CIVIL COURT – FIRST HALL

HON. MADAME JUSTICE DR. MIRIAM HAYMAN LL.D.

Sworn application no.: 489/2014MH

Today, 10 th April, 2019

A C and his wife B C

vs

Central Home Style Limited (C-33653)

The Court:

Having seen **the sworn application of plaintiffs dated 4th June 2014** which stated that –

1. *Illi r-rikorrenti akkwistaw mingħand is-soċjeta' intimata l-penthouse internament immarkata bin-numru tnax (12), f'Centre Court C, Triq it-Tiben, Swieqi permezz tal-kuntratt ta' akkwist ippubblikat fl-Atti tan-Nutar Dottor Kristel-Elena Chircop fit-3 ta' Mejju, 2013, liema penthouse huwa l-fond residenzjali tar-rikorrenti;*

2. *Illi waħda mir-raġunijiet prinċipali a bażi ta' liema r-rikorrenti ddeċidew li jixtru dina l-proprjeta', kienet li l-Blokk ta' appartamenti in kwistjoni li*

jinkludi l-proprjeta' de quo, kien u għadu jiġi reklamat mis-soċjeta' intimata bħala 'built to a true luxury specification.';

3. *Illi wara s-Sajf tas-sena 2013, din il-proprjeta' bdiet tiżviluppa sintomi li sussegwentement rriżulta li kienu riżultat ta' difetti serji li ma kienux jidhru fid-data ta' meta ġie ffirmat il-kuntratt ta' akkwist in kwistjoni;*

4. *Illi appena l-esponenti saru jafu b'dawn id-difetti infurmaw lis-soċjeta' intimata;*

5. *Illi dawn id-difetti żviluppaw f'sitwazzjoni fejn minflok qegħdin jgħixu ġewwa proprjeta' 'built to a true luxury specification', ir-rikorrenti lanqas biss jistgħu jużaw it-totalita' ta' din il-proprjeta' u r-rimanenti parti qed tiġi abitata f'kundizzjonijiet tal-biki;*

6. *Illi diversi biċċiet ta' għamara u mobbli oħrajn li jinstabu f'din il-proprjeta' u huma proprjeta' tar-rikorrenti ġew addirittura iddaneġġjati b'mod permanenti stante l-umidita' li kienet parti mir-riżultat ta' dawn id-difetti;*

7. *Illi dawn id-difetti inaqqsu il-valur tal-proprjeta' de quo b'mod tali li r-rikorrenti kienu ċertament joffru prezz ferm iżgħar li kieku kienu jafu bihom. Fil-fatt ir-rikorrenti kienu żammew id-dritt li jakkwistaw garaxx partikolari fl-istess Blokk, liema garaxx m'huwiex ser jinxtara għar-raġunijiet premessi;*

8. *Illi għalkemm kif diġa ingħad is-soċjeta' intimata ġiet interpellata diversi drabi sabiex tirrimedja din is-sitwazzjoni, inkluż iżda mhux limitatament permezz ta' ittra bonarja datata 17 ta' Jannar, 2014 ('Dok. B') u kif ukoll ittra uffiċjali datata 7 ta' April, 2014 ('Dok. A'), is-soċjeta' intimata baqgħet inadempjenti;*

Għaldaqstant, tgħid għalhekk is-soċjeta` intimata għaliex, għar-raġunijietpremessi, din l-OnorabbliQortim'għandhiex:

1. *Tiddikjara u tiddeċiedi, occorrendo bl-opra ta' periti nominandi,li l-fond ossia l-penthouse internament immarkata bin-numru tnax (12), f' Centre Court C, Triq it-Tiben, Swieqi li ġie akkwistat mir-rikorrenti mingħand is-soċjeta' intimata permezz tal-kuntratt ta' l-akkwist ippubblikat fl-Atti tan-Nutar Dottor Kristel-Elena Chircop fit-3 ta' Mejju, 2013, huwa affett minn difetti li ma kienux jidhru fil-mument tal-bejgħ ai termini tal-Artikolu 1427 tal-Kap. 16 tal-Liġijiet ta' Malta;*

2. *Tillikwida, occorrendo bl-opra ta' periti nominandi, dik il-parti tal-prezz tal-bejgħ li s-soċjeta' intimata għandha trodd lura lir-rikorrenti a kawża ta' dawn l-istess difetti li ma kienux jidhru fil-mument tal-bejgħ;*

3. *Tikkundanna lis-soċjeta' intimata tħallas lir-rikorrenti s-somma hekk likwidata;*

Bl-ispejjeż u l-imgħax legali mid-data tal-iffirmar tal-kuntratt ta' bejgħ de quo sad-data tal-pagament effettiv, inklużi dawk ta' l-ittra bonarja tas-7 ta' Jannar,

2014 u ta' l-ittra uffiċjali tas-7 ta' April, 2014 kontra s-soċjeta` intimata li hija minn issa nġunta in subizzjoni.

B`riserva ta` kull azzjoni ulterjuri spettanti lir-rikorrenti fil-konfront tas-soċjeta' intimata."

Having seen **the sworn reply of Central Home Style Limited filed on the 27th June 2014** wherein the following pleas were raised –

"Illi preliminarjament, l-azzjoni attriċi hija perenta bid-dekors ta' sena a tenur ta' l-artikolu 1431 tal-Kodiċi Ċivili;

1) *Illi preliminarjament ukoll, ma jikkonkorrux ir-rekwiżiti tal-artikolu 1424 tal-Kodiċi Ċivili (Kap. 16 tal-Liġijiet ta' Malta) stante li:*

    a. *Ma kienx hemm difetti li ma kienux jidhru fil-mument tal-bejgħ tal-fond ossia l-penthouse, internament immarkata bin-numru tnax (12), f'Centre Court C, Triq it-Tiben, Swieqi permezz tal-kuntratt ta' self u kompro-vendita tat-3 ta' Mejju 2013 fl-atti tan-Nutar Dottor Kristel-Elena Chircop (anness mar-rikors ġuramentat promotur tal-kawża odjerna u li qiegħed hemm immarkat bħala Dok. "E";*

    b. *Ma kienx hemm u ma hemmx fl-imsemmi fond ossia penthouse difetti li ma jidhrux illi jagħmluh mhux tajba għall-użu li għalih hu maħsub, jew li jnaqqsu daqshekk il-valur tiegħu;*

2) *Illi, mingħajr preġudizzju għal dak preċitat, skond ma jirriżulta mill-klawżola numru tnax (12) tal-preċitat kuntratt ta' self u kompro-vendita il-fond ossia penthouse ġie konsenjat fi stat "completed" u ottemporat ruħha*

mal-ispeċifikazzjonijiet hemm imsemmija u elenkati fid-dokument hemm anness u mmarkat bl-ittra "F";

3) *Illi, mingħajr preġudizzju għal dak preċitat, hekk kif ser jirriżulta fil-mori tal-kawża saru diversi xogħolijiet u anke modifikazzjonijiet mill-atturi stess jew minn terzi minnhom inkarigati li wasslu għal diversi ħsarat li għalihom huma responsabbli unikament l-atturi jew it-terzi li huma kienu inkarigaw biex jwettqu tali xogħolijiet jew alterazzjonijiet;*

4) *Subordinatament u mingħajr preġudizzju għall-premess, it-talbiet attriċi huma infondati fil-fatt u fid-dritt u għandhom jiġu miċħuda bl-ispejjeż;*

5) *Illi għalhekk dina l-Onorabbli Qorti ma għandhiex tillikwida parti tal-prezz biex dik tiġi mogħtija lura lill-atturi;*

6) *Salv eċċezzjonijiet ulterjuri.*

Bl-ispejjeż."

Saw its decree dated 8th October 2014[1] by virtue of which the Court upheld plaintiffs' request for the proceedings to continue in the English language.

Saw all the evidence brought forward by the parties.

Saw the Judicial Report compiled by the Court appointed experts architect Alan Saliba and Dr. Phyllis Aquilina on the merits of the case.

[1] Fol 117

Saw the Note of Submisions of parties.

Saw that the case was adjourned for judgement for today.

Saw all the other acts of the case.

