.

[10] Testimony given by the Plaintiff during the sitting held on the 23rd April 2012, folio 129 to 131 of the records of the proceedings.

[11] Doc. "X6" at folio 50 of the records of the proceedings.

[12] Doc. "GV1" at folio 126 and 127 of the records of the proceedings.

in early February 2010 when the final deed of transfer was meant to be signed;

- Upon inspecting the Property a few days prior to the date set for the signing of the final deed of sale the Plaintiff noted that the Property was not completed in shell form as alleged by the Defendant. The apartment which was to be transferred to her still did not have a ceiling and the common parts were not finished and there was no ramp to the garage. Furthermore, the stonework was not pointed[13];
- Upon finding this state of affairs, in spite of being assured by the Defendant that the Property would be completed to the agreed standard of finish, that is in shell form, by March 2010, the Plaintiff decided not to purchase the Property since she was no longer interested in doing so and by letter dated 2nd March 2010[14], copied to the Defendant, she informed Notary Pierre Cassar of her decision not to purchase the Property and of her intention to recover from the Defendant the sum of Lm3,900 she had paid by way of deposit for the purchase of the said Property.

From the above facts it is very clear that after the 30th June 2007 the Plaintiff and the Defendant were not bound by a **valid** promise of sale agreement. It is an established principle under our law that a promise of sale agreement is to be drawn up in writing *ad validitatem* and any extension of the term of validity of any such promise of sale agreement is to be drawn up in writing too. Furthermore, if a promise of sale agreement, duly entered into in writing, expires without any of the contracting parties acting in the manner provided for by law prior to the effective expiry of the validity of that promise of sale agreement, the parties return to the *status quo ante*. Any agreement pertinent to the transfer of immovable property which is not drawn up in writing is null and void at law and therefore unenforceable.

In this regard reference is made to Section 1233 (1)(a) of Chapter 16 of the Laws of Malta which provides that *saving the cases where the law expressly requires that the instrument be a public deed, the transactions hereunder mentioned shall on pain of nullity be expressed in a public deed or a private writing: (a) any agreement implying a promise to transfer or acquire, under whatsoever title, the ownership of immovable property, or any other right over such property* **and** to the judgment in the names **E. Grech Cristal Bath Ltd. v. Grezzju Patiniott, Writ No. 543/02** delivered by the First Hall Civil Court, on the 20th March 2003, wherein the said Court stated that *ir-rikjesta ghal kitba fl-artikolu 1233 mhix wahda ta' prova, izda hija mehtiega ghall-validità tal-ftehim. Il-kitba mhix rikjesta 'ad probationem tantum' izda 'ad validitatem', (ara Camilleri v. Agius, deciza mill-Onorabbli Qorti ta' l-Appell fis-27 ta' Gunju 1949), u minghajr il-kitba m'hemmx kunsens. Il-kunsens huwa element essenzjali ghall-kuntratti, u dan il-kunsens*

[13] Doc. "PBC1" at folio 107 to 112 of the records of the proceedings.

[14] Doc. "X8" at folio 54 to 56 of the records of the proceedings.

