

Court of Appeal
(Inferior Jurisdiction)
Judge Anthony Ellul
Appeal No: 257/2013

Perit Elena Borg Costanzi (respondent)

vs

David Elyan (appellant)

26th January 2018.

1. **This case concerns a claim for the payment of the sum of €1,062 allegedly due to plaintiff by defendant for professional services rendered.**
2. On the 29th of April 2013 architect Elena Borg Costanzi filed a claim against defendant David Elyan in front of the Small Claims Tribunal for the payment of €1,062 (VAT included) regarding professional services rendered in defendants' property in Floriana. She claimed that notwithstanding the fact that her services were carried out satisfactorily, payment by the defendant was not forthcoming, and hence she had no other option but to proceed legally.
3. On the 17th of June 2013 defendant filed his reply wherein he raised the following pleas:
 - i) that the action was time-barred under Article 2149(c) of the Civil Code;
 - ii) that the plaintiff's claim was not justified because:
 - she did not carry out her duties in a professional and transparent manner,
 - she failed to carry out a substantial part of the works requested, and
 - she failed to supervise the works.

He claimed that as a result of such shortcomings he had to carry out remedial works himself for which he reserved the right to make a claim for liquidation and payment of relative damages.

4. On the 13th of July 2015 the Tribunal¹ delivered a **preliminary judgment** with regards to the defendant's first plea, whereby it rejected the plea.
5. On the 7th of April 2017 the final judgment was delivered², which deals with merits of the case. The Tribunal concluded that plaintiff's claim was partly justified for the sum of €708 and consequently condemned the defendant to pay said amount of €708 together with legal interest accruing from date of judgment.
6. Defendant David Elyan appealed from both judgments wherein he submitted that this court should revoke the preliminary judgment of the 13th July 2015 and decide that plaintiff's action is time-barred in terms of Article 2149(c) of the Civil Code; failing which, it should reform the final judgment of the 7th April 2017 on the basis of the fact that it was plaintiff who abandoned him, and consequently she should not be entitled to more than one third (1/3) of the claimed fee.
7. **The grievances of appellant David Elyan are the following:**

- (i) With regards to the preliminary judgment of the 13th July 2015:

The appellant argues that the Tribunal made a wrong interpretation of the law with regards to the time when prescription under Article 2149(c) starts running. He contends that prescription should not have been deemed to have started running from the 5th July 2011, i.e. date of the invoice (as was affirmed by the Tribunal), but rather, from the 24th November 2010, i.e. the date when the works were concluded³, as

¹ Adjudicator Dr Katja Psaila Savona.

² Adjudicator Dr Anna Mallia.

³ vide Dok C, fol 22.

it was from such date that plaintiff could have sought payment for her services. He further argues that since the Tribunal eventually found that he (the client) had abandoned the plaintiff, then the prescriptive period should have been deemed to have started running from such time when the plaintiff was abandoned by him.

(ii) With regards to the final judgment of the 7th April 2017:

Without prejudice to the above, the appellant argues that the Tribunal made a wrong interpretation of the facts of the case, as it clearly transpired that it was actually the plaintiff who abandoned him and not *vice versa*. He explains that he had sought her services so that she could supervise the works carried out by the contractor in his absence, and maintains that she had failed to do so, to the extent that she was not even aware that the works had been terminated. In view of such circumstances he argues that at most plaintiff should have been awarded one third (1/3) of the fees claimed by her, in accordance with the provisions of regulation 11(1)(a) of Tariff K of Chapter 12.

8. On the 12th of June 2017 respondent (Borg Costanzi) presented her reply to the defendant's appeal application and submitted her reasons why said appeal application should be rejected, and the judgments pronounced by Small Claims Tribunal confirmed by this court.

The plea of prescription and the Tribunal's preliminary judgment:

9. In defence of plaintiff's claim against him, defendant raised the preliminary plea of prescription in terms of Article 2149(c).

10. Article 2149(c) provides that:

"The following actions are barred by the lapse of two years:

...