Considered:

Plaintiffs had bought a *penthouse* from defendant Company in Swieqi, in which tenement latent defects allegedly emerged and for which they are now requesting the liquidation of that part of the sale price which represents the latent defects in question.

Defendant company is rejecting all the claims as unfounded in fact and at law.

EVIDENCE

1. **Plaintiff A C**[2] explained in his affidavit the reasons which led him and his wife to purchase the penthouse in question among which was the fact that the block was deemed as a prestigous, luxurious and situated in the best part of Swieqi.

At the time the block was still at construction stage. They signed a promise of sale agreement in February 2013 and defendant Company had even offered to reserve for them a garage in the block which they could purchase in 2 years. A separate agreement was signed to that effect. Plaintiff explained that in the meantime they made a complaint with vendors regarding bathroom and sanitary ware which had to be installed. When they came to Malta and went to inspect the works they were not very impressed with the overall quality of the works but they were reassured by their estate agent that the finishing was going to be

[2] Affidavit a fol 97 et seq

"polished off to high standard." He even told them that everything ws ready for use in so far as the installation of the solar panels and air conditioning system was concerned and they only had to buy the units and install them. In July 2013 though they discovered that this was not the case.

The contract was signed on the 3rd May 2013[3] and a few days before plaintiffs came to Malta. They went over to see the penthouse and notice that the overall finishing of the penthouse was not at all luxurious as advertised but since they liked the penthouse and were determined to buy it they proceeded to acquire it and decided to take care of certain details regarding the finishing themselves. However there were matters which needed to be addressed by the builder namely a substantial amount of water ingress from the roof in one of the bedrooms and a lesser amount of water ingress in the kitchen. Plaintiffs took immediate steps to address the issue and on the 2nd May they, together with representatives of defendant company inspected the place. The damage in the bedroom has already been scraped that morning and was also re-plastered. In the contract they also agreed that the whole ceiling of the bedroom would be re-painted within a month from the sale. They were also assured by the builder that the water ingress issue was a trivial one and explained that it happened because it rained exactly before they laid the membrane and so moisture was trapped beneath it, impeding the ceiling walls to dry.

Upon moving into the apartment in July 2013, plaintiff's wife called him and told him that the place was very dirty. She had a lot of cleaning to do including scraping off paint from floors and doors. She also noticed other shortcomings including the shower head they had complained about and that the re-painted damaged ceiling of the bedroom was not smooth and repaired area presented visible bumps. Some of the doors were not closing properly and some of the

[3] Fol 62 et seq

windows were found to have a defective locking system. Although she spoke to the representative of defendant Company about all this nothing was done from their end.

Plaintiff then explained another problem they had with regard to the air-conditioning system because contrary to what was agreed upon the system installed by defendant company was only a partial set-up. They therefore had to do additional works to remedy the situation.

Then between August and September 2013 they started to notice wet patches along the window/balcony door frames and jambs when it rained. They also started to notice small spots of mould developing around window frames, silicon sealant and tiles. At first they cleaned them without giving it much thought but mould kept reappearing fast. They also noticed among other things that black loose surface particles were continually falling from the roof and littering the terrace and balcony. By November the silicon around the apertures was completely peeling off.

They complained about all this with defendant company but to no avail.

In November 2013 the water ingress problem escalated so plaintiffs engaged the services of architect Hermann Bonnici who took photos and did a report. However defendant company never informed them how and when they were going to act upon these problems. When the water patches started to dry up, mould started to appear and it spread throughout the property to the extent that they became concerned about their own wellbeing. Damage was even being caused to some furniture including a newly installed fitted kitchen.

Also, due to problems which they encountered regarding the garage promised to them they decided to abandon their plan to buy it.

On the 20th December 2013 they noticed a worker of defendant company on the roof covering some hairline cracks on the outside render of the building. No works were carried out on the cracks visible in the shaft. They never received any proposed plan for repairs nor any confirmation from the builder that the defects complained about would be repaired in line with the construction regulations in force and with architect Bonnici's recommendations.

Architect Matthew Cachia Caruana surveyed their apartment on December 26th[4]. He did not consider the repair works carried out a week earlier as satisfactory, and evidenced, among other things, cracks still clearly visible on the building envelope, signs of water ingress around the external apertures, as well as an abnormal amount of humidity, condensation and consequent mould growth arising from the orientation of the external walls, the low insulation value, the poor ventilation and the requirement for heating of the internal space. The architect also doubted whether the penthouse was built according to the building regulations applicable to penthouses.

In view of the above plaintiffs sent a legal letter to defendant company[5].

He added that although on the 29th January 2014 defendant company sent an architect to inspect the property and even took photos, no one from defendant company ever went to their property to survey the walls and the damage they suffered.

On the 4th February 2014 two workers were sent to do more works on the outside walls where they once again plastered the cracks and painted all the wall. But yet again no works were carried out in the *shafts*.

[4] Rapport datat 6 ta' Jannar 2014 a fol 24 et seq
[5] Fol 19 et seq

On the 27th February their property was inspected by architects Elizabeth Muscat Azzopardi and Catherine Galea and they prepared a report[6] that the exposed walls and roof were not built in compliance to the maximum U-values enforced by LN 376 of 2012. They also noted a problem with ventilation in that it was not in conformity with the Code of Police laws and the technical guidance issued by the Building Construction Industry Department.

Moreover the estate agent who had helped them buy the apartment had accepted their invitation to go and see the place. He went on the 3rd March 2014 but although he appeared shocked to see the conditions of the penthouse he refused to interfere in the issue.

Plaintiff concluded by saying that after filing a judicial letter on the 7th April 2014[7] yet again defendant company ignored it. They kept hoping that an amicable solution would be found. Their complaint is that they ended up buying a property which developed serious latent defects which were impossible to detect at the time of purchase. This had a strong impact on their lives and disrupted their family plans. So they had no other option but to seek redress through the courts by filing the present case.

In his **evidence *viva voce***[8] plaintiff declared that his wife and himself had decided not to take up the option to buy the garage in the same block on account of defects and shortcomings in the garage which were not remedied. He added that the humidity level in the Penthouse had increased, and further that new mould growth had appeared following the undersigned's site inspection, whilst the doors were becoming more difficult to close.

[6] Fol 53 et seq
[7] Fol 15
[8] Fol 311

2. Plaintiff **B C**[9] also gave evidence in which she substantially confirmed what her husband said in the affidavit.

In her **evidence *viva voce***[10] she declared that additional water ingress had occurred since December 2014, throughout the winter season 2014-2015, and that mould had increased.

3. **Robert Cassar, ex employee with KNK Airconditioners** also gave evidence[11]. He had carried out the installation of five air-conditioning units in plaintiff's penthouse. He explained that plaintiff B C had informed him that the power supply and the drain for all five units as well as the preparation of copper were affixed in place. He declared however that, on closer examination, only drain pipes and power supplies were found. He explained that copper needs to be passed through a hole in the building where a pipe is to be installed. In plaintiffs' case, this work had still to be executed. He further explained that air-conditioning units are screwed into the ceiling where they are put, onto a rubber mount, a washer and then the leg of the A/C outside unit. The insertion of the screw plug penetrates the surface by only 2cm to 2/5cm. Silicon is put around the plug and during fixing of the rubber mount. He also clarified that the copper pipe is visible, if installed. Witness further stated that he was sent again to plaintiffs' Penthouse in October 2014 after KNK received a complaint that plaintiffs' compressors were removed. He declared that four of the compressors were moved to a different location on the same roof. Three of them were put slanting and the other was pulled forward in its original position. Clips were removed and the installation in the shaft came to a slanting position. He visited again plaintiffs' Penthouse in January 2015, to investigate plaintiffs' complaint that the units were not heating. On investigation, he said he found that the four

[9] Fol 107 et seq
[10] Fol 326
[11] Fol 324

units whose compressors were set on the roof had suffered loss of gas, and thus were not functioning. He was of the opinion that moving the units causes looseness in the copper connection, and thus loss of gas. Witness declared that, on that occasion, he noticed that although he had drilled two holes for two of the units, they had four holes that were patched.

