MALTA

Court of Magistrates (Malta)
Magistrate
Dr. Gabriella Vella B.A., LL.D.

Application No. 347/11VG

Melvin Borg Concrete Works Limited

Vs

Nicholas Franchin and Sophie Carrau

Today, 19th October 2020

The Court,

After considering the Application filed by Melvin Borg Concrete Works Limited on the 14th October 2011, by virtue of which it requests the Court to condemn Nicholas Franchin and Sophie Carrau, *in solidum* between them, to pay the sum of four thousand four hundred and seventy Euro and eighty cents (€4,470.80), which sum is inclusive of Value Added Tax, representing the balance due for concrete works carried out by the Company on their instructions and for their benefit at 15, Blue Marine, Olive Street, St. Julians, together with legal interests due from the 3rd July 2011 till date of actual payment and with costs, including costs pertinent to the legal letter dated 9th August 2011, against Nicholas Franchin and Sophie Carrau *in solidum* between them;

After considering the Reply filed by Nicholas Franchin and Sophie Carrau by virtue of which they plead that: (i) the claim by the Plaintiff Company is totally unfounded in fact and at law since the works carried out by the said Company at their premises No.15, Blue Marine, Olive Street, St. Julians, are defective, of poor workmanship and not according to the rules of the trade, and this as better explained in their counter-claim; (ii) without prejudice to the first plea, the claim by the Plaintiff Company is totally unfounded in fact and at law;

After considering the counter-claim by the Defendants, by virtue of which they request the Court, subject to the prior declaration that the works carried out by the Plaintiff Company at their premises No.15, Blue Marine, Olive Street, St. Julians, are defective, of poor workmanship and not according to the rules of the trade, to condemn the Plaintiff Company to pay them damages suffered as a consequence of its default and defective works carried out, which damages do not exceed the sum of

eleven thousand six hundred and forty six Euro and eighty seven cents (€11,646.87) and include the sum of one thousand five hundred Euro (€1,500) paid by them to the Plaintiff Company by way of deposit on account of the value of the works and which must now be refunded to them, with legal interest due till date of actual payment, and with costs against the Plaintiff Company;

After considering that for purposes of competence the Defendants declare that their counter-claim for payment of damages does not exceed the sum of eleven thousand six hundred and forty six Euro and eighty seven cents (€11,646.87);

After considering the Reply by the Plaintiff Company to the Defendants' counter-claim, by virtue of which it pleads that: (i) the counter-claim by the Defendants is unfounded in fact and at law and is to be rejected, with costs against them, because contrary to that alleged by the Defendants, the works carried out by it are not defective, of poor workmanship and not according to the rules of the trade; (ii) the counter-claim by the Defendants is also unfounded in fact and at law and is to be rejected, with costs against them, because the Plaintiff Company did not cause any damages to the Defendants; and (iii) in terms of Section 562 of Chapter 12 of the Laws of Malta, the Defendants must prove those damages which they allege to have suffered through the Plaintiff Company's fault;

After considering the Decree dated 31st January 2012[1], by virtue of which the Court appointed Architect Alan Saliba for the purpose of holding an on-site inspection at the premises No.15, Blue Marine, Olive Street, St. Julians, merely to register the state of the works and take all relevant photos prior to the Defendants carrying out remedial works;

After considering the Report by Architect Alan Saliba pertaining to the state of the works carried out by the Plaintiff Company in the premises No.15, Blue Marine, Olive Street, St. Julians, at folio 62 to 92 of the records of the proceedings;

After considering that during the sitting held on the 20th March 2012[2], Defendants' legal counsel declared that the Defendants are not contesting the *quantum* of the claim by the Plaintiff Company since their opposition to the request for payment refers to the works carried out;

After considering the affidavit by Melvin Borg and documents attached thereto, submitted by the Plaintiff Company by means of a Note filed on the 20th March 2012, folio 17 to 30 of the records of the proceedings, the technical report by Architect David Mifsud Parker submitted by the Defendants by means of a Note file on the 10th April 2012 at folio 31 to 45 of the records of the proceedings, the affidavit by Defendant Sophie Carrau and documents attached thereto submitted by the Defendants by means of a Note filed on the 8th May 2012 at folio 49 to 57 of the records of the proceedings, the affidavit by Defendant Nicholas Franchin and documents attached thereto submitted by the Defendants on the 12th June 2012 at folio 93 to 106 of the records of the proceedings, the affidavit by Architect David Mifsud Parker and the

[1] Folio 15 of the records of the proceedings.
[2] Folio 16 of the records of the proceedings.

affidavit by Nicholas Atkinson submitted by the Defendants by means of a Note filed on the 8th October 2012 at folio 108 to 111 of the records of the proceedings and the Report by Architect David Mifsud Parker submitted again by the Defendants by means of a Nota filed on the 8th October 2012 at folio 112 to 128 of the records of the proceedings;

