

"Dr. MARIA CRUZ MATILLA ORTEGA. Attorney-at-law of the Department of Justice of the Investigation Court No. 2 of Marbella. I BEAR WITNESS: That on the original court records followed before this Court, there are those in which the following details appear, and which read as follows."

**SEE RULING  
ON PAGE 8**

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**ON BEHALF OF HIS MAJESTY, THE KING**

In Marbella, on the tenth day of the month of March of nineteen ninety-eight, Antonio Ruiz Villen, Magistrate Judge of the Court of First Instance and Investigation Number Five of this city, and its Judicial Party, has pronounced the following:

**R U L I N G No. 88/98**

Having had at sight this court proceedings for LARGE CLAIMS 334/93-Bis followed up at this Court, between parties, on one side as plaintiff Hans Bernard Friedli Von Muhlenen, represented by Attorney General Leal Aragoncillo, and assisted by attorney-at-law Jose Luis Sanz Arribas against Giuseppe Giudice, in default, and Kelvin John Fischer and Motorauto Marbella, S.L., represented by Attorney General Roldan Perez, aided by attorney-at-law Diego Jimenez Balbotoe, regarding the termination of sale and purchase agreement.

**F I N D I N G S O F F A C T**

**FIRST.-** That through Attorney General Leal Aragoncillo, in the representation he holds, a lawsuit was filed, which corresponded to this Court by rotation assignment, and which, after setting the facts and basis for law deemed appropriate, ended up begging the Court for a Ruling to be passed, in which it is declared:

**1<sup>st</sup>.-** The existence of a verbal sale and purchase agreement between HANS BERNARD FRIEDLI VON MUHLENEN AND GIUSEPPE GIUDICE, agreement which bounds both parties with force of Law and which had the four Ferrari vehicles mentioned above as subjects, thus establishing, in the First Fact of this lawsuit, and as consideration or price, the amount of 1,900,000 American dollars.

**2<sup>nd</sup>.-** The breach of said agreement by Mr. Giudice, and as consequence of said breach, the applicability to terminate said contract in virtue of the established in articles 1124 and 1505 of the Civil Code, at the request of the plaintiff seller.

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**3<sup>rd</sup>.**- The inexistence of the sale and purchase agreement, mediation or any other legal figure between my client and the defendants KELVIN JOHN FISCHER AND “MOTORAUTO MARBELLA, S.L.”

**4<sup>th</sup>.**- That alternatively, and for the case it deemed the existence of any kind of agreement between my client and the defendants, KELVIN JOHN FISCHER and “MOTORAUTO MARBELLA, S.L.”, declares the breach of the same by the defendants, and therefore the termination and extinction of all legal bonds, whatever this is.

**5<sup>th</sup>.**- Consequently, the right of Mr. Friedli to recover full ownership, possession title as owner and power to have the abovementioned vehicles available.

**6<sup>th</sup>.**- That the defendants, are jointly bound to compensate Mr. Friedli for the damages caused, both because of the physical damage or the quote that the vehicles may have suffered ever since they left Switzerland until their definitive recovery by the plaintiff, profitability that the same could have obtained in the same period of time for the capital that consists in the price of the sale and purchase and which was not received, and for the amounts it should have paid as deposit, transportation and custody of the vehicles, both on the basis of its original transfer and the deposit agreed in the criminal procedure and the present as well, and whose exact amounts shall be set during the execution of the ruling.

Condemning the defendants to appear and go through the previous statements and to give exact and complete compliance, and the payment of all costs of the procedure which shall be expressly imposed with a joint character, should justice be done.

**SECOND.**- Having been the lawsuit approved for proceedings, it was agreed to locate the defendants, which was legally verified, by having the codefendant Giuseppe Giudice not appear nor answer to the lawsuit, and having codefendant Kelvin John Fischer and the entity Motorauto Marbella, S.L., appear, formulating a counterclaim requesting the passing of a Sentence by which:

First.- It is declared the existence of a sale and purchase agreement between HANS BERNARD FRIEDLI and the legal entity Motorauto Marbella, S.A., represented by Kelvin John Fischer, executed during the month of June of 1991, by virtue of which the same sold and delivered to this abovementioned entity the Ferrari cars referred to in the first fact of this

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counterclaim, for the price of three hundred and fifty thousand American dollars, which the buyer would transfer to the checking account of the seller, indicated by the same in the Bank of Andalucía, Agency Number 5 of the Roman Bridge, after its exposition and sale.