Under cross-examination, Robert Cassar declared that he had got to know from Mrs. C that the copper pipes were meant to be already done. In so far as the holes he drilled are concerned, he said that he drilled one hole onto the terrace, one onto the balcony and another three onto the shaft. Each hole was 63mm in diameter. The holes were drilled around 40cm under the ceiling. For the 24000 btu units in the living room, he drilled another hole in the bedroom wall so that the piping was passed through the bedroom to the shaft. All holes were drilled from inside to outside and could not be drilled otherwise due to the height (four floors up) of the building. They were also drilled to full towards the outside. Witness further clarified that he could not seal the holes from the outside. Asked how could he be sure that the sealer impedes water ingress through the hole in the membrane, Cassar replied that he had been doing this for a number of years and he never encountered any problems or complaints of water ingress.

4. **Joseph Sullivan, the estate agent who brokered the sale of the Penthouse between plaintiffs and defendant company** also gave evidence[12]. He explained that when he accompanied plaintiffs to view properties in this complex, the Penthouse was being offered for sale as finished, not including furniture, but including tiles, bathrooms, plastering and doors, as well as drains for the air-conditioning units. At the time, it was in an advanced state of finishing with plastering ready and bathrooms already fitted or being fitted. He

[12] Fol 376 et seq

declared that plaintiffs had seen the Penthouse before signing the promise of sale agreement, and discussed the upgrading of bathroom accessories which were still missing. Sullivan declared further that he had accompanied plaintiffs' architect (a lady) to the Penthouse, which she inspected then. According to this witness, the Penthouse was finished at the time, with tiles, plastering and windows completed. He was present for the publication of the deed and recalled that no issues were raised saving for an upgrade of bathroom accessories. Sullivan added that, months after the publication of the deed, plaintiffs contacted him again because of a humidity issue, and in connection with a mess they claimed occurred when they installed the airconditioning systems. He said he offered to mediate, but the parties dealt directly with each other. Sullivan further declared on oath that the representatives of defendant company always showed readiness to assist plaintiffs.

Under cross-examination[13], Sullivan insisted that plaintiffs could see for themselves that the points and the drain pipes for the fixing of a/c units were in place. He confirmed also that they had agreed to the specifications sheet which mentioned these points and drains. He further confirmed that plaintiffs had visited the Penthouse in his presence immediately before they signed the promise of sale agreement. He said he accompanied their female architect by way of favour in their regard, as plaintiffs were not present. This occurred prior to the publication of the final deed of sale. With reference to the Energy Efficiency Certificate, Sullivan said he had not mentioned it to plaintiffs as, to his knowledge, it was not required at the time.

5. Another witness was **Carmel Debono, a shareholder and representative of defendant company** [14]. He said that he was responsible for the execution of

[13] Fol 386 et seq
[14] Fol 377 et seq

finishing works in this complex. He declared that plaintiffs' Penthouse was already finished before the signing of the preliminary agreement of sale, and only minimal accessories were yet to be installed. In so far as the airconditioning systems are concerned, the witness said that he had put in place the necessary electricity and drain connections. Plaintiffs had then to purchase the unit/s and engage fitters to install the units in place, drilling a hole in the wall for the passing of a copper pipe from the unit to the compressor which is normally put on the roof. Debono declared that, at the time of the contract, the roof was already covered in membrane. Carmel Debono declared that, after the publication of the deed, plaintiff A C had complained of water seeping into his penthouse. He attended to this complaint himself, and found the compressors fixed to the roof with bolts, which were drilled into the membrane. According to the witness, no sealer was put in the holes where the bolts were fitted, whilst copper wire was running from the compressor to a hole in plaintiffs' penthouse overlooking the shaft. According to the witness, expanding foam should have been placed round the copper pipe inside the hole to make sure that no water seeps in.

In so far as the plastering of external walls is concerned, Carmel Debono declared that this was done using GR2000, and applying paint over it. Internal walls were plastered with gypsum and then covered with water paint. The witness listed complaints which plaintiff forwarded to him at the time. These included that a window could not be closed, and that humidity appeared on the internal walls. Carmel Debono testified that he explained to plaintiff that they had to wait for the summer months so that the internal walls dry up, in order to be able to seal developing hairline cracks. Debono confirmed that he had actually carried out said works on the external walls, and further remedied openings in the sealing material for aluminium apertures. According to the witness, all apertures affixed in the Penthouse were brand new.

Under cross-examination[15], Carmel Debono declared that plaintiffs had complained of water ingress in the Penthouse during the winter following the purchase of the property, but could not confirm whether the replastering and repainting of the external walls took place before or after the affixing of the air-conditioning units.

6. **Louis Debono, a director of defendant Company** also gave evidence[16]. He insisted that plaintiffs were bound to obtain the company's approval before placing anything on the roof of the block. He declared that it was he who instructed representatives of Defendant Company to unbolt the air-conditioning compressors pertaining to plaintiffs, patch the membrane and replace the compressors to their original position without any bolts. He further insisted that hairline cracks in buildings are a normal occurrence, and that similar complaints from other purchasers were successfully addressed and remedied, unlike in this case.

Under cross-examination Louis Debono denied that he had himself advised plaintiffs where to install the air-conditioning units on the roof. He clarified however that defendant company's objection was not levelled at the location where the compressors were put, but at the fact that the ceiling and the membrane were drilled into.

7. **David Tabone, an employee of a company related to defendant company, Roger Satariano & Sons Ltd**[17], said that he takes care of the accounts of

[15] Fol 387 et seq
[16] Fol 387 et seq
[17] Fol 388

Defendant Company. He attended the signing of the promise of sale agreement between the parties, and could recall receiving complaints from plaintiffs regarding the air-conditioning units.

8. **The Court appointed architect Alan Saliba as a technical expert and lawyer Phyllis Aquilina as a legal referee, to prepare a report on all the aspects indicated in its decree of the 17th July 2014**[18]. From their report dated 4th March 2016[19] it results that –

- The experts carried out a site inspection on the 9th October 2014 and plaintiffs indicated the following alleged latent defects: (i) cracks in the internal and external walls of the penthouse; (ii) infiltration of water and mould; (iii) technical deficiencies which are pointed out in the condition report prepared on plaintiffs' instruction by Ing. Elizabeth Muscat Azzopardi and architect Catherine Galea.

- Experts noted that plaintiffs present their complaints through a number of architects/engineer reports which they commissioned. Their complaints were summarised as follows –

  1. Water Ingress (Main Defect)
  2. Lacking air-conditioning preparation
  3. Missing vents
  4. Low insulation
  5. Loose membrane particles

[18] Fol 92
[19] Fol 154 et seq

- Experts heard parties' *viva voce* evidence and witnesses they brought forward.

- Documentation and photographs were also filed to support evidence tendered.

- Court experts made both technical and legal considerations.

- The concluding opinion of the referees is that this Court should proceed to determine plaintiff's demands by –

  (i) rejecting defendant company's first plea of forfeiture of the action, and its fourt plea based on the alleged imputability of the defects to plaintiffs' actions;

  (ii) upholding the second, fifth and sixth pleas raised by defendant company, declaring thus that the legal requirements for the successful exercise of the action are not satisfied in this case; and

  (iii) consequently rejecting all plaintiffs' demands.

  (iv) in view of the points of law involved, and by application of article 223 (3) of Chapter 12, either party shall bear its own costs in connection with these proceedings.

4. Cout expert architect Alan Saliba replied to questions submitted by plaintiffs in writing[20] and *viva voce*[21] in relation to the report.

[20] Fol 183 et seq
[21] Fol 197 et seq, fol 217 et seq, fol 265 et seq

Considered:

The action filed by plaintiffs is an *actio aestimatoria* by virtue of which they are requesting the Court to order a reduction in the selling price of the property on account of latent defects.

It is based on **article 1427 of the Civil Code** which states that -

"In the cases referred to in articles 1424 and 1426, the buyer may elect either, by instituting the actio redhibitoria, to restore the thing and have the price repaid to him, or, by instituting the action aestimatoria, to retain the thing and have a part of the price repaid to him which shall be determined by the court."

