



**MALTA**

**SMALL CLAIMS TRIBUNAL**

**ADJUDICATOR  
DR. ANNA MALLIA**

Decision of the 7<sup>th</sup> April, 2017

Case Number: 257/2013 AM3

List Number: 29

**Perit Elena Borg Costanzi**

**6, Bay Step Mansions,**

**Triq Alfred Gauci,**

**San Giljan**

**Vs**

**David Elyan**

**49, Chester Court,**

**Albany Street,**

**London NW 14BU**

The Tribunal,

Having seen the Notice of Claim put forward by the applicant on the 29<sup>th</sup> April, 2013 by means of which she requested the respondent to pay the sum of one thousand and sixty

two euro (€1,062.00) VAT included for services she render in a satisfactory manner at 29, The Mall, Floriana.

Having seen the reply filed by the respondent at fol 9 by means of which he pleads the prescription in terms of Article 2149 ( c ) of Chapter 16; that on the merit the plaintiff's claim is not justified since she did not carry out her duties in a professional and transparent manner, that she failed to carry out the works requested and failed to supervise the works carried out on the premises appertaining to the defendant and as a consequence of which he had to make remedial works for which works he is reserving from not his claim for liquidation and payment of damages.

Having seen at fol 29 that the Tribunal ordered that the proceedings be conducted in the English language.

Having seen that by means of a preliminary decision on the plea of prescription raised by the defendant the Tribunal on 13<sup>th</sup> July 2015 decided that the respondent's plea of prescription is unfounded in fact and at law and ordered the continuation of the case.

Considers the following:

At fol 45 et the plaintiff explained that the amount claimed is the 6% of the fifteen thousand euro (€15,000) paid to Arredando Limited and the defendant had agreed to this. She used to regularly attend and go to the property however she did not have the keys so she would have to aim to have the contractor there to be able to visit. She used to go at least once a week. In this case she had to contact his lawyer and not the client. A few months before she sent the bill she bumped into Carlo Salamone who is one of the owners of Arredamento Limited and she spoke to him about the matter. She told him that she had to certify the works that were done and she is finding the property locked up and that no one was on site to let her in. She issued the bill on 5<sup>th</sup> July, 2011 and sent him a reminder in October, 2011. She presented a trial for emails send to defendant's lawyer as Doc EBC 1.

When cross examined she explained that the reason why she did not know that the works were done was because she did not have the key to the place and neither did she have contact with the defendant. She declared that between September and November

2010 she went on site about five times and she has contact with the contractors. When asked how she did not know that the works were finished she explained that towards the ends of a project usually one is either contacted by the contractor or the client in order to come and verify the works and create a snagging list. This never happened.

After the snagging list was done she would then certify the works. In fact she was shocked when the contractor told her he had been paid in full and that the defendant was satisfied with the works. She explained that the contractor and the defendant settled the matter without her to avoid the professional fees.

During the course of the works she went on site and there were things here and there which she corrected and also which were permuted like when they were painting and she pointed out that the painting is not uniform; or that the slabs are not perfectly straight and they need to be arranged and things like this.

Regarding the flooding, the plaintiff stated that the defendant ought to have consulted her and not engage another architect.

That at fol 72 the plaintiff testified that the sum of €1062 she is claiming in this case represents 6% of the value of the works as agreed by the defendant. The works regarded maisonettes in the Mall, Floriana which basically were finishes works and listed in document 21. The works were carried out by turnkey contractor Arredando Limited. Doc B at fol 21 exhibited by the defendant is a quotation forwarded by Arredando Limited for her approval and it basically includes various works that are related to works in the staircase, in the floors, wall finishes, ceiling finishes and the light and also works in the basement and the facades. The fees were based on the usual 6% on the value of the works on fifteen thousand (15,000). Re fol 23 Doc D exhibited by the defendant she explained that it is a copy of her bill issued to the defendant and it is a reminder. She confirmed that the defendant did not pay anything.