After hearing testimony by Architect David Mifsud Parker during the sitting held on the 10th December 2012[3], by Nicholas Atkinson during the sitting held on the 18th February 2013[4], by Defendant Sophie Carrau during the sitting held on the 1st July 2013[5], after considering the testimony by Defendant Nicholas Franchin during the sitting held by Judicial Assistant Dr. Daniela Mangion on the 7th October 2013[6], after hearing testimony by Melvin Borg during the sittings held on the 4th February 2014[7], on the 16th October 2014[8] and on the 11th December 2014[9] and after considering the document submitted by him at folio 165 of the records of the proceedings, after hearing testimony by Emanuel Spiteri during the sitting held on the 22nd July 2014[10];

After considering the declaration by the Defendants' legal counsel during the sitting held on the 11th December 2014[11], in the sense that the Defendants had not up until that date replaced the flooring of their premises and that the works as carried out by the Plaintiff Company were up until then still in place;

After considering the Decree dated 11th December 2014[12] by means of which the Court, in view of the technical nature of these proceedings, appointed Architect Alan Saliba for the purposes of considering the claim by the Plaintiff Company and the counter-claim by the Defendants, in the light of the evidence submitted during the course of the proceedings, and reporting back to the Court with his observations and conclusions;

After considering the Report by Architect Alan Saliba at folio 196 to 216 of the records of the proceedings;

After considering the questions put forth by the Plaintiff Company and the Defendants to Architect Alan Saliba[13] and after considering the replies by Architect Alan Saliba to these questions[14] and after hearing the testimony by Architect Alan Saliba during the sitting held on the 4th February 2016[15];

After considering the Note of Submissions by the Plaintiff Company at folio 360 to 370 of the records of the proceedings and the Note of Submissions by the Defendants at folio 371 to 379 of the records of the proceedings;

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[3] Folio 132A to 132S of the records of the proceedings.
[4] Folio 137 to 143 of the records of the proceedings.
[5] Folio 146 to 152 of the records of the proceedings.
[6] Folio 155 to 159 of the records of the proceedings.
[7] Folio166 to 169 of the records of the proceedings.
[8] Folio 179 to 183 of the records of the proceedings.
[9] Folio 185 to 189 of the records of the proceedings.
[10] Folio 172 to 177 of the records of the proceedings.
[11] Folio 184 of the records of the proceedings.
[12] Folio 184 of the records of the proceedings.
[13] Folio 218 to 226 of the records of the proceedings.
[14] Folio 231 to 243 of the records of the proceedings.
[15] Folio 347 to 357 of the records of the proceedings.

After considering all the records of the proceedings;

Considers:

The Plaintiff Company is requesting the Court to condemn the Defendants, *in solidum* between them, to pay it the sum of €4,470.80, which sum is inclusive of Value Added Tax, representing the balance due for concrete works carried out by it upon their instructions and for their benefit at 15, Blue Marine, Olive Street, St. Julians. The Defendants contest the claim by the Plaintiff Company and, whilst pleading that the claim by the Plaintiff Company is totally unfounded in fact and at law since the works carried out at their premises No.15, Blue Marine, Olive Street, St. Julians, are defective, of poor workmanship and not according to the rules of the trade, they filed a counter-claim against the Plaintiff Company whereby they request that the Court, subject to the prior declaration that the works carried out by the Plaintiff Company at their premises No.15, Blue Marine, Olive Street, St. Julians, are defective, of poor workmanship and not according to trade, to condemn the Plaintiff Company to pay them damages suffered as a consequence of its default and defective works carried out, which damages do not exceed the sum of €11,646.87 and include the sum of €1,500 paid by them to the Plaintiff Company by way of deposit on account of the value of the works and which must now be refunded to them. The Plaintiff Company contests the counter-claim by the Defendants and pleads that: (i) the counter-claim by the Defendants is unfounded in fact and at law and is to be rejected because contrary to what they are alleging, the works carried out by it are not defective, of poor workmanship and not according to the rules of the trade; (ii) the counter-claim by the Defendants is also unfounded in fact and at law and is to be rejected because the Plaintiff Company did not cause any damages to the Defendants; and (iii) in terms of Section 562 of Chapter 12 of the Laws of Malta, the Defendants must prove those damages which they allege to have suffered through the Plaintiff Company's fault.

In view of the technical nature of these proceedings, the Court appointed Architect Alan Saliba to consider the claim by the Plaintiff Company and the counter-claim by the Defendants, in the light of the evidence put forth by them during the hearing of the proceedings, and report back to the Court with his observations and conclusions[16]. The Court had, at an initial stage of the proceedings, appointed Architect Alan Saliba for the purposes of registering the state of the works carried out by the Plaintiff Company at the Defendants' premises No. 15, Blue Marine, Olive Street, St. Julians[17]. Architect Alan Saliba filed two Reports: one wherein he registers the state of the works carried out by the Plaintiff Company at the Defendants premises No. 15, Blue Marine, Olive Street, St. Julians - hereinafter referred to as the First Report[18]; and another wherein he considers the claim by the Plaintiff Company and the counter-claim by the Defendants and gives his observations and conclusions regarding the same - hereinafter referred to as the Second Report[19].