The other legal provisions of the Civil Code which are applicabe to the case are –

1424. *The seller is bound to warrant the thing sold against any latent defects which render it unfit for the use for which it is intended, or which diminish its value to such an extent that the buyer would not have bought it or would have tendered a smaller price, if he had been aware of them.*

1425. *The seller is not answerable for any apparent defects which the buyer might have discovered for himself.*

1426. *Nevertheless, he is answerable for latent defects, even though they were not known to him, unless he has stipulated that he shall not in any such case be bound to any warranty.*

1429. *(1) If the defects of the thing sold were known to the seller, he is not only bound to repay the price received by him but he is also liable in damages towards the buyer.*

(2) If the defects were not known to the seller, he is only bound to repay the price and to refund to the buyer the expenses incurred in connection with the sale."

Preliminary plea

In its first plea, defendant company claims that plaintiffs' action is time-barred in terms of **article 1431 of the Civil Code**.

This article states that -

"1431. (1) The actio redhibitoria and the actio aestimatoria shall, in regard to immovables, be barred by the lapse of one year as from the day of the contract, and, in regard to movables, by the lapse of six months as from the day of the delivery of the thing sold.

(2) Where, however, it was not possible for the buyer to discover the latent defect of the thing, the said periods of limitation shall run only from the day on which it was possible for him to discover such defect.

(3) The said periods of limitation shall run as provided in sub-article (2) of article 1407."

It is to be noted first and foremost that although in the aforementioned article the legislator refers to the term "prescription", the time frame is one of forfeiture and hence it cannot be interrupted by means of a judicial letter.

In the case **Benjamin Cassar Bernard vs Allan Magro decided on the 4th March 2015** the Court stated that -

*"Issir referenza għas-sentenza riċenti fl-ismijiet '**Francis Felice u martu Rita Felice għal kull interess li jista` jkollha kontra Anthony Pisani'** deċiża fit-18 ta' April 2013 mill-Prim'Awla tal-Qorti Ċivili, kif ukoll għal sentenzi oħra tal-Onorabbli Qorti ta' l-Appell mhux daqstant riċenti (**Pizzuto vs Refalo**, Vol.XX.1.316; **Ruggier vs German**, XXX.1.377 u **Arrigo vs Falzon**, Vol. XXX11.1.508) fejn ġie ritenut li dan it-terminu huwa terminu di rigore u ntqal ukoll illi l-ġurisprudenza, tant lokali kemm estera, qatt ma ddubitat illi fil-każ ta' l-azzjoni redibitorja kontemplata fl-Artikolu 1431 tal-Kodiċi Ċivili, hemm terminu ta` dekadenza, u mhux ta` preskrizzjoni vera u proprija, għalkemm il-leġislatur juża l-espressjoni ta` preskrizzjoni. Għalhekk m'hemmx dubbju li l-azzjoni redhibitoria u/jew aestimatoria għandha perijodu ta' dekadenza marbut magħha (ara **Carmelo Dimech vs Francis Xuereb**, App. Ċiv. 15.12.1997)."*

In the case **Norman Spiteri noe vs L-Avukat Dottor Pierre Lofaro et noe decided on the 14th October 2009** the Court added that -

"Fil-kawża fl-ismijiet Carmelo Dimech vs Francis Xuereb et deċiża mill-Qorti ta' l-Appell Civili Superjuri fil-15 ta' Dicembru 1997 ingħad li: "Il-perjodu ta' dekadenza jibda jiddekorri minn meta l-kumpratur seta' jiskopri d-difett, u mhux minn meta jistabbilixxi l-kawża tad-difett. Malli kellu dubju ragjonevoli għall-eżistenza tad-difett, il-kumpratur kellu l-obbligu li jinvestiga n-natura u t-tip ta' difett. Il-liġi ma riditx li tħalli d-dubji.

Fil-kawża Edward Fenech et vs Gaetano Spiteri deċiża mill-Qorti ta' l-Appell Ċivili Superjuri fl-4 ta' Lulju 1990 ingħad li t-terminu jibda jiddekorri minn dak in-nhar li seta' jkun li nkixef id-difett u li dan it-terminu huwa wieħed ta' dekadenza u għalhekk perentorju: "Biex il-kompratur jista' jsostni l-azzjoni tiegħu proposta wara d-dekors taż-żmien jeħtieġlu jipprova illi huwa, fiż-żmien utili, informa lill-venditur bil-vizzju tal-ħaġa u li dan, f'dan iż-żmien, ippromettа li jieħu l-ħaġa lura, jew almenu rrikonoxxa jew ma kkuntrastax l-eżistena tal-vizzju tal-ħaġa u li dan, f'dan iż-żmien, ippromettа li jieħu l-ħaġa lura, jew almenu rrikonoxxa jew ma kkuntrastax l-eżistenza tal-vizzju. Ir-rikonoxximent tal-vizzju da parti tal-venditur biex jissospendi d-dekadenza, irid ikun ċar, formali, espliċitu u inkondizzjonat."

In the report of the court appointed experts, the legal referee Dr Aquilina stated as follows –

"78. Plaintiffs acquired the Penthouse on 3rd May 2013. They filed this action on 4th June 2014.

79. As already explained, our Courts consistently ruled that the one-year term for the filing of this action is a period of forfeiture, following the lapse of which purchasers forfeit their right to pursue this remedy for latent defects. The said one year starts to run from the date of the purchase or, where it was not possible for the buyer to discover the latent defect with the use of ordinary care, attention and diligence, from the day on which it was possible for him to discover the defect.

80. Besides the water ingress incident prior to the publication of the deed, plaintiffs claim that they became aware of water ingress and mould patches developing in their Penthouse in August and September 2013. In so far as the lacking copper connections in air-conditioning preparation and the missing

vents are concerned, the Technical Referee concluded that these were very easily verifiable prior to the completion of the purchase, on account of the fact that their presence is immediately visible. In so far as the low insulation and the loose membrane particles are concerned, the Technical Referee concluded that these may well constitute variances from the promised quality of the finishing of the Penthouse, but are in no way 'defects' in the Penthouse, and therefore cannot be remedied through the actio aestimatoria.

81. The undersigned Legal Referee is therefore of the opinion that, without prejudice to the legal considerations whether plaintiffs' claims are justified on the merits, this action was not time-barred at the time of filing, at least in so far as the incidents of water ingress and mould patches are concerned.

The Court is competely in agreement with the observations made by the court appointed legal expert Dr Phyllis Aquilina, makes these considerations its own and has no additional observations to make in this respect.

In the light of all the above the Court deems that the plea is not justified at all.

As indicated above, some alleged defects were noted only a few months after the purchase (water ingress and formation of mould), others could have been verified before the sale of the property itself and the rest cannot qualify as 'defects' within the context of the present action.

So the action is deemed to be filed within the time-frame stipulated by law particularly with regard to the claims about water percolation and mould in the penthouse.

Therefore the first preliminary plea of defendant company is accordingly being rejected.

Merit

From the evidence tendered during the proceedings plaintiffs are alleging that shortly after they purchased the penthouse in question, various latent defects started to emerge for which they are claiming reimbursement of part of the sum paid for the said property.

Before proceeding with the analysis of the claims the Court considers it appropriate to highlight the most salient principles regarding the *actio aestimitatoria* emerging from jurisprudence.

In the case **Andrew Ransley v Harold Felice decided on the 16th November 2017** the Court stated that -

"8. Permezz ta' din l-azzjoni, l-Attur qiegħed jitlob li mill-prezz jitnaqqas tant ammont u li jintradd lura lilu, b'konsegwenza tad-difett moħbi, fil-waqt li jibqa' jżomm il-ħaġa mixtrija. Din hija għalhekk l-azzjoni magħrufa bħala l- "actio aestimatoria" ossia "quanti minoris".

9. Għalhekk din il-Qorti ser tagħmel il-konsiderazzjonijiet tagħha fid-dawl ta' din l-azzjoni fil-kuntest tal-fatti li jemerġu mill-atti tal-kawża.