ghandu jigi manifestat kif trid il-ligi. Hafna drabi, il-ligi tkun kuntenta bil-manifestazzjoni verbali tal-kunsens (xi drabi, taccetta wkoll l-espressjoni tacita tal-kunsens), però, ghal certi kuntratti trid li l-kunsens jigi manifestat b'certa forma. Dik il-forma, illum, tista' tkun solenni, permezz ta' att pubbliku, jew b'forma anqas solenni, permezz tal-kitba jew permezz ta' mezzi elettronici taht l-Electronic Commerce Act, 2001. Meta l-ligi tirrikjedi l-forma tal-kitba, dan tkun tridu ghall-validità tal-kunsens, u mhux bhala mezz tal-prova tal-kunsens. Jekk tnejn minn nies jobbligaw ruhhom verbalment, wiehed li jbiegh u l-iehor li jixtri proprjetà immobbli, il-kuntratt ma jezistix mhux ghax ma jkunx hemm att pubbliku, izda ghax il-partijiet ma jkunux taw il-'kunsens' taghhom ghall-bejgh. Il-kunsens biex jezisti u jkun validu, ma jehtieg biss li jkun manifestat, izda jehtieg li jkun manifestat kif trid il-ligi. Jekk persuna tghid 'iva' ghall-akkwist ta', nghidu ahna, ktieb, dik l-'iva', hekk manifestata, tkun valida u torbot, izda dik l-istess 'iva' ma tiswiex jekk l-oggett ikun beni immobbli, u ma tiswiex la ghall-att finali u lanqas bhala weghda. Issa hu veru li l-gurisprudenza taghna, biex itaffi ftit minn din ir-rigidità, dejjem ghamlet distinzjoni bejn il-kuntratti definittivi u l-kuntratti preliminari, jew il-promessa. Fil-kaz 'Galea Ciantar v. Galdes' deciza mill-Onorabbli Qorti tal-Kummerc fil-15 ta' Jannar 1898 (Vol. XVI.iii.60), per ezempju, intqal li 'la promessa di contraendo è cosa diversa dal contratto che ne forma l'oggetto e può essere provata per mezzo di testimoni anche quando per la perfezione del contratto futuro che ne forma l'oggetto fosse richiesta la solennita di scrittura'. Hekk ukoll fil-kawza 'Galizia v. Azzopardi' deciza mill-Onorabbli Qorti ta' l-Appell fil-11 ta' Frar 1938 (Vol. XXX.i.40) intqal li 'avolja jkun hemm akkordju ta' promessa ta' transazzjoni fuq stabbili minghajr att pubbliku dan ikun obbligatorju meta tkun promessa u mhux vera u proprja transazzjoni'. Dan jinghad però fil-kuntest tal-kuntratti elenkati fl-artikolu 1233(1) tal-Kodici Civili fejn il-ligi ma tipprovdix dwar kif tista' ssir il-weghda. Il-ligi trid li l-kuntratti ta' garanzija, transazzjoni jew kiri ta' immobbli ghal aktar minn sentejn ikunu bil-kitba, izda ma tghid xejn dwar promessa biex jigu konkluzi dawn il-kuntratti u ghalhekk, il-qrati taghna iddecidew li ladarba l-ligi tinsisti fuq is-solennità tal-kitba fil-kuntest biss ta' l-att finali, il-promessa tista' ssir bi kwalunkwe mezz. F'kaz ta' trasferiment ta' immobbli, però, il-ligi esigiet il-formalità tal-kitba mhux biss ghall-att finali, imma wkoll ghall-weghda, u jekk il-ligi trid il-kitba ghall-weghda, ikun kontrosens u illogiku li tghid li l-weghda ghal weghda tista' ssir bil-fomm. Ghall-kuntratti l-ohra, il-ligi ma tipprovdi xejn dwar il-forma ta' promessa de contraendo, izda fil-kaz ta' bejgh ta' immobbli, ipprovdiet espressament li dik il-promessa trid tkun bil-kitba, u din 'taht piena ta' nullità', kull weghda bil-fomm tkun, allura nulla. Fil-fatt, il-Qrati taghna ddecidew li l-estensjoni verbali ta' konvenju regolari huwa null u fin-nuqqas ta' estensjoni valida bil-kitba l-konvenju jitqies skadut ("Micallef v. Micallef" deciza minn din il-Qorti fis-27 ta' Gunju 1996).

Having established that after the 30th June 2007 the Defendant and the Plaintiff were not bound by a valid promise of sale agreement with regard to the transfer of the Property, the Court must now determine whether in the

circumstances of this case the payment made by the Plaintiff to the Defendant amounting to Lm3,900, equivalent to €9,084.56, is refundable to the said Plaintiff or otherwise.

As already pointed out above from the records of the proceedings it results that the Plaintiff released the sum of Lm3,900 in favour of the Defendant in July 2008 when the promise of sale agreement dated 5th June 2006 had already expired. Once the Defendant and the Plaintiff were at that point in time no longer bound by a valid promise of sale agreement neither one of them can invoke in his/her favour or expect the Court to apply the principles normally applicable to requests for refund of deposits, be it on account or forfeitable, paid during the term of validity of a promise of sale agreement. Having said that however, the Court is of the opinion that this does not automatically mean that the sum paid by the Plaintiff to the Defendant in July 2008 is not in the circumstances of this case refundable to the said Plaintiff.

The particular circumstances of this case are in the opinion of the Court very pertinent to the outcome of these proceedings because in spite of the way in which the Defendant and the Plaintiff decided to conduct their affairs between them following the expiry of the promise of sale agreement dated 5th June 2006, there undoubtedly was an underlying reciprocal obligation to act in good faith towards each other.

