COURT OF MAGISTRATES (MALTA)

DR. RACHEL MONTEBELLO B.A. LL.D.

MAGISTRATE

Application Number : 40/2022 RM

Polina Vaswani (MT 4393621)

-Vs-

Doors & More Limited (C 64577)

Today, 10th July 2023

The Court,

Having seen the Application filed by plaintiff, Polina Vaswani, in the Registry on the 15th February 2022 where she requested that defendant company, Doors & More Limited is condemned to:-

Refund the sum of five thousand, five hundred and twenty euro and sixteen cents (€5,520.16) disbursed by the plaintiff.

Remove and transport at your expense, the defective doors and ancillary goods supplied by you from the residential address of the plaintiff.

Liquidate damages caused to the residence of the plaintiff solely due to you lack of diligence and skill in your workmanship and defective goods supplied, includings further damages arising from the removal of the doors and related fixtures.

Liquidate any moral damages that the Court deems fit to award in these circumstances.

With costs, including those of legal letter dated 7th January 2022 with interests against the defendant who is, from now, being summoned with reference to the oath of the adversary according to law.

Having seen the Reply filed by Doors & More Limited on the 21st March 2022 where the following pleas were raised:-

(i) *Illi preliminarjament*, jidher illi r-rikorrenti qiegħda tibbaża t-talbiet tagħha, in parte, fuq l-Artikolu 1424 tal-Kodici Ċivili, liema azzjoni hija preskritta ai termini tal-artikolu 1431 tal-istess Kodiċi;

(ii) Illi subordinatament u mingħajr preġudizzju għall-ewwel eċċezzjoni, tiġi eċċepita l-improponibilita' ta' l-azzjoni billi filwaqt li r-rikorrenti qiegħda titlob għall-ħlas ta' ammont rappreżentanti danni allegatament sofferti minnha, fl-istess waqt tiddikjara li dawn id-danni huma riżultat ta' allegat difett moħbi;

(iii) Illi mingħajr preġudizzju għas-suespost, hija ma hijiex responsabbli għal ebda allegati spejjeż sofferti jew li għad jistgħu jiġu inkorsi mir-rikorrenti;

(iv) Illi mingħajr preġudizzju għas-suespost, fi kwalunkwe każ l-ammont ta' danni pretiż mir-rikorrenti irid jiġi pruvat;

(v) Illi finalment u mingħajr preġudizzju għas-suespost, it-talbiet rikorrenti huma nfondati fil-fatt u fid-dritt stante li l-bibien in kwistjoni ma kienux affliti b'difetti latenti fil-mument li sar il-bejgħ;

(vi) Salvi eċċezzjonijiet oħra permessi mill-ligi.

Għaldaqstant u in vista tas-suespost l-esponenti umilment titlob lil din l-Onorabbli Qorti tiċħad it-talbiet rikorrenti"

Having seen that by virtue of a decree given on the 2nd May 2022, it was ordered that the proceedings are conducted in the English language;

Having heard the testimony of the parties and their respective witnesses;

Having seen all the evidence and documents produced by the parties;

Having heard the parties declare that it is not necessary for the acts of the proceedings that were filed in the Maltese language to be formally translated into the English language;

Having seen all the acts of the proceedings;

Having seen the note of submissions filed by plaintiff on the 3rd May 2023 in accordance with the decree given on the 16th February 2023, as duly amended in virtue of a further decree given on the 3rd April 2023;

Having seen the note of submissions filed by way of reply on behalf of defendant company on the 30th June 2023 on accorance with the decree given on the 3rd May 2023;

Having considered;

Upon an examination of the acts of the proceedings and the evidence brought forward by the parties, it would result that in August 2019 plaintiff ordered six new internal doors for her home from defendant company, and these were installed in December 2019. Plaintiff claims that immediately upon installation she noticed that four of the doors were not installed properly since there were evident gaps between the wall and the door frames, while the frame of the door of the ensuite bathroom which touches the shower cubicle was cut in a rough and irregular manner. She also complained that the door of the guest room sags from the hinges and scrapes the floor when being opened and closed. Although the defendant company had sent on her request, an employee to fix the hinges, she claimed that the problem continued to recur every month or so. As for another two of the doors, she claimed that the screws of the rotating mechanism with which these doors were installed, would loosen periodically. As a result, the screws scratch and damage the door frame and prevent the doors from being opened or closed normally.

Plaintiff confirmed that she notified defendant company with these complaints regarding the various doors, almost immediately following installation and then again regularly each time the faults resurfaced after rectification, in any event within less than one year following installation.

