

Actio Surrogatoria

Anthony Micallef vs Paul Balzan

MICHELLE CAMILLERI

The facts are as follows:

- By means of a promise of sale (*konvenju*) dated 10 May 1993, Paul Balzan and Richard Camilleri promised Anthony and Raymond Farrugia a portion of land in Zebbug, divided into plot 1 and 2. On 23 August 1993, Anthony and Raymond Farrugia promised to transfer plot no. 2 to spouses Mario and Mary Joan Farrugia and on 22 October 1993, they promised to transfer plot no. 1 to Anthony Micallef and Doreen Micallef Edwards.
- Plaintiffs are demanding that defendants proceed with the publication of the contract of sale according to the conditions stipulated in the *konvenju* of 10 May 1993.

Italian Jurisprudence has accepted the *actio surrogatoria* as an action which is available to the 'buyer' of immovable property against the prospective vendor where the latter has entered into a promise of sale with a third party in relation to the same immovable. On the contrary, in local jurisprudence, the *actio surrogatoria* '*ma twettaqx biss funzjoni konservattiva imma principlment ta' forza ezekuttiva*'.¹ Moreover, in 'Francis Flores proprio et nomine v. Accountant General et'² the Civil Court First Hall concluded that the action contemplated in Article 1143 '*ssir biex dak li hu dovut jidhol fil-patrimonju tad-debitur tal-attur (i.e. il-kreditur)*'.³

As expounded in '**Stephenson Harvey v. Dr Tanya Sciberras Camilleri et**'⁴ the elements of the *actio surrogatoria* are as follows:

- (i) Plaintiff is the creditor of the debtor;
- (ii) The credit is factual and not conditional or potential;
- (iii) The debtor has a right, of a patrimonial nature, which is open to him against his own debtor;
- (iv) The plaintiff must show that his debtor failed to bring an action against his own debtor to claim back what is due to him;
- (v) Consequently, plaintiff must suffer prejudice as a result of his debtor's inaction; and

¹ *Anthony Micallef Et v Paul Balzan Pro Et Noe* [2012] CCFH 596/2008, pg 11

² Civil Court First Hall, 1994

³ Court refers to other cases, namely: *Celestino Muscat v Giovanni Attard*, Court of Appeal, 1938; and *William Gollcher nomine v Pietro Azzopardi ed altri*, Commercial Court Vol XXIII.iii.464

⁴ Civil Court First Hall, 2002

- (vi) If the debtor of the debtor contests the action, the plaintiff must prove the credit which is due by his debtor.

The onus of proof falls upon the plaintiff himself. The creditor does not act as the mandatary of his debtor but acts in his own personal interest.

Plaintiffs had a right to demand, from Anthony and Raymond Farrugia, the execution of the promise of sale concluded by them in their favour. However, Anthony and Raymond Farrugia could not fulfill their obligations because the execution of such obligations depended on the execution of the promise of sale which existed in their favour vis-à-vis defendants Balzan and Camilleri. Therefore plaintiffs, in order to safeguard their credit in relation to Anthony and Raymond Farrugia, exercised the action which the Farrugia's had against Balzan and Camilleri.

In this case, the Court felt that it had not been sufficiently proved that Balzan and Camilleri were indeed creditors of the defendants, Anthony and Raymond Farrugia. It also emerged that both '*konvenji*' had lapsed and therefore could not be enforced – subsequently, the Court decided the case against plaintiffs for the abovementioned reasons.