At fol 87 et in her cross-examination the plaintiff stated that Tariff K applies where there is no agreement with the client and in this case she had an agreement with the defendant. She confirmed that Tariff K normally reserves the 6% fee for a full development application and the supervision and certification thereafter. She confirmed that she used to go on site once a week. Regarding Mr Catania she stated that he was not the only one on site and he was not always on site so he cannot vouch for the amount of times she went on site. She explained that she did not know when the works

were completed because she used to find the door closed and the defendant did not inform her. However she later confirmed that the site was open at times but not all the time and she did not have the keys.

When asked how the contractor did not have problems to contact the defendant and she is saying that she has had such problems, she explained that she has already explained at length how difficult it was to contact the defendant. She did not recall that the plaintiff had given her the keys which she later gave to Arredando. She confirmed that she recommended Arredando to the defendant and that he told her that he had a budget of fifteen thousand euro (€15,000) for the works to be carried out. The quotation of Arredando was reduced to fifteen thousand euro (€15,000). She had contacted another two but only Arredando was interested. She was not aware that Mr Catania and Mr Salamone of Arredando were in continuous regular contact with the defendant but she had the business card of the defendant.

Asked when was the last time she went on site before she issued the bill on 5 July 2011, the plaintiff explained that she cannot give the exact month but this information transpires from the previous sittings. She explained that between the periods when she started to find the doors closed and she met Carlo Salamone of Arredando there were a series of emails with whom she thought was the defendant's barrister. She confirmed that Doc EBC1 is one of these emails and is dated 28 August, 2011 and it is at fol 36. The works were carried out in November, 2010.

Asked to explain how come the works were finished in November, 2010, the contractor was promptly paid and all amounts due were settled immediately and that she is saying that she visited the site once a week but then she did not realize that the works had been completed, the plaintiff replied that she did not say she did not realize. She issued the bill in June of the following year because she expected her client to contact her for certification.

Asked why should the defendant contact her for certification when she should have been following the progression of works supervised he works and should have known when the works were completed in November 2010, (corrected to 2011 at fol 29) her lawyer remarked that the plaintiff is being asked the same question over and over again.

The plaintiff confirmed that she did not do the snag list because she had no keys to the property and she did not asked the defendant for access to the place in order to be able

to certify the works and issue a snag list because she knew that the defendant paid the contractor in full.

The plaintiff confirmed that she met the plaintiff a few months before the works started and whenever she went on site she never met him and he never contacted her.

At fol 31 Eder Catania testified that he did generic work on the property in question and in the three months that he did the works he referred to the architect a couple of times but he was in charge of the site while the main contact person was Carlo Salamone his partner who was communicating with her. He was not aware of any certificate of works issued. When they inspected the works with the defendant he gave him a small snag list which he completed.

He confirmed that the plaintiff gave them specific instructions at the beginning and they were sufficient for them to continue with their work and during the three months he did not need to refer to the plaintiff as there were minor alterations. It was primarily the architect who gave him instructions whether they were instructions or request for quotations. In the beginning the architect listed a list of works that had to be done, then there were some site visits and then they started to co ordinate with both. In the beginning the plaintiff was also present on site and during the rest of the terms she was present maybe a couple of times. On site she was actually checking on the job but she was not there with regards to just quotations.

He confirmed that the works related to the instructions given by the plaintiff, and the amount of five thousand eight hundred (5800) circa mentioned at the bottom of Doc C which says 24/11/2010 he stated that that was in relation to the works done in relation to the works given by the architect. The list in doc C is a list of irons they did extras for the plaintiff. The money received is at the bottom which includes also those extras.