[16] 11th December 2014, folio 184 of the records of the proceedings.
[17] Decree dated 31st January 2012, folio 15 of the records of the proceedings.
[18] Folio 62 to 92 of the records of the proceedings.
[19] Folio 196 to 218 of the records of the proceedings.

In the First Report, Architect Alan Saliba listed the complaints and observations made by both the Defendants and the Plaintiff Company with regard to the flooring works forming the merits of these proceedings. These complaints are listed in Doc. "ASL" attached to the Report at folio 89 to 91 of the records of the proceedings and on the part of the Defendants they essentially consist of the following:

- Level discrepancy between the sliding door frame and the floor surface;
- Stains in the floor surface;
- Power flout cross marks on the floor surface;
- Squarish stain on the floor surface;
- Expansion joint short from the wall and adjacent diagonal crack in the floor;
- Crack in the floor;
- Level discrepancy in the floor surface; and
- Superficial stains on the floor surface.

The complaints by the Defendants, which have been duly recorded by means of photographs taken by Architect Saliba and attached to his Report[20], refer to the flooring in all the rooms and areas within their apartment, as better outlined in the sketch prepared by Architect Alan Saliba and attached to the Report as Dok. ASK[21]. Architect Alan Saliba also indicated and explained that the phrase "power flout cross marks" means *marks left by the flouts of the power-flout machine (helicopter) - used to smoothen the concrete surface - where the machine stops* and the phrase "superficial stains" *are on the floor surface and are not within the floor itself and can thus be polished away.*

On its part the Plaintiff Company pointed out the coloured floor surface in the entrance of Bedroom 1 indicated with the number 29 on the sketch marked Dok. "ASK".

In the Second Report Architect Alan Saliba observes and concludes the following:

Defects in the floor *- From the evidence submitted, particularly from the Defendant's Architect Perit David Mifsud Parker Report, the Defendants are complaining from the following defects in the flooring works carried out by Plaintiff, namely: <u>Various marks</u>, including footprints (a boot print in the middle of the living room and half a boot print towards the patio doors), and also a number of friction burn marks (where the machines stopped midway through the flooring and left standing for a long period of time) that were left showing. Defendant Sophie Carrau says that when the concrete was laid and it was still wet she asked Melvin Borg about the footprint and he replied that he would sort it out. Other marks include a squarish mark in the living room and various round marks in the bedroom. The round marks appear to be the marks of the feet of a table. When placing objects on fresh concrete, objects tend to absorb and not allow the concrete surface to breath hence the change in colour. Melvin Borg only remarks that the squarish mark resulted after a pallet was placed by other persons on the fresh floor. Furthermore, the other marks mentioned: footprint, power flout marks and table*

[20] Doc. "ASP" at folio 68 to 86 of the records of the proceedings.
[21] Folio 88 of the records of the proceedings.

feet marks together with other patching marks imply a visual defect in the surface colour due to bad workmanship and cannot be attributed to third parties. These defects can be remedied by machining the whole surface, applying a surface hardener and re-polishing. These works are being estimated at the amount of one thousand three hundred and eighty Euro (€1,380). The other stains close to the external aluminium doors are a result of water infiltration from around the same doors or from within the aluminium frame particularly at its joints. These defects signify poor detailing in the fixing of the same doors and cannot be attributed to the flooring works in question. Levelling of the concrete varies especially in the corners and restricted spaces (see also fol. 45 figure 22). Perit David Mifsud Parker mentions also change in level between the concrete floor and bathroom tiles. One expects to find such changes in level as can be seen in fol. 45 figure 22 in similar floors since, unlike tile laying, concrete flooring is carried out at one go. Regarding the other changes in level, these are higher levels than the remainder of the floor in areas that are not reached by the blades of the power flout since it being circular in nature. This defect could have been avoided using hand-held rotary machines, however one should also keep in mind that this would also have the consequence that one has to pass onto the fresh floor to carry out these works and also that if these corrections are carried out once the works have settled, there might also result a difference in colour. Notwithstanding this fact, these discrepancies signify a defect that can only be remedied with a hand-held machine whilst as regards the colour, this will be remedied when treating the marks mentioned in paragraph 4.02 above. These levelling marks are being estimated at the amount of three hundred and fifty euro (€350). Minor cracks in different areas. The cracks result due to insufficient expansion joints (22 metres of expansion joints were carried out). Although the cracks shown in green on Doc. "AST" would not have resulted if the expansion joints marked in red on said Doc. "AST" were carried out. Plaintiff submitted evidence that Defendants did not want further expansion joints and they also signed a declaration in this regard. In this regard Defendant Nicholas Franchin said that it was agreed with Plaintiff that there would be expansion joints one in every corner of the penthouse in addition with other expansion joints on each and every internal door, were not cut from side to side. Regarding the latter, it should be noted that the edge of the expansion joint cannot be reached by the chaser due to the circular nature of the disc. This defect only implies minor cracks at the edge of the joint as can be seen on Doc. "ASR" photo 05 and does not have any effect on the remainder of the floor. The lack of cutting the expansion joint up to the wall cannot be considered as a defect since this cannot be carried out with hand-held tools and also since this does not have any deleterious effect on the flooring. With regards to the number of expansion joints, during cross-examination Defendant Sophie Carrau agreed that they only did not want the expansion joint suggested by Melvin Borg in the middle of the living room where there are no cracks. Defendant Sophie Carrau said that they also signed a statement to Melvin Borg with regards to expansion joints. During cross-examination Defendant Nicholas Franchin says "I remember complaining about the number of expansion joints and in fact these were reduced". The document mentioned by Melvin Borg Doc "MB1" fol. 165 states that "The risk of cracking is for client because they decide to don't have enough expansion joints (3m x 3m) because they like polish concrete with big slabs." Without entering into legal aspects of this issue, the undersigned considers that these defects can only be remedied by redoing the concreting of bays marked "A", "B" and "C" on Doc. AST (9 square metres total))

