THE SMALL CLAIMS TRIBUNAL

Adjudicator
ADV. JULIANA SCERRI FERRANTE

Sitting of Tuesday, 19th January 2021

Claim number 368/2019SFJ

George Amato (84760M) in his capacity as condominium administrator of the block of apartments "Neptune Court" in Ċensu Tabone Street, St Julians

vs.

Susan Jennifer Firth-Bernard Kavanagh

The Tribunal:

Saw the Notice of Claim filed on 18th November 2019 in the Maltese language as well as the English translation of the same judicial act (fol. 1 and fol. 16).

Saw that the English language translation was sworn on oath by Advocate Dr Anthony Cutajar (fol. 19).

Saw the Reply filed on 3rd December 2019 together with an English language translation (fol. 24 *et seq.*).

Saw that although the record of the sitting of 15th January 2020 (fol. 26) was drawn up in the Maltese language, the records of subsequents sittings were drawn up in the English language.

Saw that the Tribunal is being asked to condemn the defendant to pay the amount of **two thousand and nine hundred and fifty-six Euros and ninety-one cents (€2,956.91)** broken down into smaller amounts as indicated in the Notice of Claim (fol. 17) together with the costs of the case as well as costs relative to judicial letters 2364/2013 and 1156/2018 and with interest at the rate of eight per cent (8%) on the amount of one thousand and two hundred and fifty Euros (€1,250.00) starting to run from 9th October 2013 and interest at the rate of eight per cent (8%) on the remainder from 8th May 2018.

Saw that in her Reply, the defendant stated that the plaintiff's demands were unfounded in fact and at law for the following reasons:

- That no amount was due by the defendant for the lift was installed much before the formation of the association of the owners of Neptune Court block and in fact, she had refused the installation of the lift and so she should not pay for the installation of the same lift and any payment which she made in the past relative to the installation of the lift was made as a sign of good will.

- That no contribution is due for the maintenance of the common parts by way of preservation of the common parts due to the fact that in the mentioned block, no maintenance, restoration or preservation was ever done in accordance with art and trade in the dommon parts.

- Saving further replies.

- With costs against plaintiff.

Heard all the witnesses, read the documentation filed, heard final oral submissions delivered on 30th November 2020 and saw that the case was put off for a decision for 19th January 2021.

Documentation and evidence tendered by the plaintiff *nomine* and witnesses produced by him

In support of the Notice of Claim, the plaintiff attached:

- **Document A** – a statement of account indicating the amount claimed by the plaintiff duly broken down and explained;

- **Document B** – a copy of a judicial letter (sent in accordance with the provisions of Article 166A of Chapter 12 of the Laws of Malta) bearing number 2364/2013; and

- **Document C** – a copy of a judicial letter bearing number 1156/2018.

George Amato testified during the sitting of 17th February 2020. Under oath, he stated that during the past year, he had been appointed administrator of Neptune Court in Ċensu Tabone Street. He added that he was testifying in his capacity as administrator. The condominium came into existence in 2015 and subsequently, in April 2019, he took over as administrator from Harry Fenech. The condominium had been registered on 7th August 2015.

The witness then referred to documentation which he presented and after that, went on to state that insofar as the lift was concerned, a report had been drawn up. Amato explained that at the time, the owners' association was run by Mr Wilfred Axiaq, who had appointed a firm to conduct tests on the lift. The firm found that the lift was in an unsatisfactory state to the extent that it did not conform to standards set out in Maltese law. The firm concluded that the lift had to be refurbished or replaced. The owners' association decided to change the lift completely. Amato stated that during the meeting at which it was decided to change the lift, nine out of thirteen members of the association were present for the meeting and eight out of the nine voted to change the lift.

The witness explained that the decision to replace the lift was taken during the meeting held on 27th May 2010 (minutes of the meeting located at fol. 53). During that meeting, the defendant was not present. However, she had been present at the meeting of 4th May 2010.

Amato confirmed that in 2012, the defendant had paid half her share of the lift and still owed one thousand and two hundred and fifty Euros (€1,250). He added that as far as he knew, the defendant gave no reason why she did not want to pay. However, he clarified that at the time, the administrator was Mr Wilfred Axiaq who had since died.