Second.- That the seller Hans Bernard Friedli, after the delivery of the cars and property titles to the buyer acted in bad faith, perturbing and hindering the same in the possession, use and enjoyment of the cars preventing the free disposal and sale of the same, causing damages that rise up to the amount of 12,665,912 pesetas, or in this case, whichever is determined in the execution of the Ruling.

That as a consequence of the same, the defendant HANS BERNARD FRIEDLI is condemned to:

1<sup>st</sup>.- Being and passing through said statements.

2<sup>nd</sup>.- The compliance of said sale and purchase agreement.

3<sup>rd</sup>.- Compensating the damages caused by his attitude by not letting the buyer keep possession of the cars sold and preventing it from its free disposal and sale in the amount of 12,665,912 pesetas or whichever it is determined in the execution of the ruling.

4<sup>th</sup>.- Receiving from the buyer the amount of the sale and purchase of the abovementioned cars which rises up to the amount of 350,000 American dollars, from which amount it will be deducted and removed by the buyer the amount of the compensation established in favor of the buyer for the damages caused.

5<sup>th</sup>.- The payment of the costs of the trial.

**THIRD.-** Dated on December 30<sup>th</sup> of 1994, evidence in these proceedings were received, being the approval of the same practiced with the result found on record, being the proceedings concluded for Ruling.

**FOURTH.-** During the proceeding of this trial, all legal provisions have been observed, except for those regarding procedural terms due to the accumulation of matters that fall on this Court.

## LEGAL GROUNDS

**FIRST.-** The representation of the acting party exercises a declaratory action,

termination of an agreement and of conviction to the payment of an amount in the terms collected in the request section of its writ of summons, which we have transcribed in the FIRST Finding of Fact of this resolution and which, for the sake of brevity, we consider as reproduced.

On its part, the representation of the codefendants that appear in the court proceedings, Motorauto Marbella, S.L. and Kelvin John Fischer, opposes to the lawsuit, and also formulates a counterclaim exercising a declaratory action and one of conviction, in the terms collected in the Request section of its counterclaim deed, which we have transcribed in the Second Finding of Fact of this resolution and which, likewise for the sake of brevity, we consider as reproduced.

**SECOND.-** Starting with the analysis of the intentions of the counterclaim defendant, no production of evidence sufficient to credit the reality of the existence of a verbal sale and purchase agreement executed in July of 1991 between himself, as seller, and the codefendant Giuseppe Giudice, as buyer, has been developed, regarding the vehicles

- Ferrari 250 GT Espider, series II, year 1960, chassis No. 1.893.
- Ferrari 250 GTE, 2-2 couple, 1961 model, with chassis No. 2.925.
- Ferrari 230 GT, Espider, series I, 1957 model, with chassis No. 0799 GT.
- Ferrari 365 GT, 2-2 couple, 1970 model, with chassis No. 13.811.

Nor does it appear to be credited that the price rose up to the amount of 1,900,000 American dollars.

Let us not forget that, pursuant to article 1214 of the Civil Code, the burden of proof falls over the same.

The only valid proof to reach the conclusion of the existence of said sale and purchase agreement would be constituted by the insistence, by the acting party or its verbal agents since the month of August of 1991, both in police proceedings (see the report of Attorney-at-law Mr. Torrabadella Pare before the Police Station of this city on August 28<sup>th</sup> of 1991, understood as an arrangement to the upright discretion of the human intelligence and not as the representation of the codefendants intends, as it appears in its written pleadings; article 3 of the Civil Code), as well as in the Previous Formalities 1451/91-C of the Court of Investigation number 2 of this city, as in the written pleadings of the present procedure, in

the way in which the reality of the facts has occurred, combined with the scarce unconformity shown by the codefendant Kelvin John Fischer in its declarations in those Previous Formalities and in evidence of legal confession in this procedure (being sufficient for this the comparison of the declarations expressed by the same, among each other, and the testimony on folio of Gianni Meninno, page 1.197 of the court proceedings).