whilst forming three new expansion joints, which works are being estimated at the amount of five hundred euro (€500). The detachment of the sealant material from the joint is due to poor joint preparation before sealer application. Although the expansion joints require regular maintenance, it transpires that this defect appeared immediately following works. The re-application of this sealer is being estimated at the amount of two hundred and fifty Euro (€250).

***Damages claimed by Defendants** - Defendants are requesting their €1,500 deposit back as well as compensation for the remedial works as per Architect Mifsud Parker's report. Perit David Mifsud Parker estimated the removal and redoing of the concrete floor at the amount of €45 per square metres amounting to €5,175 excluding VAT and excluding damages that might occur. Although Defendants are pretending that both the laying of the concrete bed and the polishing works are of poor quality, during cross-examination, Perit Mifsud Parker admits that there is no need to remove the concrete bed which had to be scarified and redo cement and polish. Had the works been carried out satisfactorily, their cost would be €5,970.80, €1,500 of which were paid as a deposit by Defendants. As mentioned above, there is an amount of one thousand, nine hundred and eighty Euro (€1,980) damages due to bad workmanship (€1,380 marks + €350 levelling + €250 expansion joints detachment) and five hundred Euro damages (€500) due to lack of expansion joints which is subject to a legal issue. Therefore one has to spend €1,980 in order to achieve a satisfactory floor. Hence, Plaintiff is due one thousand nine hundred and ninety Euro and eighty cents (€1,990.80) from Defendants together with the amount of five hundred Euro (€500) if the legal aspect decides that Plaintiff is not responsible for the lack of expansion joints due to the requests and signed declaration by Defendants.*

***Conclusions -** The flooring in question has various defects, namely marks, changes in level and expansion joints detachment attributable to bad workmanship by Plaintiff Company; There are also cracks in the floor attributable to lack of expansion joints. The Defendants requested few expansion joints and signed a declaration in this regard that they assume the risk for cracking. After deducting the €1,500 deposit paid by Defendants and considering these defects, Plaintiff Company is due one thousand nine hundred and ninety Euro and eighty cents (€1,990.80) from Defendants for the works carried out, together with the additional amount of five hundred Euro (€500) if the legal aspect decides that Plaintiff Company is not responsible for the lack of expansion joints due to the requests and signed declaration by Defendants*[22].

After considering all the evidence put forth before it and the observations of Architect Alan Saliba on the basis of said evidence, the Court cannot but concur with the technical conclusion reached by Architect Alan Saliba (Conclusion No. 6.01 and Conclusion No. 6.02) that the works carried out by the Plaintiff Company in the Defendants' premises at No.15, Blue Marine, Olive Street, St. Julians, are indeed defective, of poor workmanship and are not according to the rules of the trade.

[22] Para. 4.01 to para. 6.03 of the Report by Architect Alan Saliba at folio 196 to 216 of the records of the proceedings.

In this regard the Court refers to the judgement in the names **Raymond Mallia noe v. Martin Mizzi noe, Writ No.102/94**, delivered by the Civil Court, First Hall on the 28th May 2003, wherein that Court observed that *huwa minnu u ġuridikament korrett li jiġi osservat li l-konsiderazzjonijiet u opinjonijiet esperti jikkostitwixxu prova ta' fatt u allura, bħal materjali istruttorji oħrajn, kontrollabbli mill-ġudikant. Tant dan hu hekk illi l-Artikolu 681 tal-Kapitolu 12 jipprovdi li l-Qorti ma hijiex tenuta jew marbuta li taċċetta l-konklużjonijiet tar-rapport tal-perit kontra l-konvinzjoni tagħha nfisha. Eppure, kif insenjat f'ġurisprudenza assodata, il-Qorti però "ma tistax tagħmlu b'mod leġġer jew kapirċċjuż". (Philip Grima v. Carmelo Mamo et nomine, Appell, 29 ta' Mejju 1998). Anzi, "kellu jingħata piż debitu lill-fehma teknika ta' l-espert nominat billi l-Qorti ma kellhiex leġġerment tinjora dik il-prova" (Joseph Saliba v. Joseph Farrugia, Appell, 28 ta' Jannar 2000), meta din tkun tesprimi l-'giudizio dell'arte' tal-perit tekniku (Giswarda Bugeja et v. Emmanuele Muscat et, Appell, 23 ta' Ġunju 1967). Dan hu hekk il-każ aktar u aktar meta ma jinġiebu l-ebda raġunijiet li gravement ipoġġu fid-dubju dik l-opinjoni teknika, u, anzi, dik l-istess opinjoni tibqa' waħda konvinċenti, anke taħt it-tiroċinju ta' eskussjoni elaborata u serrata ... Kif drabi oħra rimarkat "f'ċirkostanzi bħal dawn ikun prużuntuz għall-ġudikant illi jiddipartixxi bla raġuni verament valida mir-relazzjoni teknika. Dan mhux biss għax ma kellux il-mezzi għad-disposizzjoni tiegħu biex serenament jinoltra ruħu fl-aspetti tekniċi tal-meritu, imma wkoll għaliex neċessarjament tkun tonqsu dik il-konoxxenza meħtieġa biex, b'mod kritiku, jasal għal konvinċiment divers minn dak li jkunu waslu għalih l-esperti nominati minnu" (Benjamin Camilleri noe v. Charles Debattista et noe", Appell 9 ta' Frar 2001).*