The sum of Lm3,900 paid by the Plaintiff to the Defendant was not a mere payment made in order to secure the Property and to ensure that the Defendant would not negotiate the sale of the said Property with third parties as claimed by the Defendant, neither was it a mere gesture of goodwill on the part of the Plaintiff in the hope that eventually the Defendant, whom the Plaintiff thought might have been short of funds, would complete the Property as soon as possible, but it was a payment actually and effectively made in anticipation of the final transfer of the Property from the Defendant to the Plaintiff, which Property was to be transferred completed to the standard of finish agreed to between them, that is in a shell form state.

Even though the verbal agreement between the Defendant and the Plaintiff relative to the transfer of the Property was not enforceable at law, the Court has absolutely no doubt that the Defendant led the Plaintiff on into believing that he would actually transfer in her favour the Property completed to the agreed standard of finish, that is in shell form.

Even though the contract of works dated 6th June 2006 and signed between the Defendant and the Plaintiff was intrinsically connected to the promise of sale agreement dated 5th June 2006, which it is being reiterated had expired, the mere fact that the parties had entered into that agreement sufficiently shows that their intention with regard to the standard of finish of the Property to be transferred by the Defendant to the Plaintiff was very clearly set out between them. From evidence submitted during the hearing of these

proceedings it does not result that the parties reached a different agreement with regard to the standard of finish of the Property to be transferred and therefore it is safe to state that the Plaintiff expected to receive from the Defendant the Property finished in shell form with the common parts of the garage complex finished as per specifications indicated in the contract of works, that is with an *electricity operated gate to the garage complex with optional remote control unit, automatic sensor lighting, lighting points, trunking systems for water and electricity services to the garage, plastering and pointing of the garage common parts and garage,* which was the standard of finish being promised by the Defendant but which ultimately was not delivered by him.

From the records of the case and from evidence submitted by the parties it results that in January 2010, precisely towards the end of January 2010, the Defendant informed the Plaintiff that the Property was completed in shell form and that therefore they could proceed with the signing of the final deed of transfer, so much so that he set an appointment with Notary Pierre Cassar for the publication of the final deed of sale for early February 2010. After transferring the necessary funds on the 26th January 2010[15], the Plaintiff came over to Malta in early February 2010 so that she could finalize the deal with the Defendant however upon inspecting the Property a few days prior to the appointment set for the publication of the final deed of sale, the Plaintiff realized that the Property was not completed to the agreed standard of finish. The state the Property was in when the Plaintiff inspected it results from the photos taken by her and exhibited as Doc. "PBC1" at folio 107 to 112 of the records of the proceedings and the Defendant himself confirmed and acknowledged that the Property was not, as at early February 2010, completed to the agreed standard of finish. In fact, on being asked whether he confirms that as at 2010 the common parts of the block were not ready, there was no ceiling to apartment number 4, the façade was not pointed and the ramp was not ready, the Defendant replied that *I confirm that the common parts, even though the ceiling of apartment number 4 was not completed, it was shuttered and therefore all that had to be set was the concrete. So much so that by the end of February 2010[16] the ceiling was ready. The façade was not pointed and the ramp was under construction, how in fact that by the end of February 2010[17] it was ready.* The Defendant further added that *I am being shown some photos which are being marked as document PBC1 and I am being asked to comment about them. I confirm that these photos show the state of the property as it was in February 2010[18].*

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15 Doc. "GV1" at folio 126 to 128 of the records of the proceedings.