But that is not sufficient as a direct evidence, nor through assumptions (articles 1249 and subsequent articles of the Civil Code) to have the memorandum of understanding between the acting party and the codefendant Giuseppe Giudice over the thing and the price as credited, in the terms of articles 1261 and its related articles of the Civil Code and articles 1445 and subsequent articles of the same legal text.

That evidence is not even sufficient along with the insurance agreement of the vehicles arranged with the company Elite Difussion, insurance certificates from the vehicle transportation company, SOMATRA -AG, the returns to the Treasury department from Mr. Friedli n Switzerland regarding the insured value of the vehicles, the valuation of the vehicles made by the company GRABER AUTOMOVILE AG, and finally, the thoughts of the representation of the acting party Hans Bernard Friedli Von Muhlenen, contained in a summary of his list of evidence (see page 1256 of the court proceedings) regarding the fact that if his version was not true, his agent would not have initiated the numerous legal procedures for the same facts.

In the civil process, we are trying to forward the evidence to the procedure, so that it credits the reality of the facts that make up our intension (article 1214 of the Civil Code), since, the principle of formal truth governs even with all the clarifications wanted.

Before all the considerations above, it is appealed,

- 1) The pro forma invoices issued by the acting party in favor of Motorauto Marbella, S.L. (even when the same denies the truthfulness of its intrinsic content), signed by him.
- 2) The expert report issued by Ernesto Rueda Martinez in which he appraises the vehicles, as a mean value of the four vehicles in matters during the year 1992, in the price of 457,000 American dollars (see page 9 of its report, page 1604 from the court proceedings)

Not even the mean value of the four vehicles for the year 1997 is enough, far from half of the intended sales price. Before the 1,900,000 American dollars intended as a sale price, the expert gives a mean value for 1997 that of 717,000 American dollars.

About this particular detail, we shall note the fact that the representation of the acting party, when responding to the document given to them granted under the support of article 342 of the Law of Civil Procedure (deed from February 2<sup>nd</sup> of 1998, page 1632 and its subsequent articles in the court proceedings) comes, interestingly enough, from the valuation given to the vehicles on the year 1997 (see page 10 of the report, page 1605 of the court proceedings), which is erroneous.

3) Lastly, the thought pursuant to which, in a sale and purchase as the acting party intends is very strange that no evidence whatsoever is recorded about the real sale and purchase carried out, as honest and chivalrous as the defendant-buyer might appear to the acting party.

Based on all the above, the intentions deduced through the two first points of the Request of the petition are headed for failure.

**THIRD.-** We will dedicate this basis to the joint study of the rest of the intentions deduced in the Request of the petition and those formulated through the counterclaim, since they become the heads and tails of one same coin.

Before that, leaving record of the fact that given the tough luck that the main intention of the acting party has had, it does not necessary mean that his subsidiary request has to be sustained (existence of an agreement between him and the appearing defendants, being the price that of 1,900,000 American dollars) or the request formulated by them through a counterclaim, since it could happen that a pronouncement for dismissal is adopted before the lawsuit and the counterclaim, based on the lack of evidence of the facts that would normally constitute the intention deduced in one and the other (lawsuit and counterclaim).

Well, with the evidence examined, which appears in the court records and which is jointly valid pursuant to review, we deem that the reality of no sale and purchase agreement whatsoever has not been credited either regarding the Ferrari vehicles referred above, between the counterclaim defendant and Motorauto Marbella, S.L., or in its case, Kelvin John Fischer, in spite of the content of the pro forma invoices (pages 482 and subsequent articles in the court proceedings) issued by Mr. Friedli, whereas

a) It is not pursuant to rational logic that in this kind of agreements (due to its economic volume and the special nature of its subject) the execution of the same is carried out without even having seen them before.

b) It is not pursuant to said logic that a sales price (350,000 American dollars) that is lower in practically 24% of the mean market price as of July of 1991 (457,000 American dollars) is agreed upon for vehicles that have not been credited to be in a medium level of preservation.