With regard to the defects in the floor consisting of boot marks, power flout burn marks, a squarish mark in the living room and various round marks in the bedroom, the Plaintiff Company - in its questions to Architect Alan Saliba following the filing of the Second Report - insists that these cannot be attributed to bad workmanship on its part but due to actions/omissions by third parties but Architect Saliba reiterates that *I consider Plaintiff Company solely responsible for the 'various marks' defects as mentioned in paragraph 4.02 of the report: "Furthermore, the other marks mentioned: footprint, power flout marks and table foot marks together with the other patching marks imply a visual defect in the surface colour due to bad workmanship and cannot be attributed to third parties. Plaintiff Company only rebutted the squarish mark that resulted after a pallet was placed by other persons on the fresh floor and did not provide any evidence that the other marks were not its fault as submitted by Defendants". Hence the conclusion mentioned in the previous reply. If one were to separate both issues, I would say that 20% could be attributed to the squarish mark mentioned in reply B and 80% to the marks mentioned in reply A. Nevertheless, it is relevant to mention that the squarish mark is located in the area "B" mentioned in paragraph 4.04 of the report wherein it was concluded that this area should be redone if the legal aspect decides that Plaintiff Company is not responsible for the lack of expansion joints due to the requests and signed declaration by Defendants. I agree that some of these defects (surely excluding the power flout marks) might not have developed had the floor in question been polished using a particular colour. I agree that some of these defects (surely*

excluding the power flout marks) could be rectified by re-polishing using a particular colour[23].

The Court cannot but agree with Architect Alan Saliba that these marks are indeed a direct consequence of bad workmanship on the part of the Plaintiff Company.

Even though the Plaintiff Company claims that some of these marks and stains were made by third parties who entered the premises during the 28 day curing period for the concrete to set[24], it did not put forth any evidence which satisfactorily substantiates this allegation. The Court is of the opinion that even though the Plaintiff Company had informed and also warned the Defendants that nobody was to go to the premises during the curing period and most of all no heavy works were to be carried out at this point, the said Company was still duty bound to inspect the works on a regular basis to ensure that, first and foremost the concrete was curing as required by the standards of the trade, and that indeed no third parties caused any damage to the flooring. If these inspections were indeed carried out and if the Plaintiff Company had at the time noticed that its works were being compromised by third party actions, it is safe to say that it would have informed the Defendants about this, something which does not seem to have happened in this case. Since no mention of any damage during the curing period was made to the Defendants during said time, it is very difficult for the Court to believe that these marks were indeed caused by third parties.

Apart from this, the foot print, squarish mark and round marks were not the only visual defects observed by Architect Alan Saliba since he also noted the power flout marks, which marks in his opinion constituted the most prominent and obvious visual defect the flooring. There can be no doubt that the Plaintiff Company is to be considered solely responsible for these marks and it surely cannot attribute the same to third parties.

Notwithstanding any attempt by the Plaintiff Company to contradict the findings and technical conclusion by Architect Alan Saliba, from the affidavit by Melvin Borg it clearly results that the visual defects in the flooring works are the sole responsibility of the Plaintiff Company and a direct consequence of bad workmanship on its part.

Melvin Borg[25] declares that *before we started these polishing works, I had made a sample with a colour which had been chosen by the clients. This sample was made out on a section of the flooring on which a wardrobe was to be placed. Mr. Franchin and Ms. Carrau had requested another sample, this time without colour being added to the mixture, and it was actually this last sample which they liked the most, even because this would have taken a shorter time to apply. I remember that I had personally warned Mr. Franchin and Ms. Carrau that if we were not to add a colour to the mixture, there would be huge variations in colour since the said colour of the flooring would result solely from the sand used for the production of the concrete, which sand varied according to lot. Apart from this, I had also informed the clients that the retouching works which are normally done to the concrete bed would remain visible also because, obviously, no even colour would have been applied*