The Court must begin by determining the nature of the action exercised by plaintiff. In her note of submissions, she points out that the action is based on the provisions of the Consumer Affairs Act (Chapter 378 of the Laws of Malta) namely for a return of the goods and refund of the price paid due to lack of conformity in terms of article 73(7)(a), 74(3) and 78A of Chapter 378 of the Laws of Malta.

From its end, defendant company pleads that since the action is based at least in part, on the provisions of article 1424 of the Civil Code which provides for the exercise of the *actio redibitoria*, the action is therefore time-barred as provided in article 1431 of the same Code. Also the impossibility of a demand for the payment of damages based on the existence of an alleged latent defect.

The Court would point out at the outset that defendant's second plea is manifestly unfounded since plaintiff's demand for the payment of damages is not based on the existence of a latent defect – the word "latent" ("*moħbi"*) does not appear anywhere in the Application and in any event, as would result from the note of submissions filed by plaintiff, the action is expressly based on the provisions of the Consumer Claims Act and not on the provisions of aeticle 1424 of the Civil Code.

It would be pertinent to begin by reproducing the relevant parts of the provisions of Chapter 378, the Consumer Affairs Act, hereinafer referred to as 'the Act', on which plaintiff claims to have based the action.

Plaintiff claims that the doors installed in her premises lack conformity with the sales contract. Article 73(1)(2) of the Act defines lack of conformity that would give a right of action for the termination of the sales contract in terms of Article 78A of the same Act:-

'(1) Sellers shall deliver goods to the consumer that conform with the sales contract, which goods shall, in particular, where applicable:
(a) be of the description, type, quantity and quality, and possess the functionality, compatibility, interoperability and other features, as required by the sales contract;
(b) be fit for any particular purpose for which the consumer requires them and which the consumer made known to the seller at the latest at the time of the conclusion of the sales contract, and in respect of which the seller has given acceptance;
(c) be delivered with all accessories and instructions, including on installation, as stipulated by the sales contract; and
(d) be supplied with updates as stipulated by the sales contract.

(2) In addition to complying with any subjective requirement for conformity with sub-article (1) the goods shall also:

(a) be fit for the purposes for which goods of the same type would normally be used, taking into account, where applicable, any law, technical standards or, in the absence of such technical standards, applicable sector-specific industry codes of conduct;
(b) where applicable, be of the quality and correspond to the description of a sample or model that the seller made available to the consumer before the conclusion of the contract;
(c) where applicable, be delivered along with such accessories, including packaging, installation instructions or other instructions, as the consumer may reasonably expect to receive; and
(d) be of the quantity and possess the qualities and other features, including in relation to durability, functionality, compatibility and security normal for goods of the same type and which the consumer may reasonably expect given the nature of the goods and taking into account any public statement made by or on behalf of the seller...'

Plaintiff invokes specifically article 73(7)(a) of the Act which defines lack of conformity in so far as this results from incorrect installation:-

'(7) Any lack of conformity resulting from the incorrect installation of the goods shall be regarded as lack of conformity of the goods if:
(a) the installation forms part of the sales contract and was carried out by the seller or under the seller's responsibility'.

As already pointed out, plaintiff's complaint does concern the installation of the doors, but only in part.

According to article 74(1) of the Act, in the event of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity or to receive a proportionate reduction in the price, or to terminate the contract, under the conditions set out in that article and in article 75.

In the case under review, plaintiff submits that her action is intended to obtain the return of the goods and the refund of the price paid as a result of the lack of conformity of the goods with the sales contract and indeed, in her Application she demands that defendant company is condemnded to: "*refund the sum of five thousand, five hundred and twenty euro and sixteen cents (€5,526.16)*" and to "*remove and transport at your expense, the defective doors and ancillary goods supplied by you...*" However, in so far as by means of these two demands, plaintiff claims that she is acting in accordance with article 78A of the Act ('*Termination of sales contract*'), expressly cited in her note of submissions, the Court observes that plaintiff did not at any point, either prior to the institution of the lawsuit in correspondence exchanged with defendant company or in her Application commencing proeedings, exercise her right to terminate the contract by terminating or expressing her decision to terminate, the sales contract. In fact, the correspondence exhibited in evidence shows that plaintiff only ever requested the repair or the replacement of the allegedly defective goods and or installation[1] but never the termination of the sales contract.

Article 78A of the Act stipulates that the sales contract shall be terminated, either in whole or in relation to some of the goods delivered, by the consumer "*by means of a statement to the seller expressing the decision to terminate the sales contract*". This statement operates, by virtue of subarticle (2) of article 78A, as a termination of the sales contract without any further formality required in order to give effect to such termination.