10. Stabbilita x-xorta ta' azzjoni mill-ewwel issir referenza għas-sentenza fl-ismijiet, Tancred Manfre' -vs- Carmel sive Charles Micallef tal-Qorti Ċivili Prim' Awla per Imħallef Joseph R. Micallef tad-9 ta' Frar 2012, fejn il-Qorti kellha dan xi tgħid dwar din l-azzjoni:-

"l-azzjoni stimatorja (jew kif magħrufa wkoll bħala quanti minoris) hija rimedju mogħti mil-liġi lix-xerrej fir-rabta li l-bejjiegħ tiegħu għandu li jiggarantixxi li jagħmel tajjeb għad-difetti li ma jidhrux tal-ħaġa mibjugħa li jagħmluha mhix tajba għall-użu li għalih hija maħsuba, jew li jnaqqsu daqshekk il-valur tagħha

illi x-xerrej ma kienx jixtriha jew kien joffri prezz iżgħar li kieku kien jaf bihom (Art. 1424 tal-Kap 16);

Illi l-imsemmija azzjoni hija mħarsa b'dak li jgħid l-artikolu 1427 tal-Kodiċi Ċivili u li jagħti lix-xerrej l-għażla ta' waħda minn żewġ azzjonijiet f'każ li joħorġu difetti mistura fil-ħaġa mixtrija: jew l-għażla li jħoll il-kuntratt u jitlob irradd lura tal-prezz imħallas, jew li jżomm il-ħaġa mixtrija imma jitlob lura l-Cit. Nru. 478/05TA 8 biċċa mill-prezz li l-Qorti tistabilixxi. Din l-azzjoni tgħodd kemm jekk il-ħaġa mixtrija tkun mobbli u kif ukoll, bħal f'dan il-każ, jekk tkun immobbli;

Illi minn kliem il-liġi, jidher ċar li mhux kull difett jgħodd biex isejjes l-azzjoni. Ibda biex, irid ikun difett li ma jkunx jidher fil-waqt li jkun sar il-bejgħ (P.A. NC 23.4.2004 fil-kawża fl-ismijiet Carmel Mifsud et vs Joseph Sant et (mhix appellata). Minbarra dan, irid ikun ukoll nuqqas li jagħmel il-ħaġa mixtrija mhux tajba għall-użu li għaliha nxtrat jew li jnaqqas hekk il-valur tagħha li xxerrej ma kienx jixtriha jew kien joffri prezz anqas;

Illi biex nuqqas f'ħaġa jitqies bħala difett għall-finijiet tal-azzjoni estimatorja, jeħtieġ li jkun "annormalita' jew imperfezzjoni, gwast jew avarija li tiġi riskontrata fil-ħaġa u li, aktar jew anqas, tneħħilha l-attitudini għall-użu jew il-bonta' jew l-integrita' tagħha" (App. Ċiv. 29.1.1954 fil-kawża fl-ismijiet Borġ vs Petroni noe (Kollez. Vol: XXXVIII.i.279).

Minbarra dan, dawk il-vizzji jridu jkunu gravi u kienu jinsabu fil-ħaġa mibjugħa sa minn qabel il-bejgħ u baqgħu hekk jeżistu fil-waqt tal-bejgħ. Fuq kollox, dawk id-difetti jridu jkunu tali li x-xerrej ma setax jintebaħ bihom meta jagħmel eżami serju u għaqli tal-ħaġa meqjusa l-ħila u l-għarfien tiegħu fiċ-ċirkostanzi (P.A. 4.11.1957 fil-kawża fl-ismijiet Moore noe vs Falzon et (Kollez. Vol: XLI.ii.1134)). Huwa stabilit ukoll li l-piż tal-prova li d-difett kien wieħed mohbi jaqa' fuq l-attur xerrej u jekk ikun hemm dubju, dan imur favur il-bejjiegħ

imħarrek (P.A. NC 28.1.2005 fil-kawża fl-ismijiet Mark Farruġia et vs Michael Arthur Williams et (mhix appellata));"

Having said that the buyer has the duty of acting as *bonus pater familias* by conducting all the necessary verifications of the state and condition of the thing bought and he cannot bring forward this action if what he is complaining about could have been discovered prior to the purchase.

In the case **Giuseppe Gerada vs Salvu Attard**[22] the Court said –

"Il-leġislatur impliċitament jimponi lill-kompratur l-obbligu li jivverifika l-istat u l-kondizzjoni tal-ħaġa, taħt il-piena li ma jkunx jista' mbagħad jissolleva ebda reklam għall-vizzji apparenti li minnhom il-ħaġa tkun affetta; u din il-verifika għandu jagħmilha bid-diliġenza konsweta li juża l-bonus pater familias, u mingħajr distinzjoni jekk il-verifika tippreżentax fil-fatt diffikultajiet kbar jew żgħar, billi l-liġi, meta ġġiegħel tiddependi l-apparenza tal-vizzju miċ-ċirkustanzi li l-kumpratur seta' jinduna bih, ma tibbaża bl-ebda mod la għall-mezzi li bihom għandu jinqeda, u lanqas għall-ostakoli maġġuri jew minuri li kellu bżonn jissupera, naturalment sakemm il-konoxxenza tal-vizzju ma tkunx tippreżenta diffikulta' tali li, nonostanti l-eżerċizzju ta' l-imsemmija diliġenza, il-vizzju ma jkunx jista' jiġi skopert; u jekk ix-xerrej ma jkunx kapaċi jivverifika hu personalment il-ħaġa, għall-inesperjenza jew imperizja tiegħu, għandu f'dan il-każ jisserva jew jassisti ruħu minn persuna prattika u esperta; u jekk ma jagħmilx hekk, ma jkunx jista' jgħid li adempixxa dan l-obbligu tiegħu, l-għaliex dan hu wieħed mill-każi li fihom għandha tiġi applikata r-regola imperita culpae adnumeratur sakemm naturalment, dan jiġi ntiż in relazzjoni għal dik ta' l-ordinarja u konsweta diliġenza ta' eżami li aktar il-fuq ġiet aċċennata; għaliex il-liġi ma teżiġix xogħol li mhux soltu jsir, eżami diffiċlu u komplikat, provi

[22] Commercial Appeal 6th November 1959, quoted in the book "L-Alfabett tal-Kodiċi Ċivili – Volume A" by Mr Justice Emeritus Philip Sciberras pg 559

tekniċi, esperimenti twal, imma almenu eżami pju o meno akkurat ta' bniedem prattiku."

In view of the technical nature of the alleged technical defects which plaintiffs complained about in the present case, the technical expert architect Alan Saliba was specifically appointed to delve into these issues from a technical point of view. The technical considerations made by this expert as laid out in the report are the following –

" G. Technical Considerations

46. Plaintiffs acquired the property in question from defendant company in virtue of a contract dated the 3rd May 2013 in the acts of Notary Dr Kristel-Elena Chircop[23] for the price of €267,868. This property is Apartment 12, 'Centre Court C', Triq it-Tiben, Swieqi and consists of a Penthouse located in a block of apartments with access from common stairwell with lift. This apartment includes an open-plan kitchen/dining/living room with large terrace, two bedrooms, shower-room and boxroom overlooking an internal shaft and a main bedroom with ensuite shower-room and terrace at the back.

47. As already stated, a relevant clause in this contract is Condition 10(iii) which states that "The external walls of the Block of apartments, including the exposed dividing walls with neighbouring tenements shall, only for the purpose of

[23] Doc. E annexed to the Sworn Application

maintenance and repairs, be deemed common parts of the Block which fall under the jurisdiction of the Administrator or until such time as the Administrator is appointed under the jurisdiction of the Vendor, provided each apartment owner shall pay a Pro Rata share of the expenses disbursed for the maintenance and repair thereof."

48. Another relevant clause is Condition 12 whereby the vendor declares that the property in question has been completed to the specifications in Doc. 'F' therewith attached. Relevant specifications from this document include:

"Plastering of internal shafts with sand and cement plastering and two coats paint."

"Finishing of roof with 'kontrabejt' and water-proof membrane."

"Air-conditioning preparation Electrical point and Drain included."