The witness stated that the administrator would draw up expense sheets and at the end of each year, he would indicate in a detailed manner how much money had been collected and how much had been paid out.

Mr Amato added that some of the documentation was addressed to Mr Anthony Tabone as this individual used to help him in administering the block.

The witness then stated that each apartment had been asked to contribute. He added that in addition to the amount owed by the defendant in relation to the lift, she still owed the amounts due in maintenance contributions for 2015, 2016, 2017 and 2018 as well as another amount for "*the room in the lift*".

The witness confirmed that the defendant had paid her contributions for 2019 and 2020 and that none of the inhabitants of the other apartments ever refused to pay any amounts or complained about anything. The witness also confirmed the veracity of the judicial letters filed against the defendant of which copies had been presented.

Anthony Tabone testified during the sitting of 2nd March 2020. He confirmed that he was one of the inhabitants of the block of apartments. When asked to go through the documents in the case file from fol. 38 onward, he confirmed that as an inhabitant of the block, he had received copies of the documents situated at fol. 54, 55, 59, 60, 64, 65, 71 and 72.

Referring to the defendant, the witness explained that she used to complain and point out what needed to be painted and where maintenance had to take place. The defendant was told that if all the inhabitants of the block paid their shares, things would be done. However, the yearly contribution only covered utility bills, cleaning services and the maintenance and inspection of the lift. He stated that there was no money left to do anything else.

<u>Considerations of the Tribunal</u>

- ***<u>Legal considerations surrounding the form of the defendant's affidavit</u>***

The Board cannot ignore that although the defendant's written statement is titled "*Affidavit*" and seems to have been signed by the defendant, there is no indication that this has been sworn on oath before an individual competent to administer an oath (fol. 100 *et seq.*). Neither is there any indication that any of the thirty-five documents filed in support of the affidavit are in any way confirmed on oath.

Article 160 of the Code of Organisation and Civil Procedure defines an affidavit as a document which must be sworn "*before a judicial assistant or any other person authorised by law to administer oaths*".

The Tribunal refers also to Article 21(3) of the Code of Organisation and Civil Procedure, which stipulates that when an affidavit is drawn up in a language other than the Maltese language, it is to be translated into the Maltese language and that translation is to be confirmed on oath. It follows logically that if the law requires even the translation to be confirmed on oath, the law must surely require the actual affidavit to be confirmed on oath as well.

The Tribunal notes that from a historical perspective, affidavits used to be disallowed principally because they deprived the opposing party of the opportunity to cross-examine the witness who testifies via affidavit (see ***<u>Mallia vs. Busuttil</u>*** decided on 17th October 1919 and ***<u>Giuseppe Abela et vs. Herbert Camilleri</u>*** decided by the Court of Appeal on 15th November 1946.)

This is a matter that the Tribunal is raising *ex officio*. Neither party commented on this matter. It is being assumed that as during the sitting of 26th October 2020, the defendant was subjected to lengthy cross-examination, the plaintiff saw nothing to criticise in relation to the form of the defendant's affidavit.

Furthermore, the historical objection cited in the abovementioned cases surely does not apply, given that the transcript of the defendant's cross-examination is twenty-five pages long.

The Tribunal is bound by Article 7 of Chapter 380 of the Laws of Malta which article states that cases must be decided principally in accordance with equity. However, the Tribunal must emphasise that affidavits, which by definition, are sworn statements, must actually be sworn. It is not enough to use the word "affidavit" in the title and to sign the document. As the law itself requires, the document must be sworn before someone competent to administer an oath according to law.

However, due to the fact that the defendant was subjected to cross-examination in which plaintiff's legal counsel continually referred to the defendant's affidavit as such and hence, was deemed to have accepted the affidavit as such, the Board shall consider the affidavit as though it were sworn on oath according to law.

- ***<u>The substance of the defendant's affidavit and the cross-examination of the defendant</u>***

There is no doubt that the defendant accepts that she has not paid contributions. In fact, on the second page of her affidavit (fol. 101), she twice uses the word "*arrears*". In particular, she refers to a meeting held of which the result was that it was "*amicably agreed that the administrator would rectify certain issued and I would pay some arrears*". In so stating, the defendant accepts that she is a debtor.