*(c) actions of advocates, legal procurators, notaries, **architects and civil engineers**, and other persons exercising any other profession or liberal art, for their fees and disbursements; ..."*

11. Article 2137 states:

*"Subject to any other provisions of the law, the prescription of an action commences to run **from the day on which such action can be exercised**, irrespective of the state or condition of the person to whom the action is competent."*

12. The Tribunal referred to a judgment delivered by the Court Appeal (Superior) in the case *AIC Eric Mamo vs Pupul Fenech*⁴, wherein it was held that with regards to claims made by architects for their professional fees, prescription (that of two years) starts running from when their services were given ("*minn meta jkunu saru l-prestazzjonijiet tagħhom*").
13. The Tribunal considered the evidence that was submitted and highlighted the fact that after the initial communication that took place between plaintiff (architect) and defendant (client), whereby an agreement was reached with regards to the refurbishment works to be carried out, subsequent communication with defendant was not easy and defendant made no attempts to remain in contact with plaintiff. It observed that that contrary to what is usually the case, when works were completed no certificate of works was issued at the request of either the client or of the contractor, and that this notwithstanding, client had paid contractor in full. The Tribunal underlined the fact that defendant had not communicated to plaintiff that her services were being terminated or no longer required. In view of such circumstances it established the date of plaintiff's bill (5th July 2011) as the date from which prescription should be deemed to have started running and consequently rejected defendant's prescription plea.
14. Defendant (now appellant) disagrees with such reasoning, and maintains that such an interpretation of the law would open doors to all possible kinds of abuses and undermines the certainty which the law clearly desires in the

⁴ 26th of November 1951.

provisions of Article 2137. He insists that the present claim was filed on the 29th April 2013, more than 2 years from when plaintiff could have sought payment for her services.

15. This court thoroughly examined the evidence and highlights:

- Defendant David Elyan wanted to refurbish his property in Floriana, so he had contacted plaintiff Architect Borg Costanzi and they had met on site on the 15th of March 2010. Borg Costanzi had made some suggestions with regards to the refurbishment works that could be done on the property and Elyan was open to such suggestions. He informed her that he had a budget of €15,000 which he did not want to exceed. They agreed that Borg Costanzi was to find a reliable contractor to carry out the works and was to supervise such works.
- On the 30th March 2010 she provided him with a quotation which actually amounted to €15,000⁵.
- According to Borg Costanzi, they had agreed that her professional fees would amount to 6% of such amount. (In fact the claim of €1,062 represents 6% of €15,000 + 18% VAT: €900 + €162)
- On the 10th of June 2010 Borg Costanzi introduced Elyan to the contractor of her choice: Eder Catania and Carlo Salamone of Arredando Ltd.
- Eder Catania confirmed that he had been instructed to carry out the works and said that in the three months that it took to carry out the works (September to November 2010) he had only referred to Borg Costanzi a couple of times, since the work involved minor alterations. He said that client Elyan was present when the works had started in September 2010 and also in November 2010, though he couldn't remember if he was also present in between such times. He recalled that Borg Costanzi was present once on site and could not recall if she was there other times.
- Defendant made various payments to the contractor: €2,540 (deposit), €2,360, €4,700 and finally €5,800. (A total of €15,400 which included some extras).
- The receipt dated 24th November 2010 (Dok C) in the amount of €5,800 indicates that this was the last payment, in full settlement and was issued in the absence of Borg Costanzi's "*certification of works*".

⁵ Dok B, fol 21.

- Catania said that he and defendant Elyan inspected the works together; defendant gave him a small snag list, the issues were sorted "*and that was that*".
- He also said that he was sure that his partner Carlo Salamone had informed Borg Costanzi when the works were terminated in November 2010.
- On her part Architect Elena Borg Costanzi said that during the execution of works she would regularly visit the site however since she did not have the keys she would have to make sure that the contractor was there in order to be able to enter. She said that she used to go at least once a week (During her cross-examination however she said that she went around five times between September and November 2010).
- Borg Costanzi emphasized the fact that she was not in contact with the client but with his lawyer, a certain Rosemarie Ellwood. She explained that she would send her "*the odd email*" and Ellwood would inform her that she referred the matter to Elyan and would revert back. She highlighted the fact that Elyan did not have a mobile phone or an email address and that she had never met with Elyan while the works were being carried out and that her only means of contacting him was by sending an email to the lawyer⁶. She emphasized the fact that there was never any proper discussion between her and Elyan with regards to the works.
- Borg Costanzi said that she did not know that the works were completed since she did not have a key to the place and was not in contact with the client (defendant). She explained that a few months before she sent defendant the bill⁷, she had "*bumped into Carlo Salamone*" and told him that she was not in a position to certify that the works were carried out since the property was locked up and there was nobody there to let her in. That was when Salamone actually informed her that he and his partner had been paid in full. She commented that this was "*a strange thing because usually the contractor does that through the architect. And usually the client should rely on the architect's responsibility so that he would pay the bill.*"
- She said that she issued the bill on the 5th of July 2011 after having tried to contact Elyan several times. "*And then I sent him a reminder in October 2011*".