In this sense, we deem all repair budgets that appear on pages 501 and all subsequent pages that appear on the court records as lacking value, since they have not been submitted to contradiction. Certainly, the witness, legal representative of Sportcar has been summoned and has not appeared, and even when we cannot make the counterclaim bidders responsible for the obligation of taking steps to ensure its appearance, it is true that when it has been of its interest, the same has indeed ensured it (see evidence regarding the contribution of a document by Ugo Giovanni Gianino, pages 832 and its subsequent pages, and offering made in D.P. 1451/91 of the Investigation Court No. 2 of this city to take care of the appearance of the defendant, Giuseppe Giudice, pages 977, 1065 and 1069 in the court proceedings).

In any case, the intervention proceedings of the vehicles are appealed to those budgets in which the intended defects are not recorded, in pages 581 and its subsequent pages in the court proceedings, and the statement from Antonio Moreno Canovas (escrow agent of the deposit legally constituted), page 610 of the court proceedings, in which no defect whatsoever is addressed either, not even in a visible manner for being the vehicles of external parts.

c) Due to the existing contradictions, the judicial confession from the codefendant Kelvin John Fischer (page 785 of the court proceedings) and the testimony of folio of Giani Meninno (page 1197 of the court proceedings) precisely practiced at the request of the representation of the codefendant Kelvin John Fischer are compared.

Contradictions that are also existing between the content of that judicial confession and what is credited as documentation (pages 1295 and its subsequent pages in the court proceedings, transfer of the vehicles between Motorauto Marbella, S.L., represented by the codefendant Kelvin John Fischer, and the entity Shoreham Investments Ltd, and from this to Pedro Manuel Poiaras Serra).

Definitely, there is a deficit of evidentiary activity by who was bound to it (article 1214 of the Civil Code, without it having been credited the existence of a memorandum of understanding between the counterclaim defendant and Motorauto Marbella, S.L. or Kelvin John Fischer about the thing and price in the terms of articles 1261 and all its related articles of the Civil Code, and articles 1445 and its subsequent articles of the same legal document.

In law, it is not valid either to admit in this resolution the existence of that sale and purchase agreement due to the circumstance that the counterclaim defendant alternatively

proposes it, and the defendant does so through a counterclaim, since,

a) The price is not recorded as credited. For some, the price is 1,900,000 American dollars, and for the other, it is 350,000 American dollars.

b) The alternative request from the counterclaim defendant becomes a request such as a “lesser evil” but is preceded by a convincing refusal over the reality of that agreement.

Given that the rest of the requests contained in the Request section of the petition and counterclaim start from the premise of the declaration of the existence of this agreement, in sight of the negative luck that said request has had, those are also headed for failure by not applying to the record from which they depend.

**FOURTH.-** In matter of costs, the acting party is to be imposed with those caused by the lawsuit, and the counterclaim defendants shall be imposed with those caused by the counterclaim, as authorized by article 523 of the Law of Civil Procedure.

Having seen the articles mentioned as well as any others of general applications,

## I R U L E

That dismissing the lawsuit formulated by the Attorney General Lean Aragoncillo, on behalf and representation of Hans Bernard Friedli Von Muhlenen, against Giuseppe Giudice, Motorauto Marbella, S.L. and Kelvin John Fischer, I must absolve and do absolve them from the intentions that are contained against them in said lawsuit, with the imposition of costs to the acting party.

That dismissing the counterclaim lawsuit formulated by the Attorney General Roldan Perez, on behalf and representation of Motorauto Marbella, S.L. and Kelvin John Fischer, against Hans Bernard Friedli Von Muhlenen, I must absolve and do absolve the same from the intentions that are contained against him in said counterclaim lawsuit, with the imposition of costs to the counterclaim defendants.

Against this judgment, which is not firm, an appeal may be filed in the term of FIVE DAYS as of its notification before this Court.

It is so ordered by my Judgement, from which a testimony shall be deduced for its union



to the official grievance record, judging in first instance, and I pronounce, send and sign it.

E/

*[Illegible signature]*

**PUBLICATION.** - Having the above resolution being read and published by the undersigned Judge, celebrating a public hearing on the day of the date, I bear witness in Marbella.

*[Illegible signature]*

The foregoing is a faithful and true transcription of the original to which I refer to, and for the record and corresponding effects, I issue and sign this document in Marbella on the 7<sup>th</sup> day of February of 2018

*[Illegible signature]*

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