The defendant seems to think that she can withhold contributions which are necessary for the preservation and maintenance of the condominium simply because in her opinion, which is not supported by any expert opinion, no maintenance was ever carried out. This is contrary to what the law states and contrary to what the statute of the owners' association states. As this Tribunal has already made clear, the law does not allow a condominus to unilaterally withhold payment. The remedy which the condominus may seek is to refer the matter to arbitration, not to simply stop paying her share.

With reference to the section of the defendant's affidavit titled "*Photographic Evidence*", the Tribunal observes that this section consists of a number of grievances which the defendant has. However, the defendant fails to establish the necessary connection between these grievances and why these grievances should result in her being allowed to not contribute her share of the relative costs.

Furthermore, although the defendant refers to insulting, threatening and untruthful content of e-mails (fol. 103), matters relative to insults and threats are a matter for the Police to investigate, not this Tribunal. Unpleasant as the content of the e-mails may be, it does not follow logically that she may not pay the relative amounts.

In cross-examination, the defendant confirmed that she stopped contributing and stated that she stopped during the time that Mr Henry Fenech served as administrator. Subsequently, she confirmed that she had not made payments since 2011.

The defendant also confirmed that her grievance relative to the drains in the main shaft had nothing to do with the substance of the Notice of Claim.

Questioned by the Tribunal and by plaintiff's legal counsel, the defendant stated that each year she received a statement detailing how much she had to pay. She also confirmed that she received a statement of expenditure relative to the previous year.

- ***<u>The law applicable to the case</u>***

The case revolves around expenses and contributions which the plaintiff *nomine* contends that the defendant failed to pay in relation to her share of expenses and contributions as one of the *condomini* of Neptune Court in Ċensu Tabone Street in St Julians.

According to the Notice of Claim, the Tribunal was asked to condemn the defendant to pay:

i. €1,250.00 as balance due in relation to the installation of a lift;
ii. €250.00 as her share of the contribution towards the maintenance, restoration and/or preservation of the common parts for 2015;
iii. €250.00 as her share of the contribution towards the maintenance, restoration and/or preservation of the common parts for 2016;
iv. €250.00 as her share of the contribution towards the maintenance, restoration and/or preservation of the common parts for 2017;
v. €300.00 as her share of the contribution towards the maintenance, restoration and/or preservation of the common parts for 2018; and
vi. €656.91 as the amount due in relation to her share for the reconstruction of the lift room in the common parts.

Article 11(1) of the Condominium Act states:

"*The costs necessary for the preservation, maintenance, ordinary and extraordinary repairs, for the enjoyment of the common parts, for the rendering of services in the common interest and for the alterations agreed upon by the condomini are to be divided between the condomini in proportion to the value of the property of each condominus, saving always any contrary agreement.*"

The pleas raised by the defendant make it clear that she believes that she ought not to pay the abovementioned amounts.

Article 11(5) of the Condominium Act provides that any condominus who feels that his share in respect of such expenses is not fair considering the value of his ownership rights in the condominium may refer the matter to arbitration. The Tribunal observes that the law does not provide that any condominus who feels that his share of the expenses is not fair may unilaterally decide not to pay. Rather, the matter may be referred to arbitration for a decision on the matter. Although in her affidavit, the defendant referred to having initiated arbitration proceedings (fol. 100), there is no actual evidence that any arbitration proceedings ever took place.

The Tribunal saw the statute of the owners' association which was filed in support of the defendant's affidavit (fol. 129 *et seq.*). Article 7.1 of the statute states that all costs which refer exclusively to the common parts shall be borne in equal portions between the condomini who own units in the block. Article 7.2 of the statute mirrors Article 11(2) of the Condominium Act.

The Tribunal also saw that article 9.2 of the statute explicitly states that any dispute arising shall be referred to arbitration in terms of the Condominium Act.

The defendant's pleas do not question the *quantum* in any way. The defendant does not claim that the plaintiff's mathematics is faulty or that the amounts are exaggerated or otherwise wrong. Rather, the defendant essentially pleads that she should not be made to pay the relative amounts firstly because the lift was installed prior to the formation of the owners' association and secondly because she had objected to the installation of the lift.