⁶ Plaintiff produced copies of said correspondence with defendant's lawyer by email, dated as follows: 19 April 2010; 22 April 2010; 25 June 2010; 13 July 2010; 19 July 2010; 30 June 2011; 4 July 2011; 28 August 2011; 09 September 2011; 12 September 2011.

⁷ The bill is dated 5th July 2011.

- Elyan said that he was in Malta between the 8th and the 21st of September 2010 and the 15th and the 19th of November 2010. *"During my stays in Malta I had frequent meetings with Mr Salamone and Mr Catania on site but architect Elena Borg Costanzi was never present and made no contact with me with regards to the works."*
- He said that Borg Costanzi invoiced him for her services several months after the works were completed. *"The invoice was dated 5th July 2011⁸ but it was only sent out to me on 27th October 2011."* He emphasized that although on said invoice there appears the word "reminder" stamped, he had never received an invoice previously. *"In fact I had genuinely thought that architect Elena Borg Costanzi was not going to bill me for her services as she had not done anything in my place and had failed to carry out supervision of the works."*
- He explained that he did not feel obliged to make contact with Borg Costanzi when the works were finished because *"she did not show any interest once the builder was appointed, she never contacted me to see if I was satisfied with the build or anything like that..."*
- With regards to Borg Costanzi's version that she had no access to the property, Elyan commented that both builders had sets of keys *"and if she wanted to she could have easily contacted them with a local phone call and got access to the place through the builders."* He also said that he expected a professional person like Borg Costanzi to be present on site and to constantly inspect the works and take note of the times she did so.
- Elyan said that he moved in the property in November 2010 and explained that he stays in Malta in two-monthly intervals, avoiding the summer months.

16. In a normal scenario the architect would be involved throughout the period of the works right up to their completion, when he or she would then issue a certificate of works, which would form part of the professional services rendered. An architect's professional services are considered terminated once the works themselves are terminated and the relative certificate of works issued.

⁸ Dok D, fol 23.

17. In this case however, plaintiff was completely left out of picture and defendant paid the remaining balance to the contractor in full settlement notwithstanding the fact that no certificate of works was issued.
18. As the Tribunal commented, it is irregular that communication was not made with the plaintiff (i.e. the architect responsible).
19. There are conflicting versions as to the architect's presence on site while the refurbishment works were being carried out. Defendant said that he never saw her there when he was in Malta (8-21 September 2010 and 15-19 November 2010). Catania (the contractor) said that he could only recall seeing the architect on site once, although he also stated that contact was made with the plaintiff. Plaintiff said that during the execution of works she was present on site "at least" once a week, and in cross-examination she said that during such time she was present a total of five times.
20. In her cross-examination, plaintiff said that she did not know that the works were completed since she did not have a key to the place and was not in contact with the client (defendant). It is the understanding of this court, however, that since the plaintiff insists that she was regularly on site supervising the works, she should have known that the works would be completed by the end of November 2010 or thereabouts. She never tried to contact the contractor or the defendant in order to finalize things on her part: i.e. to issue the certificate of works and to subsequently invoice the defendant. Had she attempted to do so she would have found out that contractor and defendant had already settled matters "*behind her back*" and she could have proceeded to invoice the defendant as early as November or December 2010.
21. Although the information given to her by Salamone (that defendant had paid in full for the works notwithstanding the fact that no certificate of works had been issued by her) allegedly came as a surprise to her, she let a few more months before invoicing defendant, and in the meantime did not even bother

communicating with him. In fact, according to the email trail filed by the plaintiff, since the correspondence she had with Elyan's lawyer on the 19th of July 2010, she did not make any attempt to contact Elyan through his lawyer again until the 30th of June 2011.

22. In view of all the above, the question that arises is: at what point should the appointment of Borg Costanzi as defendant's architect be considered terminated, and prescription be deemed to have commenced ?

i) Shortly after the refurbishment works and payment in November 2010, when should the plaintiff have discovered that the contractor and client decided to do away with the certificate of works (and hence her "final" services) ?

ii) Months before the 5th of July 2011, when she 'bumped' into Carlo Salamone and was specifically informed that client had paid contractor in full, notwithstanding the fact that she was not contacted in order to issue a certificate of works?

iii) When she actually issued the bill dated 5th July 2011?