[23] Replies 1A-E, folio 241 and 242 of the records of the proceedings.
[24] Vide affidavit by Melvin Borg, folio 27 to 30 of the records of the proceedings.
[25] Affidavit at folio 27 to 30 of the records of the proceedings.

throughout. Nevertheless, Mr. Franchin and Ms. Carrau still chose to have the polishing done without any particular colour being added to the mixture. My company, therefore, commenced polishing works according to the clients' instructions. These works were also being carried out through the company's employees, under my supervision. Nevertheless, I remember that after we had finished these works, Mr. Franchin and Ms. Carrau had called me and requested that I go on site. They had told me that whereas the resultant shine achieved was to their satisfaction, they were not happy with the fact that the retouching works which had been done to the concrete bed remained visible, and that the colour achieved was not uniform. Naturally, I had reminded them that I had already explained that this would happen if they decide not to choose any particular colour, and I had effectively done this before my company had started the works. I remember, however, that Ms. Carrau, whilst not denying that I had informed them accordingly, started raising her voice and insisting that the works were not to her satisfaction. Mr. Nicholas Franchin, on the other hand, had requested my company to redo the polishing of two rooms of the penthouse, this time round by adding a brown colour to the mixture. I had accepted to do this, even if just in an attempt to satisfy the clients and not because my company was to blame. After my company finished two rooms, Nicholas Franchin told me that he was happy with the works, and requested that my company does the remainder of the penthouse using the same method. Naturally, this meant that my company had to redo all the polishing works for the second time at a substantial cost, but even in this instance, whilst hoping that the end result would be to the satisfaction of the clients, I had accepted the request. I remember that as soon as my company commenced works on this second round of polishing, I had requested Mr. Franchin to immediately tell me if he had any other complaint about the finish which was being achieved so that, if possible, a solution would be found. Nevertheless, Mr. Franchin assured me that he was happy with the works and therefore requested that I proceed. I remember that, since Mr. Franchin and Ms. Carrau were in a hurry, my company had even increased the number of workers on site, and this second round of polishing works took place over a period of around five days. … I must clarify that, although as I have already explained, the polishing works were done twice since Mr. Franchin and Ms. Carrau were not satisfied with the effect achieved through the first polishing works which were done, my company still decided to stick to the original estimate which it had given, that is by requesting payment of the balance of €4,470.80, which amount included the relative VAT.

No matter how much Melvin Borg tries to put facts in a way as to exonerate the Plaintiff Company from any responsibility for the ultimate defective result of the flooring works, when the facts stated by him are considered objectively and in their proper context, it cannot but result that the Plaintiff Company itself acknowledged that the works carried out by it were not up to standard so much so that it repeatedly tried to remedy the defects - at a substantial cost to it - but, as can be determined from evidence submitted and the Reports by Architect Alan Saliba, failed to give a result which is up to the standard. Even though Melvin Borg claims that the Plaintiff Company was not responsible for the end result primarily because the resultant defects are by and large due to certain choices made by the Defendants themselves during the execution of the works - for example the decision not to apply any colour to the flooring during the first round of polishing works - his claims are totally

unacceptable. Apart from being legally unacceptable, the Court deems that it is highly unlikely that a company which claims not to be responsible for the bad quality of the works, which according to it are the result of bad decisions and choices made by the Defendants, accepts to re-do the whole polishing process twice over, at a substantial cost for it, and does not charge, at least in part, the Defendants for the repeated works.

In the light of all the above the Court reiterates that the Plaintiff Company is solely responsible for the visual defects which resulted in the flooring works carried out in the premises No. 15, Blue Marine, Olive Street, St. Julians, since these are a direct consequence of bad workmanship on its part.

Apart from the visual defects, Architect Alan Saliba also pointed out defects in the joints of the flooring namely the detachment of the sealant material from the joints and also the fact that levelling of the concrete varies thorough out the apartment. In this regard the Court does not have much to add to what has already been observed and concluded by Architect Alan Saliba and therefore confirms that the Plaintiff Company is respsonsible for the defects in the joints of the flooring.

The Court points out that the Plaintiff Company repeatedly places the blame for defects on the Defendants by claiming that these resulted due to decisions and choices made by them prior to or during the execution of the works. Apart from the issue of the colouring and visual defects, the Plaintiff Company claims that the cracks which resulted in the flooring are a direct result of the fact that the Defendants specifically asked it not to put in all the expansion joints which are normally required by good standards of the trade in this type of flooring.

Whilst in the Second report Architect Alan Saliba states that the small cracks which appeared at the edge of the expansion joints cannot be avoided in the trade since the edges cannot be reached with the chaser due to its circular blade, he states and concludes that the cracks marked in green on the plan marked as Doc. "AST" at folio 213 of the records of the proceedings would have been avoided had the Plaintiff Company done the two expansion joints marked in red in the said plan. During the course of the proceedings however, the Plaintiff Company submitted evidence that the Defendants themselves had, against its better judgement, instructed it not to carry out all the required expansion joints and they had accepted the risk by means of a declaration in writing[26]. The decision taken by the Defendants contrary to the Plaintiff Company's better judgement and their written declaration do not however exonerate the Plaintiff Company from its responsibility for bad workmanship in the execution of the works. It is in fact an established legal principle in the field of contracts of work that the person carrying out the works must always ensure to deliver works which are free from any defects and that it must not give in to instructions by the client which it knows full well will give an ultimate defective result.