16 Underlining by the Court.

17 Underlining by the Court.

18 Testimony given during the sitting held on the 9th January 2012, folio 113 to 114 of the records of the proceedings.

Considering the fact that the Plaintiff had been waiting for this transfer to occur since 2008, the year when the development permit was issued, and in reality since 2006, the year when the promise of sale agreement, now expired, was signed, it is not at all surprising and unjustified that on finding that the Property was not completed to the agreed standard of finish in early February 2010, in spite of being informed by the Defendant that the property was indeed completed to the agreed standard of finish and could be transferred to her, she decided that she was no longer interested in purchasing the Property from the Defendant.
The Court is of the opinion that the Defendant breached the underlying reciprocal obligation to act in good faith and this breach on his part necessarily gives rise to the Plaintiff's right to demand the refund of the sum of Lm3,900, equivalent to €9,084.56 which she had released in his favour in June 2008 and effectively transferred to him in July of that same year. To this end the Court makes reference to the observation made by the Court of Appeal in its Inferior Jurisdiction in the judgment in the names **Daniela Debattista noe v. JK Properties Limited, Appeal No. 840/04** decided on the 7th December 2005, which judgment dealt with a request for the refund of a sum of money paid by the plaintiff nomine to the defendant company prior to the signing of a promise of sale agreement: *kif saput, hu principju maghruf illi fl-izvolgiment tat-trattativi hu mistenni li l-partijiet igibu ruhhom bil-bwona fede. Dan f'kull fazi tal-kuntatt instawrat anterjorment ghall-possibilità tal-konkluzjoni tal-ftehim, anke permezz ta' konvenju. Din il-bwona fede trid tigi intiza f'sens oggettiv bhala regola ta' kondotta li l-partijiet iridu josservaw, ukoll fl-ambitu tal-fazi pre-konvenju.* Even though the circumstances forming the merits of the above-mentioned proceedings are not identical to those forming the merits of these proceedings, the principle set out by the Court of Appeal in its Inferior Jurisdiction in the said judgment undoubtedly apply in this case too.

Once the Defendant clearly violated his underlying obligation to act in good faith towards the Plaintiff it necessarily results that he must refund to the Plaintiff the sum of Lm3,900, equivalent to €9,084.56, which he had received in July 2008.

The Defendant on his part claims that it was the Plaintiff who violated her obligations towards him by not finalizing the deal between them at the elventh hour and to this end requests – via his Counter-Claim – that the Plaintiff be condemned to make good for damages suffered by him as a consequence of her decision not to purchase the Property.

From that observed above it is very clear that the Plaintiff did not violate her underlying obligation to act in good faith towards the Defendant and therefore she cannot be found responsible for any damages allegedly suffered by the Defendant and consequently be held liable to make good for the same.

The Plaintiff was always prepared to purchase the Property completed to the agreed standard of finish, that is in shell form in so far as concerns the apartment and the garage and with agreed specifications for the common parts of the garage complex, and prior to coming to Malta in February 2010 she forwarded the necessary funds in order to conclude the sale[19]. Even though the Plaintiff admits that though she did not need to sell her property in the United Kingdom in order to purchase the Property in Malta, it would have been more convenient for her to purchase the Property in Malta from the proceeds of the sale of her property in the United Kingdom, the availability of funds for the Plaintiff was not the determining issue which led to a protracted wait till 2010 when the Property could according to the Defendant have been transferred to her or which led to her ultimate decision not to purchase the Property from the Defendant. The reason why the Plaintiff ultimately decided not to purchase the Property from the Defendant was that when she came over to Malta with the understanding that the transfer of the Property was going to be completed, she found out that the Property was not completed to the agreed standard of finish and with the agreed specifications.

The Defendant argues that due to the Plaintiff he kept the Property off the market and thus could not for a number of years negotiate it with third parties. The Court however points out that this was a totally voluntary decision on his part since he undoubtedly knew that following the expiry of the term of validity of the promise of sale agreement dated 5th June 2006, he was not legally bound to transfer the Property to the Plaintiff and in any case the deal was called off not due to any fault of the Plaintiff but because he failed to complete the property to the required standard of finish and according to the agreed specifications by the time when he decided to set an appointment for the publication of the final deed of transfer.

In the light of all the above it clearly results that the main claim being put forth by the Plaintiff for the refund of the sum of €9,084.56 is justified and should therefore be upheld whereas the Counter-Claim for damages put forth by the Defendant is totally unjustified and should therefore be rejected.

For these reasons the Court:

1. Rejects the Defendant's pleas to the Plaintiff's claim;
2. Uphold the Plaintiff's pleas to the Defendant's Counter-Claim;
3. Rejects the Defendant's Counter-Claim;
4. Upholds the Plaintiff's claim; and
5. Condemns the Defendant to pay the Plaintiff the sum of €9,084.56, with legal interest due from the 21st March 2011, the date of service of the claim on the Defendant, till date of actual payment.

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[19] Doc. "GV1" at folio 126 to 128 of the records of the proceedings.

Costs are to be borne entirely by the Defendant.

MAGISTRATE

DEPUTY REGISTRAR