23. During the proceedings reference was made to a judgment of the Court of Appeal (Superior Jurisdiction) in the case "Guido J Vella A.&C.E. vs Dr Emanuel Cefai LLD", 5th October 2011. Plaintiff (an architect) had filed a lawsuit against defendant for the collection of his professional fees, and, as in this case, the plea of prescription was raised. Since the defendant was no longer making use of the architect's services the issue arose as to from when could the architect's action for his fees be exercised. The court held that for the architect to be deemed to have an action exercisable against his client one of two moments had to be established: (i) that when client terminated architect's services, or (ii) when architect terminated his services himself.

"Kellu allura jipprova ghas-sodisfazzjon tal-qorti konklussivament meta sehhet ic-cirkostanza jew li hu ttermina l-inkarigu tal-appellat ghal kull wiehed minn dawn il-progetti jew meta l-appellat iddecieda li jirrinunzja ghal dan l-inkarigu. Kien biss meta tavvera ruħha waħda minn dawn iż-żewġ eventwalitajiet illi kienet tinholoq l-obbligazzjoni favur l-appellat li kienet azzjonabbli kontra l-appellant u li fir-rigward tagħha setgħet tiddekorri l-preskrizzjoni estintiva."

24. Although defendant never informed plaintiff that he no longer required her services (his version being that he genuinely thought that since she had "*not done anything in my place*" she was not going to bill him, i.e. he didn't feel that there were any services that required termination in the first place), and although plaintiff (rightly or wrongly) assumed that the agreement between her and defendant was still in force, on the day that she "bumped" into Salamone she definitely found out that she was out of the picture. This court considers that it is at such time that plaintiff was in a position to exercise an action against defendant for professional fees allegedly due to her.
25. Now plaintiff says that encounter occurred "*a few months before*" the 5th of July 2011 (when she billed defendant). She did not specify a date. Since this case was filed on the 29th of April 2013 it cannot be established with certainty whether the two years elapsed or not.
26. Furthermore, it transpires that initially the contractor issued a quotation for €15,000⁹. With reference to this document, Eder Catania said "*... this is basically the description of works in general; and some were done by my company and **some were done by others.** This is a summary of the works done but they were not all allocated to my company*"¹⁰. Therefore there is no proof that all the works that plaintiff had to supervise, were completed in November, 2010. Furthermore, the same witness stated that in March 2011 snagging work was done. Circumstances which lead the court to conclude that there is not sufficient proof that the project was completed by November 2010.
27. Consequently, the court has no doubt that the Tribunal was justified in rejecting the plea on prescription.

⁹ Fol. 21.

¹⁰ Fol. 31.

The Tribunal's final judgment:

28. With regards to the merit of the case, defendant maintains that the Tribunal made a wrong interpretation of the facts because according to him it was plaintiff who had abandoned him and not he who abandoned plaintiff. He argues that he should not have been ordered to pay her any amount, and at most he should only have been ordered to pay 1/3 of the claimed fees in accordance with the provisions of regulation 11(1)(a) of Tariff K of Chapter 12. In the judgment of the 7th April 2017 the Tribunal concluded, "*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*".
29. This court notes that since the amount in dispute is less than €1,500, an appeal on the merits of the case is not possible. In this regard the court makes reference Article 8 of Chapter 380 (Small Claims Tribunal Act), and highlights the relevant provisions:
- (1) *An appeal shall lie from a decision of a Tribunal to the Court of Appeal composed of one judge only in accordance with article 41(6) of the Code of Organisation and Civil Procedure. Such appeal shall be entered by an application to be filed within twenty days.*
- (2) Independently of the amount of the claim, an appeal shall always lie in the following cases:
- (a) *on any matter relating to the jurisdiction of the Tribunal;*
(b) *on any question of prescription;*
(c) *on any non-compliance with the provisions of article 7(2);*
(d) *where the Tribunal has acted in a serious manner contrary to the rules of impartiality and equity according to law and such action has prejudiced the rights of the appellant.*
- (3) A right of appeal on all grounds shall also lie where the amount in dispute, calculated in accordance with the provisions of article 3(2), exceeds one thousand and five hundred euro (€1,500).
30. The appellant wants this court to re-examine the evidence produced by the parties and reach a different conclusion from that of the Tribunal. This is not

possible. From a reading of article 8(2) of Chapter 380, it is evident that the appellant had no right of appeal on points of fact.

Conclusion:

For the above reasons the court rejects defendant's appeal. All legal costs are to be paid by the appellant.

Anthony Ellul.