In this regard the Court refers to the judgement in the names **Pierre Darmanin v. Moira Agius et, Appeal No. 323/02** delivered by the Court of Appeal on the 6th October 2004, wherein that Court observed that: *huwa dottrinalment u*

[26] Vide testimony by Melvin Borg during the sitting held on the 4th February 2014, folio 166 to 169 of the records of the proceedings and document Doc. "MB1" at folio 165 of the records of the proceedings.

ġurisprudenzjalment riċevut illi l-appaltatur għandu l-obbligu li jeżegwixxi x-xogħol lilu kommess fis-sens li huwa għandu l-obbligu wkoll li jara li dan ix-xogħol ikun sejjer isir utilment u mhux b'mod li l-quddiem juri difetti. "L'imprenditore ha l'obbligo di eseguire bene l'opera commessagli, secondo i dettami dell'arte sua, e deve prestare almeno una capacità ordinaria". Dan fis-sens li hu "għandu jiggarantixxi l-bontà tax-xogħol tiegħu". "L-appaltatur li jeżegwixxi ħażin ix-xogħol li jifforma l-oġġett ta' l-appalt huwa responsabbli għad-dannu kollu li jiġi minn dik l-eżekuzzjoni ħażina". ... Għax kif jinsab ritenut ukoll "f'każ bħal dan hu għandu mill-ewwel ma jagħmilx ix-xogħol jew ikollu jirrispondi għad-difetti li jiġu l-quddiem". Dan hu hekk avvolja jkun hemm l-approvazzjoni tax-xogħol jew l-appaltatur ikun mexa skond l-ispecifications jew l-istruzzjonijiet lilu mogħtija mill-kommittent. "È dovere dell' appaltatore di resistere ad ordini che egli vedesse pregiudizievoli alla solidità e contrarii alle buone regole dell' arte". Kif aħjar imfisser u spjegat "l-appaltatur hu obbligat u hu dejjem responsabbli li jagħti lill-appaltant opra sodisfaċenti, u ma jistgħax jallega li x-xogħol sar mhux sewwa għax hu għamlu kif ried il-kommittent, billi l-appaltatur hu obbligat jirreżisti għal kwalunkwe intromissjoni tal-kommittent. Huwa paċifiku wkoll illi l-ħlas tal-prezz ta' l-appalt jew il-ħlas akkont ma jfissurx neċessarjament approvazzjoni tax-xogħol jekk dan fil-fatt jirriżulta difettuż. Meta allura jirriżultaw dawn id-difetti, kif ċertament hu l-każ in ispeċja, l-appaltatur jitqies in kolpa minħabba inadempiment. "Il-kolpa kontrattwali hija dik li tikkonsisti fin-nuqqas ta' l-eżekuzzjoni, jew f'eżekuzzjoni ħażina, ta' l-obbligazzjoni riżultanti mill-kuntratt. Effettivament, it-tutela akkordata mill-liġi lill-kommittent tinkwadra ruħha fl-ambitu ta' dik ir-responsabilità kontrattwali normattiva minħabba inadempiment. Li jfisser li l-kommittent jista' jopta li jaġixxi ġudizzjarjament jew bl-eżekuzzjoni speċifika ta' l-appalt jew bl-azzjoni li twassal għar-riżoluzzjoni tal-kuntratt (Art. 1069(1) tal-Kodiċi Ċivili). Fil-każ il-wieħed jew l-ieħor il-kommittent ikollu d-dritt jirreklama d-danni (Art. 1069(2)).

The Plaintiff Company cannot expect to be exonerated from all responsibility and consequent liability when it knowingly shifted the responsibility of its default - that is its decision to carry out works not according to the standards of the trade - onto the Defendants. The main responsibility for the provision of works which are ultimately of a good standard of workmanship and free from any defects ultimately lies squarely with the Plaintiff Company since, it is reiterated, it is obliged to carry out works in a way which will not, upon completion or at some time the future, have defects.

In the light of all the above, the Court therefore concludes that the Plaintiff Company failed to carry out the works commissioned by the Defendants in the premises No.15, Blue Marine, Olive Street, St. Julians, to the required standards of good workmanship and is indeed responsible and liable for the resultant defects in said works and it must therefore answer for the said defects and resultant damages caused by the same.

The Court does not only concur with the technical conclusion by Architect Alan Saliba but it also concurs with his final conclusion that after deducting the deposit of €1,500 and the various amounts liquidated by him - including the sum of €500 - representing the value of the required remedial works, the Defendants have to pay

the Plaintiff Company the sum of €1,990.80 for the works carried out by it in the premises No.15, Blue Marine, Olive Street, St. Julians.

The Defendants do not agree with the conclusion by Architect Alan Saliba and they insist that the Plaintiff Company's claim should be rejected in its entirety, whilst damages must be liquidated in their favour, which damages are to include the sum of €1,500 paid by them to the Plaintiff Company by way of deposit on account of the value of the works commissioned to it.