49. Plaintiffs present their complaints through a number of Architects/Engineer reports which they commissioned. Their complaints can be summarized as follows:

1. ***WATER INGRESS (the main defect)***
2. ***LACKING AIR-CONDITIONING PREPARATION***
3. ***MISSING VENTS***
4. ***LOW INSULATION***
5. ***LOOSE MEMBRANE PARTICLES***

Plaintiffs refer also to problems with the garage in the same block[24], however this case concerns only the Penthouse in question as this garage was not purchased[25] and hence the problems related with this garage are not being considered.

G.1 Water Ingress

50. The main complaint put forward by Plaintiffs regards the water ingress in the Penthouse[26] that is creating mould and damages to movables[27] and internal doors not closing due to their expansion. This water ingress also caused mould growth around the apertures and their silicone surround to peel off[28]. In this regard, defendant company submits that plaintiff expected that any lack in sealing material had to be remedied by the replacement of the aperture itself[29].

51. It is quite evident that water is percolating inside the Penthouse in question through the higher parts of the exposed party-walls (photos Doc. 'ABX') on the Northern side of the Penthouse[30] and to a lower extent through the exposed shaft-walls[31] on the southern part of the Penthouse. This water ingress is also causing

[24] Plaintiff A C Affidavit Doc. AAB para. 21; Plaintiff B C Affidavit Doc. AEB para. 21.
[25] Plaintiff A C Affidavit Doc. AAB para. 18; Plaintiff A C Evidence during Sitting number 2, 17.11.2004; Plaintiff B C Affidavit Doc. AEB, para. 18.
[26] Plaintiff A C Affidavit Doc. AAB, para. 16; Plaintiff B C Affidavit Doc. AEB, para. 16.
[27] Sixth Declaration in Plaintiffs' sworn application
[28] Plaintiff A C Affidavit Doc. AAB, para. 14; Plaintiff B C Affidavit Doc. AEB, para. 14.
[29] Carmel Debono Evidence during Sitting number 9, 28.5.2015.
[30] Architect Hermann Bonnici Report, Doc. F attached to the Sworn Application
[31] Architect Catherine Galea Report, Doc. D attached to the Sworn Application

mould growth in the walls and ceilings[32], accentuated by the fact that the internal walls were plastic painted (on water-paint) on plaintiff's demand[33]. This is due to the fact that plastic paint does not have the breathing qualities of water-paint.

52. Although defendant company contends that plaintiffs carried out works that caused water infiltration, such as the air-conditioning unplastered holes[34], incorrect fixing of copper pipes (directly up and not down and up to avoid water ingress along pipe)[35], and the air-conditioning external unit fixing system that perforated the roof membrane[36] (by 2 to 2.5cm on rubber mount with silicon around plug[37] where installer also mentions that although he had drilled two holes, he saw four holes that were patched[38] when the four external units were moved to a different location on the same roof[39]), it is quite clear that water percolated solely through cracks in the walls (as correctly reported by Architect Rossignaud[40]), mainly through the exposed party-walls that face the predominant and prevailing Northern winds (mould in ceilings is not caused by water ingress from roof but by high levels of humidity inside the Penthouse caused by water ingress through the walls). These cracks were noted during the site inspection carried out by

[32] Plaintiff A C Affidavit Doc. AAB, para. 17; Plaintiff B C Affidavit Doc. AEB, para. 17

[33] Carmel Debono Evidence during Sitting number 9, 28.5.2015 – however, no evidence supporting this claim was produced

[34] Robert Cassar Evidence during Sitting number 6, 17.3.2015; Carmel Debono Evidence during Sitting number 9, 28.5.2015

[35] Carmel Debono Evidence during Sitting number 9, 28.5.2015

[36] Carmel Debono Evidence during Sitting number 9, 28.5.2015

[37] Robert Cassar Evidence during Sitting number 6, 17.3.2015

[38] Robert Cassar Evidence during Sitting number 6, 17.3.2015

[39] Robert Cassar Evidence during Sitting number 6, 17.3.2015; Louis Debono Evidence during Sitting number 9, 28.5.2015 and Cross-examination during Sitting number 10, 20.6.2015; Carmel Debono Cross-examination during Sitting number 10, 30.6.2015

[40] Architect Edgar Rossignaud Report Doc. ABZ

the Judicial Referees on the 9th October 2014, and also by the plaintiffs' Architects during their inspections following the sale.

53. The Penthouse in question is located within a new building[41] that was still in shell form when plaintiffs were house-hunting (January 2013)[42], although the estate agent and defendant company claim that when plaintiffs visited the Penthouse for the first time, it was in an advanced state of finishing[43]. Nonetheless, it is not contested that the Penthouse had just been finished on the date of publication of the deed of sale (in April 2013 the Penthouse was not finished yet[44]). Prior to the signing of the promise of sale agreement, set for 1st February 2013, plaintiff involved Architect Edgar Caruana Montaldo[45] whose evidence was not produced during these proceedings. Plaintiffs' 'female Architect' also inspected property before the final deed to check whether Penthouse was according to MEPA when Penthouse was finished[46], however her testimony was also not heard.

54. Hence, on the date of sale (May 2013), the property in question - consisting of the most exposed part of the building, that is the Penthouse - was not yet subjected to the thermal movements that occur during the extreme temperatures of the following Summer months. In fact, this water ingress occurrence appeared a few

[41] Architect Matthew Cachia Caruana Report Doc. 'C' attached to the Sworn Application
[42] Plaintiff A C Affidavit Doc. AAB, para. 1/2; Plaintiff B C Affidavit Doc. AEB, para. 1/2
[43] Joseph Sullivan Evidence during Sitting number 9, 28.5.2015; Joseph Sullivan Cross-examination during Sitting number 10, 30.6.2015; Carmel Debono Evidence during Sitting number 9, 28.5.2015; Carmel Debono Cross-examination during Sitting number 10, 30.6.2015
[44] Plaintiff A C Affidavit Doc. AAB para. 8; Plaintiff B C Affidavit Doc. AEB para. 8
[45] Plaintiff A C Affidavit Doc. AAB para. 4; Plaintiff B C Affidavit Doc. AEB para. 4
[46] Joseph Sullivan Evidence during Sitting number 9, 28.2.2015 and Cross-examination during Sitting number 10, 30.6.2015

months after the sale (first signs of wet patches along window/balcony door frames and jambs and small spots of mould along window frames, silicone sealant and tiles were noted between August and September 2013 when it rained[47] and significant water ingress in November 2013[48]). ***It is a normal occurence that during the Summer months the ceilings (made of concrete) expand, pushing with them the walls and thus causing the cracks in question at the higher parts of the walls both in the joints and in the GR2000 plastering[49].***

55. Following this November 2013 water ingress incident, defendant company executed repair works on 20th December 2013 along the upper section of the outer face of the external wall[50] (although no works were carried out in the shaft[51]) which, according to plaintiffs' Architect, were not propertly carried out[52]. These works were again carried out on 4th February 2014 when workers plastered the cracks and painted the full height of the outside walls[53]. In this regard, it is important to mention that these cracks should be filled with a flexible compound to prolong their reappearance as much as possible.

56. Plaintiffs' Architect Bonnici also mentions wetness in the lower area of the door jamb leading from the living to the terrace

[47] Plaintiff A C Affidavit Doc. AAB para. 14; Plaintiff B C Affidavit Doc. AEB para. 14

[48] Plaintiff A C Affidavit Doc. AAB para. 16; Plaintiff B C Affidavit Doc. AEB para. 16; Legal letter dated 17/01/2014 Doc. B attached to Sworn Applicatiom; Architect Hermann Bonnici Report Doc. F attached to Sworn Application

[49] Carmel Debono Evidence during Sitting number 9, 28.5.2015

[50] Architect Matthew Cachia Caruana Report Doc. C attached to Sworn Application

[51] Plaintiff A C Affidavit Doc. AAB para. 19; Plaintiff B C Affidavit Doc. AEB para. 19

[52] Architect Matthew Cachia Caruana Report Doc. C attached to Sworn Application, pg 3

[53] Plaintiff A C Affidavit Doc. AAB para. 24; Plaintiff B C Affidavit Doc. AEB, para. 24; Carmel Debono Evidence during Sitting number 9, 28.5.2015 and Cross-examination during Sitting number 10, 30.6.2015

due to poor detailing in the junction between the aluminium door frame and the external wall finish[54] (photos Doc. 'ABX') whilst plaintiffs' Architect Galea also mentions a crack in the joint between the edge of the back balcony to main bedroom to the party wall which may lead to water ingress in the underlying slab[55].