The defendant's other plea is that she ought not to be made to pay the relative amounts as in fact, no maintenance or preservation of the common parts ever took place.

The Tribunal refers to the judgment of the First Hall of the Civil Court ***Ivan Azzopardi noe vs. Madliena International Limited*** (case 747/2014MH decided on 4th November 2020) in which it was stated:

In any case, the Court refers to article 11 (1) and (2) of the Condominium Act which state as follows –

"*"(1) The costs necessary for the preservation, maintenance, ordinary and extraordinary repairs, for the enjoyment of the common parts, for the rendering of services in the common interest and*

for the alterations agreed upon by the condomini are to be divided between the condomini in proportion to the value of the property of each condominus, saving always any contrary agreement."

The Condominium Act allows the possibility that not all condomini pay the same amount of condominium fees as indicated by subarticle 2 of the article in question-

(2) Where the expenses are made with respect to anything that serves the condomini in an unequal measure, the expenses shall be apportioned in proportion to the use that each one can make." Having said so the Court underlines the fact that the apportionment of costs is catered for in clause 8 of the Condominium Rules and Regulations, so it is a matter that should be dealt with according to those provisions. And as already indicated earlier, any disputes concerning the Rules and Regulations should be referred to arbitration in terms of the Condominium Act. Thus, this Court has no jurisdiction to decide on such issues.

Notwithstanding the above, it is pertinent to point out that in any case, section 11 (2) of the Condominium Act on which defendant company is basing its plea, is being wrongly interpreted by the said company. In the case ***Joseph Camilleri et vs Allcare Limited*** *the Court gave a very thorough interpretation of article 11 (2) of the Act –*

"2. Hu evidenti li l-appellanti qegħda tistrieħ fuq l-Artikolu 11(2) tal-Att dwar il-Condominia (Kap 398) biex issostni l-aggravju tagħha:

"(2) Meta l-ispejjeż isiru dwar xi ħaġa li sservi lill-condomini f'miżura mhux ugwali, l-ispejjeż jinqasmu fi proporzjon tal-użu li kull wieħed jista' jagħmel."

3. Fil-fehma tal-qorti, l-appellanti qegħda tinterpreta dan il-provvediment b'mod żbaljat. Il-fatt li condominus jagħżel li ma jagħmilx użu minn appartament li jifforma parti minn kondominju, ma jeżonerahx milli jikkontribwixxi sehemu millispejjeż. Is-subinċiż (2) qiegħed jirreferi għal dawk il-każijiet fejn ħaġa fil-kondominju, sa mill-bidunett ma tkunx intiża għall-użu b'mod ugwali bejn il-condomini. Tista' tgħid li l-Artikolu 11(2) hu riproduzzjoni tat-tieni paragrafu tal-Artikolu 1123 tal-Kodiċi Ċivili Taljan, li jipprovdi:

"Se si tratta di cose destinate a servire i condomini in misura diversa, le spese sono ripartite in proporzione dell'uso che ciascuno puo farne."

Il-Qorti Kassazzjoni Taljana fis-sentenza numru 17557 tal-1 ta' Awissu 2014, ikkumentat hekk dwar dan il-provvediment:

"La norma in questione ha infatti riguardo al godimento potenziale che il condomino puo' ricavare dalla cosa o dal servizio comune, atteso che quella del condomino e' una obbligazione propter rem che torva fondamento nel diritto di comproprieta' sulla cosa comune, sicche' il fatto che egli non ne faccia uso non lo esonera dall'obbligo di pagamento della spesa."

Wieħed irid jiddetermina d-destinazzjoni tal-ħaġa li dwarha jkunu saru l-ispejjeż. Jista' jkun li d-destinazzjoni ta' ħaġa fil-kondominju tkun għall-użu b'mod divers bejn il-condomini u l-ħlas tal-ispejjeż fir-rigward ta' dik il-ħaġa tidher li għandha tkun fi proporzjon għall-użu li kull wieħed jista' jagħmel u mhux fi proporzjon għall-użu li kull wieħed jagħmel. Jekk il-ħaġa hi ntiza biex isservi lill-condomini f'mizura mhux ugwali, allura japplika l-Artikolu 11(2). Tant din

hi l-interpretazzjoni korretta li d-disposizzjoni tipprovdi li l-ispejjeż, "... jinqasmu fi proporzjon tal-użu li kull wieħed jista' jagħmel." u mhux "li jagħmel". Il-fehma tal-qorti tkompli tissaħħaħ mit-test Ingliz tal-provvediment:

"... the expenses shall be apportioned in proportion to the use that each one can make."