At fol 18 the defendant stated in his affidavit that he had engaged the plaintiff to supervise the refurbishment of the works in his absence. He prepared a list of tasks that he thought need to be dealt with and is marked Doc A at fol 20. He asked the plaintiff to find him a reliable builder and she said introduced him to Carlo Salamone. He told her that his budget is that of fifteen thousand euro (€15,000). He never had any contact with the plaintiff during the progression of the works and he believes she never went on

site. He paid the contractor and it was several months later that he received an invoice dated 05 July, 2011 which he received on 27<sup>th</sup> October, 2011 as a reminder. He never believed that the plaintiff was going to bill him for services she did not do. There were a lot of shortcoming which surfaced subsequently when the basement was flooded with drainage water and he had to pay two thousand one hundred and fifty euro (€2,150) to remedy these works which could have been avoided had the plaintiff carried out her duties and supervised the works as she had been requested to do originally.

At fol 34 et the defendant stated that he was not in Malta he got calls from Mr Catania a couple of times. He stated that he is not aware that Catania carried out works in March 2011 but the snagging items were done and paid for separately. When he moved in on 17 November the plaintiff was not aware of this.

The defendant in his ulterior affidavit (fol 93 et) stated that he had given a copy of the key to the house to the plaintiff on the clear understanding that she would need this key to supervise the works in his absence. However he she gave this key to Mr Salamone on 10 June 2010 in his presence. That was the last time he saw the plaintiff and the first time he met Mr Salamone who need the key to inspect the place once again in order to plan the work. He is sure that if the plaintiff needed the key she could have contacted the contractor.

The defendant stated that he visited Malta between 8 and 21 September and between 15 and 29 November 2010 and he was in Malta for a week in October. He would go to the house to see the progress of works on at least every other day that is a minimum of fifteen visits over the course of these three months during which the works were carried out and there were always workmen on site. He cannot therefore understand how the plaintiff is claiming that she was unable to accede to the site to carry out her professional duties. He had frequent meetings with Mr Salamone and Mr Catania on site and the plaintiff was never present and she made no contact with him or with the contractor with regards to the works and he knows this because he asked them.

In his cross-examination the defendant confirmed that he met the plaintiff on 8 and 21 September and 15 and 29 November and on 10 June 2010. He did not inform the plaintiff every time he was in Malta and he assumed that if she was in contact with the builders she would have found out. He confirmed that he would inform the builder but not the plaintiff. He does not carry a mobile or a computer but she contacted him by telephone and a friend who worked as a clerk in a law firm would send him the e-mails and he provided the plaintiff with the email address of this friend.

When he initially he contact the plaintiff the idea was that she supervises the works because he is away often. He has no reason to communicate with the plaintiff if the work was up going and happening. If there was problem he would have expected her to contact him so he did not get in touch. He expected a phone call or a letter from the plaintiff although he confirmed that he gave instructions to email this person who was doing him a favour receiving the emails on his behalf.

The builders told him she never came to inspect their work and he expected the plaintiff as a professional person to come on site and take a note of the times she would on site and constantly inspect the works. Both the builders had sets of keys and she had lamented that she had no access to the place and if she wanted she could have easily contacted them with a local phone call and got access to the place through the builders. He did not feel the need to call the plaintiff before paying the builder for the reason that she did not show any interest once the builder was appointed and she never contacted him to see if he was satisfied with the built and also because when it came to the supplier of the marble it turned up that the supplies is a company where her brother was involved. In the interest of transparency he accepted her to tell him. After he moved in the house in November, 2010 he came to Malta in two monthly intervals and he avoids the summer months in Malta. For him it was strange that the plaintiff did not know when the move was taking place.

When confronted with the fact that her brother has absolutely no connection to the issue at all and it was Salamone the builder who was actually simply operating from the plaintiff's premises, the defendant replied that it could be trued but there was a connection if he was a tenant. When asked that he wanted to avoid her fees, the defendant replied that it is completely untrue.

The plaintiff contacted him almost a year after the completion of the works when she sent him a bill with the words 'reminder' written on it. He denies that he had received any invoice from her. He reiterated that he has not paid the plaintiff because he is not aware of any services she rendered in connected with his property at 29, The Mall, Floriana and he confirmed on oath the contents of his letter to the plaintiff of 8<sup>th</sup> November, 2011 Doc A. He is refusing to pay the plaintiff as a matter of principle.