57. It also transpires that on 30th April 2013, three days before the final deed, there was extensive water infiltration from the roof in one of the bedrooms and a less important one in the kitchen area that were taken care of before the signing of the final deed[56]. Plaintiffs also mention that there were some irregularities in the rendering of this damaged area in the bedroom ceiling and that some of the windows had defective locks[57], however these damages were neither shown during the onsite inspections nor elaborated on during evidence submitted.

58. In conclusion, the undersigned Technical Referee concludes that the occurrences related to the water-ingress after the date of sale are a consequence of: (1) cracks which developed in the outside walls of this brand new Penthouse during the summer months and (2) rainwater falling in the subsequent winter months infiltrated through these cracks inside the Penthouse. This occurrence cannot be considered as a latent defect since it did not exist at the time of purchase, when the Penthouse was brand new, but appeared in the following months.

[54] Architect Hermann Bonnici Report Doc. F attached to the Sworn Application
[55] Architect Catherine Galea Report Doc. D attached to the Sworn Application, pg 6
[56] Plaintiff A C Affidavit Doc. AAB para. 9; Plaintiff B C Affidavit Doc. AEB para. 9.
[57] Plaintiff A C Affidavit Doc. AAB para. 10; Plaintiff B C Affidavit Doc. AEB para. 1

G.2 Lacking Airconditioning Preparation

59. Plaintiffs are also complaining that the air-conditioning preparation was missing since when they installed the air-conditioning units after the sale they found that only the electrical points and drain outlets were prepared and there was no preparation for the copper piping[58].

60. Air-conditioning units consist of an internal unit and an external unit where the internal unit is connected to the electrical supply and to a drain outlet whilst the external unit is connected to the internal unit through electrical wire and copper pipes that are usually insulated and taped together.

61. As submitted by defendant company[59], the preparation for the copper piping is not something that is usually done since the copper piping is not flexible and hence the exact location of the perforations that are required to be carried out in the building fabric are only known on the day of installation. Furthermore, these holes, if prepared before-hand, will also be a nuisance due to water infiltration. Although the air-conditioner installer testified that plaintiff B C informed them that the copper was also installed, but they only found the electrical point and drain pipes installed onsite[60], as mentioned above, it is common practice that

[58] Plaintiff A C Affidavit Doc. AAB para. 11; Plaintiff B C Affidavit Doc. AEB para. 11
[59] Carmel Debono Cross-examination during Sitting number 10, 30.6.2015
[60] Robert Cassar Evidence during Sitting number 6, 17.3.2015

the copper-pipes hole is done during installation and in fact the installers executed these works[61] (by drilling 63mm holes in the walls, 40cm under the ceiling[62] - photo Doc. 'ABX') without any evidence of any additional costs suffered by plaintiffs in this regard.

62. If plaintiffs expected that the copper-pipes preparation was included, these could have easily be seen on site[63]. Even the positioning of the points on an inside rather than an outside facing wall as complained by plaintiffs[64], could have easily be noted on the date of the sale. Hence, the complaints regarding the lack of air-conditioning preparation as constituting a latent defect in the Penthouse cannot be entertained.

G.3 Missing Vents

63. Plaintiffs' engineer reports that bedroom 2 does not have a passive vent[65] whilst the living area has only one vent and requires another one[66]. The undersigned Technical Referee shares this view as these vents are required according to the sanitary laws (Article 97/1/e of the Code of Police Laws Chapter 10) considering the size and use of the relative rooms.

[61] ibid.
[62] ibid.
[63] ibid.
[64] Plaintiff A C Affidavit Doc. AAB para. 11; Plaintiff B C Affidavit Doc. AEB para. 11
[65] Plaintiff A C Affidavit Doc. AAB para. 14; Plaintiff B C Affidavit Doc. 'AEB' para. 14
[66] Engineer Elizabeth Muscat Azzopardi Report Doc. D attached to Sworn Application, pg 6

64. Nonetheless, the vents or lack thereof is easily visible, and hence the missing vents cannot be considered as a latent defect in the Penthouse.

G.4 Low Insulation

65. Plaintiffs refer to the low energy performance of the Penthouse, and that no one had ever mentioned that the vendor should have given them the Energy Performance Certificate (EPC) when purchasing the property[67] as confirmed by the estate agent[68]. Infact, plaintiffs' Engineer calculated the U-values of the roof and exposed walls from a visual inspection based on normal building practices[69] rather than on the actual building fabric.

66. The type, or rather lack of, insulation in a building is not considered as a defect but rather as an indication of the quality of the building with regards to its performance in respect to the climate and the environment where the building is located. Although plaintiffs submit that they were under the impression that they bought a property "built to a true luxury specification", but in actual fact they acquired a property with low energy performance (Doc. 'ABY'), this EPC could have provided a good indication of the performance levels of the Penthouse on the date of the sale. Furthermore, there is no indication of any non-compliance to the specifications list Doc. F annexed to the contract of sale in question.

[67] Plaintiff A C Affidavit Doc. AAB para. 20; Plaintiff B C Affidavit Doc. AEB para. 20
[68] Joseph Sullivan Cross-examination during Sitting number 10, 30.6.2015
[69] Engineer Elizabeth Muscat Azzopardi Report Doc. D attached to Sworn Application, pg 4

G.5 Loose Membrane Particles

67. Plaintiffs complain also of membrane particles that come loose and litter their terraces[70]. These membrane particles consist of loose particles from the membrane installed on the roof that are blown away by the wind. These loose particles tend to diminish eventually and this can only be accelerated by simply sweeping the roof membrane and/or by painting the membrane.

68. Nonetheless, this complaint is not in actual fact a defect in the Penthouse, but, if anything, an occurrence on the overlying roof.

G.6 The Effect of these Defects on the Selling Price

69. Since the defects lamented by the Plaintiffs (1) those causing Water Ingress could not be seen on the date of sale not because they were hidden but because they did not exist; (2) the Lacking Air-conditioning Preparation and (3) Missing Vents, could have been easily noted on the date of sale (furthermore a property with a number of vents cost the same as a similar property missing two vents); (4) the Low Insulation cannot be considered as a latent defect since there is no indication of non-compliance with the specifications of the contract and no EPC was included in the sale, and (5) the Loose Membrane Particles are not a defect in the

[70] Plaintiff A C Affidavit Doc. AAB para. 14. Plaintiff B C Affidavit Doc. AEB para. 14.

property in question, said 'defects' do not in any way affect the Selling Price of the Penthouse."

Based on these technical considerations and conclusions, the court appointed legal expert Dr Phyllis Aquilina made the following observations and conclusions -

"After considering the technical explanations and conclusions of the undersigned Technical Referee, the undersigned Legal Referee concludes that the complaints which plaintiffs raised about the Penthouse (in particular the water ingress and mould growth, the lack of copper wire connections in preparation for the installation of airconditioning units, and the reduced energy efficiency of the Penthuse) are ***not*** *latent defects within the scope of* ***art. 1424*** *of the Civil Code. Therefore, plaintiffs could not avail themselves of the actio aestimatoria to obtain a diminution of the price, and the reimbursement of excess paid. The Penthouse was not shown to lack some essential quality which is indispensable for its basic use as a residential tenement for plaintiffs. In fact, plaintiffs have settled, and continued, to live in this Penthouse, without interruption.*

In this case, plaintiffs ex admissis repeatedly alleged that the Penthouse delivered was found not to be up to the expected or promised high standards, which claim, even if proved, can never form the merits of an actio aestimatoria."

At this stage it is important to highlight the fact that in line with constant jurisprudence, court experts reports have probatory value and although the Courts are not bound to adopt the conclusions of said reports yet they should not summarily discard them unless they are incorrect and unjust. This is said

especially when the case being dealt with is one that stems for very technical issues as is today's case.