The determination of this issue, that is whether the Plaintiff Company is entitled to any payment and whether the Defendants are entitled to any damages, essentially rests on the entity of the defects in the flooring works carried out by the Plaintiff Company in the Defendants' premises No.15, Blue Marine, Olive Street, St. Julians.

It is an established principle at Law that *il-kuntratt ta' appalt huwa kuntratt bilaterali li huwa dejjem soġġett għal patt kommissorju taċitu. Konsegwentement meta d-difetti fl-esekuzzjoni jkunu ppruvati, il-kriterju essenzjali tad-deċiżjoni jinsab fl-eżami, jekk ix-xogħol, kif jirriżulta, jkunx affett jew le minn vizji sostanzjali. Dawn huma dawk id-difetti, imsejħin ukoll essenzjali, li jipprivaw il-ħaġa mill-iskop jew mill-utilità tagħha, b'mod li ma tibqax tikkorrispondi għad-destinazzjoni proposta mill-kommittent u ndikata minn natura stess tax-xogħol, waqt li l-oħrajn kollha għandhom jiġu ritenuti mhux essenzjali. Meta d-difetti jkunu essenzjali l-kommittent għandu d-dritt jitlob ir-riżoluzzjoni tal-kuntratt minħabba l-inadempjenza. Meta għal kuntrarju d-difetti ma jkunux sostanzjali l-appaltatur ma jistax jiġi ritenut inadempjenti però jibqa' obbligat li jirripara d-difetti jew jaċċetta riduzzjoni*[27].

From the evidence submitted, including the technical Report by Architect David Mifsud Parker and his testimony under cross examination[28], and from the Second Report by Architect Alan Saliba, it transpires that the defects in the flooring forming the merits of these proceedings are not such that the totality of the works has to be removed and re-done afresh. In fact both Architect Mifsud Parker - who is the Defendants' architect - and Architect Alan Saliba agree that the concrete bed does not need to be removed and the defects can be remedied by machining the whole surface and applying a surface hardener and re-polishing. This means that whilst the defects in the works carried out by the Plaintiff Company cannot and should not be minimised, they cannot be considered to be essential defects which affect the totality of the works carried out and consequently the Plaintiff Company's claim cannot be rejected *in toto*. Having said that, the ultimate amount adjudicated in favour of the Plaintiff Compnay must reflect the value of the remedial works to rectify the defects in the flooring forming the merits of these proceedings. The value of such remedial works constitutes the damages to granted in favour of the Defendants as a consequence of the bad workmanship on the part of the Plaintiff Company and in the opinion of the Court they are the only damages which can be liquidated in their favour since they did not submit evidence of any further damages incurred by them.

[27] Bonaventura Camilleri v. John Cuschieri, Writ No. 248/89 delivered by the Civil Court, First Hall on the 31st January 2003.
[28] Sitting held on the 10th December 2012, folio 132A to 132S of the records of the proceedings.

Furthermore, in the light of that observed above, the deposit amounting to €1,500 already paid by them to the Plaintiff Company is not refundable to them.

The value of the remedial works necessary to rectify the damages in the flooring works carried out by the Plaintiff Company in the premises of the Defendants No. 15, Blue Marine, Olive Street, St. Julians, in total amounts to €2,480, which sum includes the sum of €500 representing remedial works in the expansion joints. This sum must however be set off against the claim of the Plaintiff Company, leaving a balance amounting to **€1,990.80** in favour of the Plaintiff Company which must be paid to it by the Defendants.

For the above reasons, the Court declares and decides that:

1. The works carried out by the Plaintiff Company upon engagement by the Defendants in the premises No.15, Blue Marine, Olive Street, St. Julians, are defective, of poor workmanship and not according to the rules of the trade;
2. The defects in the flooring works as carried out give rise to damages to the Defendants, consisting these in the value of the remedial works necessary to rectify the defects;
3. The counter-claim by the Defendants is being upheld and the value of the remedial works necessary to rectify the defects in the flooring works, and therefore the value of damages due to the Defendants by the Plaintiff Company, is being liquidated in the sum of €2,480;
4. The said sum of €2,480 is being set off against the claim by the Plaintiff Company for payment of the sum of €4,470.80 representing the balance due for works carried out by it upon engagement by the Defendants in the premises No.15, Blue Marine, Olive Street, St. Julians, leaving balance of €1,990.80;
5. The claim by the Plaintiff Company is thus being upheld to the said sum of €1,990.80; and
6. The Defendants, *in solidum* between them, are being condemned to pay the Plaintiff Company the sum of €1,990.80, with legal interest due from the 23rd April 2015, the date of filing of the Second Report by Architect Alan Saliba, till date of actual payment.

In the light of the circumstances of this case, all the costs pertaining to these proceedings, including the costs pertinent to the counter-claim by the Defendants, are to be borne as to 2/3 by the Plaintiff Company and 1/3 by the Defendants.

MAGISTRATE

DEPUTY REGISTRAR