Having seen all the documents filed by the parties.

**Considers the following:**

The relationship between the architect and the client and particularly that regarding payment of fees, is outlined in Tariff K (Chapter 12 of the Laws of Malta), Paragraph 10 - *Design and Erection of Buildings*, which specifies that -

For taking client's instructions, preparing sketch designs, making approximate estimates of cost by cubic measurement or otherwise, submitting applications for building and/or other licences, preparing working drawings and specifications, giving general supervision, issuing certificates of payment and certifying accounts, the fee in respect of new works is to be assessed as follows:

If the cost of the executed work exceeds one thousand Maltese Liri (Lm1,000) -- 6% of the cost.

Paragraph 11 - Fees in cases when the Architect Abandons or is Abandoned by the Client or Works remain Unexecuted. 1. If a project referred to in paragraph 10 of this Tariff or part thereof is abandoned or if the architect abandons or is abandoned by the client:

(b) after the architect has taken the client's instructions, prepared sketch designs, made an approximate estimate of the cost, submitted applications for building and/or other licences, and prepared working drawings and specifications, the fee shall amount to two thirds (2/3) of the fees specified in paragraph 10.

So the fees are calculated at 6% of the cost in relation of supervision of the works.

In this case the defendant engaged the plaintiff to supervise the works that he needed to do in his property situated at number 29, The Mall, Floriana. They agreed about the budget for such works and also on the turnkey contractor recommended by the plaintiff. The plaintiff had meetings with the contractor about these works and she even handed the key of the premises to the contractor so that works could start. Eder Caruana confirms that when the works were being carried out he has a couple of meetings with the plaintiff although the main contact person with her was Carlo Salamone his partner. He also recalls that she was on site once and that the plaintiff gave them specific instructions at the beginning, she listed the works that needed to be done and they were sufficient for them to continue with their work. When the works were being done between September and November there was no need to contact the plaintiff since the works were minor. When the works were completed they did not contact the plaintiff to issue the certificate of works, and the defendant inspected the works with them and gave him a small snag list and completed the snag list. The



plaintiff was not informed when the works were completed and she complains that it was difficult to go on site because she had no key to the premises.

The defendant pleads that the plaintiff is not owed anything because she did not carry out the works supervision in a professional and transparent manner; that she failed to conduct the works requested by the defendant and she failed to carry the supervision of the works. However from the facts of the case, the defendant failed to prove any of these pleadings. It is true that the plaintiff was not on site as much as he wishes her to be but it is also true that the contractor was well briefed by the plaintiff before he started the works, that the works were not major works and that her presence was not so much needed. The plaintiff went on site once and the other times she was unable to attend because she had problems with communication with the plaintiff to get the keys to the premises. This is admitted by the defendant in that he never informed the plaintiff every time he was in Malta, that he spent more time abroad than in Malta, and that the communication between them was limited since he does not carry a mobile and that he instructed the plaintiff to communicate with him when he is abroad through his friend.

However, the Tribunal notes however that the plaintiff could have easily obtained the keys from the turnkey contractor as the defendant rightly points out and from the evidence produced the Tribunal can conclude that the defendant abandoned the plaintiff when the works were completed and he did not inform her when the snag list was done with the contractor. The snag list was a small one for minor repairs and this shows that the plaintiff's instructions were conducted in a professional manner.

The Tribunal declares that Para 11 of Tariff K applies in this case and that the fees due to the plaintiff for her services shall be of two-thirds ( $2/3$ ) of the amount claimed, that is, the sum of seven hundred and eight euro (€708).

Now therefore the Tribunal decides that the claim of the plaintiff is partly justified for the sum of seven hundred and eight euro (€708) and condemns the defendant to pay the plaintiff the sum of seven hundred and eight euro (€708) with legal interest as from today.

Expenses are to be borne by the defendant.

**Dr Anna Mallia**

**Chairman**