As was stated in the case **Noel Pisani et pro et noe vs Adam Bartolo decided on the 12 th April 2016**[71] **-**

*"Fis-sentenza tagħha tad-19 ta` Novembru 2001 fil-kawża **"Calleja vs Mifsud**", il-Qorti tal-Appell qalet hekk –*

'Kemm il-kostatazzjonijiet tal-perit tekniku nominat mill-Qorti kif ukoll il-konsiderazzjonijiet u opinjonijiet esperti tiegħu jikkostitwixxu skond il-liġi prova ta` fatt li kellhom bħala tali jiġu meqjusa mill-Qorti. Il-Qorti ma kenitx obbligata li taċċetta r-rapport tekniku bħala prova determinanti u kellha dritt li tiskartah kif setgħet tiskarta kull prova oħra. Mill-banda l-oħra pero', huwa ritenut minn dawn il-Qrati li kellu jingħata piż debitu lill-fehma teknika ta' l-espert nominat mill-Qorti billi l-Qorti ma kellhiex leġġerment tinjora dik il-prova. Hu manifest mill-atti u hu wkoll sottolinejat fir-rikors ta' l-appell illi l-mertu tal-preżenti istanza kien kollu kemm hu wieħed ta' natura teknika li ma setax jigi epurat u deċiż mill-Qorti mingħajr l-assistenza ta' espert in materja. B'danakollu dan ma jfissirx illi l-Qorti ma kellhiex tħares b'lenti kritika lejn l-opinjoni teknika lilha sottomessa u ma kellhiex teżita li tiskarta dik l-opinjoni jekk din ma tkunx waħda sodisfaċentement u adegwatament tinvesti l-mertu, jew jekk il-konklużjoni ma kenitx sewwa tirriżolvi l-kwežit ta' natura teknika.

In linea ta` prinċipju, għalkemm qorti mhix marbuta li taċċetta l-konkluzjonijiet ta` perit tekniku kontra l-konvinzjoni tagħha (dictum expertorum numquam transit in rem judicata), fl-istess waqt dak ma jfissirx pero` illi qorti dan tista' tagħmlu b' mod leġġer jew kapriċċjuż. Il-konvinzjoni kuntrarja tagħha kellha

[71] Cit Nru 13/06 JZM

*tkun ben informata u bażata fuq raġunijiet li gravament ipoġġu fid-dubju dik l-opinjoni teknika lilha sottomessa b' raġunijiet li ma għandhomx ikunu privi mill-konsiderazzjoni ta` l-aspett tekniku tal-materja taħt ezami ("**Grima vs Mamo et noe" –** Qorti tal-Appell – 29 ta' Mejju 1998)***.***

*Jiġifieri qorti ma tistax tinjora r-relazzjoni peritali sakemm ma tkunx konvinta li l-konklużjoni ta` tali relazzjoni ma kienetx ġusta u korretta. Din il-konvinzjoni pero` kellha tkun waħda motivata minn ġudizzju ben informat, anke fejn mehtieg mil-lat tekniku. (ara - "**Cauchi vs Mercieca" –** Qorti tal-Appell – 6 ta' Ottubru 1999 **; "Saliba vs Farrugia**" – Qorti tal-Appell – 28 ta' Jannar 2000 ; "**Tabone vs Tabone et**" – Qorti tal-Appell – 5 ta` Ottubru 2001 ; "**Calleja noe vs Mifsud**" – Qorti tal-Appell – 19 ta` Novembru 2001 ; `**Attard vs Tedesco et**` - Qorti tal-Appell – 1 ta` Gunju 2007 u **"Poll & Spa Supplies Ltd vs Mamo et"** (Qorti tal-Appell Inferjuri – 12 ta' Dicembru 2008).*

*Din il-Qorti tirribadixxi li l-giudizio dell`arte espress mill-perit tekniku ma jistax u ma għandux, aktar u aktar fejn il-parti nteressata ma tkunx ipprevaliet ruhha mill-fakolta` lilha moghtija ta' talba ghan-nomina ta` periti addizzjonali, jiġi skartat faċilment, ammenokke` ma jkunx jidher sodisfaċentement illi l-konklużjonijiet peritali huma, fil-kumpless kollha taċ-ċirkostanzi, irraġonevoli" – ("**Bugeja et vs Muscat et" –** Qorti tal-Appell – 23 ta` Ġunju 1967)."*

Having seen all the acts of the case the Court finds no valid reason in fact and at law to doubt or discard the technical and legal conclusions of architect Alan Saliba and lawyer Phyllis Aquilina and is hereby adopting adopting their report *in toto.*

The Court highlights the following -

1. From the findings of the Court appointed experts, against which no satisfactory proof to the contrary was brought, it transpires that both from a technical and a legal point of view the complaints put forward by plaintiffs cannot be considered *'latent'* and this because they were either not present at the time of purchase, or they were verifiable at the time of purchase or they had nothing to do with "*defects*" as such.

2. In fact in so far as the issue of the water ingress is concerned, the court appointed architect concluded that the complaints were done in relation to ingress that took place after the purchase of the property. So much so that plaintiff himself testified that the first water ingress they had after the contract (signed on the 3rd May 2013) was about 3 months later, that is, between August and September 2013 and subsequently in November of that year. This as a result of cracks which formed in summer as a result of thermal movements. Therefore, as the court expert concluded these cracks were not yet there when the contract was signed and therefore no question of latent defects can arise.

3. In so far as the complaint that the air-conditioning preparation was missing, the Court, without entering into the technical issues elaborated on by the court expert, stresses the fact that factually this was easily verifiable prior to concluding the sale so yet again this matter cannot be considered to fall within the remit of latent defects in terms of the law. The same thing can be said about the missing vents which was at most was a visible shortcoming that could have been seen too and sorted before the signature of the contract. With regard to these two complaints the Court further notes that according to the evidence of plaintiff, they came back to Malta only 3 days before signing the final deed of sale so if plaintiffs did not allow sufficient time to ensure that such

things were in order before entering into the contract they cannot now shift the blame on the seller under the umbrella of latent defects.

4. With regard to the low insulation complaint the Court cannot but agree more with the court expert that this is not a matter that can be deemed a 'defect' as such but is associated with the performance of the property. The same can be said with regard to the issue of the loose membrane particles. The Court yet again agrees with the court experts that this cannot be deemed as a latent defect in the first place.

5. Furthermore the Court oberves that in their Note of Submissions plaintiffs listed a number of criticisms to rebut the conclusions of the experts nominated by the court in particular with regard to the technical aspect. It is to be pointed out however that these criticisms are substantially based on architects' and technical reports commissioned by plaintiffs which reports were made available to the technical and legal expert appointed by the court. Thus when the technical and legal expert nominated by the Court made their own considerations and reached their conclusions they did so after having taken note of all the reports and other documentation presented to them. Moreover, even in the subsequent sittings where architect Alan Saliba was repeatedly asked about technical issues in the report he neither changed or revoked his opinions nor his conclusions as stated in the court experts' report.

6. In addition to all this, although plaintiffs originally requested the Court to appoint additional referees after the court experts file their report[72], they eventually renounced to that request[73].

7. All the above leads the Court to conclude that all plaintiffs' demands and claims should be rejected because the complaints raised do not satisfy the criteria laid down by law with regard to latent defects and the remedies available.

8. Having said this however, with regard to the fourth plea of defendant company this will be rejected because as concluded by the court appointed experts, the works and modifications done by plaintiffs were not the cause of percolation of water in the tenement of plaintiffs, which percolation took place solely through cracks in the walls through exposed party walls[74].

For all these reasons the Court decides the case as follows:

1. Rejects the first preliminary plea raised by defendant Company with regard to the forfeiture of the action and also rejects the fourth plea regarding the alleged responsibility of plaintiffs for damage caused to the property;

2. Upholds the remaining pleas of defendant Company;

3. Rejects all plaintiffs' claims and demands;

[72] Fol 178
[73] Fol 244
[74] See point 52 of court appointed experts' report

4. In line with article 223 (3) of Chapter 12 of the Laws of Malta in view of the points of law involved, each party is to bear its own costs with regard to the proceedings.

Hon. Dr. Miriam Hayman
Judge

Victor Deguara
Deputy Registrar