Il-fatt li l-condominus minn jeddu jagħżel li ma jagħmilx użu minn ħaġa, m'hu ta' ebda rilevanza għall-finijiet tas-subinċiż (2) tal-Artikolu 11 tal-Kap. 398.

4. ***Fil-fehma tal-qorti skond l-Artikolu 11, il-prinċipju hu li l-condominus għandu obbligu li jikkontribwixxi b'mod proporzjonali għall-ispejjeż, irrispettivament ikunx qiegħed effettivament jagħmel użu jew le mill-partijiet komuni. Il-provvediment m'huwiex jagħti rilevanza għall-użu effettiv li kull wieħed mill-condomini jkunu qiegħed jagħmel.*** *F'sentenza tal-Qorti Kassazzjoni Taljana (Tieni Sezzjoni) numru 17557 tal-1 ta' Awissu 2014, intqal:*

In tema di condominio, fatta salva la diversa disciplina convenzionale, la ripartizione delle spese della bolletta dell'acqua, in mancanza di contatori di sottrazione installati in ogni singola unita' immobiliare, va effetuata, ai sensi dell'art 1123 c.c. , comma 1, in base ai valori millesimali delle singole proprieta, sicche' e' viziata, per intrinseca irragonevolezza, la delibera asembleare, assuta a maggioranza, che – adottato il diverso criterio di riparto per persona in base al numero di coloro che abitano stabilmente nell'unita immobiliare – esenti al contempo dalla contribuzione i condomini i cui appartamenti siano rimasti vuoti nel corso dell'anno.""

The Tribunal reiterates that the Condominium Act does not allow a *condominus* to unilaterally decide not to pay amounts due in order to maintain and preserve the condominium. If anything, the *condominus* – in this case, the defendant – must pay the relative amounts and if she then believes that the money is being misused or not being used to properly preserve and maintain the condominium, sue whomsoever it may be appropriate to sue in order to recover damages.

In any case, the Tribunal notes that the defendant's affidavit does not establish a link between the grievances listed therein and justification for her failure to pay the relative amounts. Although the Tribunal can understand that on a human level, the defendant feels hard done by, it is obvious that were everyone to adopt the defendant's reasoning, everyone could surely find enough grievances to justify non-payment.

Furthermore, the defendant completely failed to prove that the amounts claimed were truly not due or were exaggerated. In fact, her affidavit did not even address the *quantum*.

This being the case, the Tribunal believes that the plaintiff's claims have merit.

It is not even the case that defendant referred to Article 11(2) cited above: *(2) Where the expenses are made with respect to anything that serves the condomini in an unequal measure, the expenses shall be apportioned in proportion to the use that each one can make."*

Nowhere in her affidavit did she claim, for example, that she does not use the lift in an equal measure as other condomini. To the contrary, her flat is in fact situated on the fifth floor of the building.

<u>Decision</u>

Therefore, after having read the documentation filed and after having heard the witnesses, the Tribunal:

i. Accepts the plaintiff's first request and condemns defendant to pay to the plaintiff *qua* administrator the amount of two thousand and nine hundred and fifty-six Euros and ninety-one cents (€2,956.91);

ii. Accepts the plaintiff's second request and orders the defendant to pay the costs of judicial letters 2364/2013 and 1156/2018 (having seen satisfactory evidence that these judicial letters were in fact filed); and

iii. Accepts the plaintiff's third request and orders that interest should run at a rate not higher than the maximum allowable at law in the manner stipulated in the Notice of Claim.

The Tribunal orders the defendant to pay the costs of this case.

AVV. JULIANA SCERRI FERRANTE
B.A., L.P., Mag. Iur. (Int. Law), LL.D.
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