The Court is of the firm view that failing a statement having been made to defendant company terminating the contract and where plaintiff, in her testimony, made no reference whatsoever to the termination of the sales contract, plaintiff cannot by means of this action, avail herself of the remedy consisting in the termination of the sales contract. Specifically, since the right to terminate the sales contract is to be made by means of a statement to the seller, as aforesaid, plaintiff cannot request the termination of the contract by virtue of this lawsuit where, it must be added, no

[1] Emails at page 54 and 55 of the record of proceedings, containing plaintiff's final complaints.

express demand for the termination of the sales contract was even made. In any event, it is the Court's view that the termination of the sales contract is made by the consumer's statement to the seller to that effect, and not by virtue of a demand in the Application commencing proceedings.

In addition, it must be observed that plaintiff requested in her Application that defendant company is condemned at its own expense, to remove the defective doors and accessories and transport them from her residence. This demand in the Court's view, continues to negate plaintiff's assertion that the action was brought in accordance with the provisions of article 78A of the Act, because in terms of paragraph (a) of article 78A(2) of the Act, the consumer is bound to return to the seller (albeit at seller's expense) the goods lacking conformity with the sales contract.

According to article 78A(2):-

"Where the consumer terminates a sales contract as a whole or, in accordance with the proviso in the preceding sub-article, in relation to some of the goods delivered under the sales contract:
(a) the consumer shall return to the seller, at the seller's expense, the goods; and
(b) the seller shall reimburse to the consumer the price paid for the goods upon receipt of the goods or of evidence provided by the consumer of having sent back the goods."

Paragraph (b) of article 78A(2) makes it clear that the seller's obligation to reimburse the price to the consumer comes into effect upon receipt of the goods or evidence of the consumer having returned the goods to seller. However, plaintiff also evidently failed to fulfil this requirement since it is an undisputed fact that the doors were not restored to defendant company and to date remain in plaintiff's possession. It is clear that article 78A of the Act requires the consumer, not the seller, to return to the seller the goods lacking conformity with the sales contract, following the statement made to seller expressing the decision to terminate the sales contract. Consequently, not only

is plaintiff's second demand in the application inadequate to satisfy the demand for the refund of the price paid for the doors, but it must also follow that the exercise of the right under article 78A of the Act cannot succeed since plaintiff failed to fulfil the statutory requirements that would compel the seller to reimburse the price paid for the doors.

In any event, and in addition to the above considerations, the Court is also satisfied that the right to terminate the sales contract in the particular circumstances of this case, is excluded by article 76(2) of the Act which provides that the consumer shall not be entitled to terminate the contract if the lack of conformity is only minor[2]. The same subarticle also stipulates that the burden of proof with regard to whether the lack of conformity is minor shall be on the seller.

The Court examined the evidence and cannot but observe that the complaint concerning the gaps between the wall and the door frames, touching only four of the doors, must be considered as a minor defect, as must also the irregularly-cut part of the door frame of the ensuite bathroom. As for the door of the guest room which periodically sags and brushes the floor and the persistent difficulty in opening one of the doors due to a loose screw from the rotating mechanism, these also are, in the Court's view, minor defects that cannot be deemed to be sufficiently serious in order to warrant the termination of the contract, even if taken together with the other minor defects already pointed out.

The Court is not persuaded that plaintiff's demands for the refund of the price of the contract and the removal of the doors, based as they are on the premise that the sales contract has been terminated, because, as already pointed out, the right to terminate the contract was not exercised by plaintiff in accordance with the relevant articles of the Act. Consequently, the Court cannot order the refund of the price and the removal

[2] The requirement that the lack of conformity is not minor is further emphsised in paragraph (c) of article 74(3)(c) of the Act which stipulates that termination of the sales contract may be sought if the lack of conformity is of such a serious nature as to justify immediate termination of the sales contract.

of the defective doors on the basis of the provisions of the Consumer Affairs Act invoked by plaintiff as the basis for the action.

Having considered;

That since this Court in its inferior jurisdiction, is not precluded from judging upon any other right that from the evidence adduced, might be made to appear, it must proceed to examine whether plaintiff has a right to demand the refund of the price paid in terms of the sales contract and or any other right, under any other provision of law, even if such right does not fall precisely within the terms of the claim as originally framed[3].

As for the refund of the price paid on the sales contract due to alleged defective goods, the Court notes that this right is available to the buyer who exercises an action in accordance with article 1427 of the Civil Code in respect of any latent defects in the thing sold 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[4]. In the event that the thing sold presents a latent defect as referred to in article 1424 of the Civil Code, that is where the defects were not apparent and were not known to the buyer at the time of sale, the buyer may elect, by instituting the *actio redhibitoria*, to restore the thing and have the price repaid to him.

However it would result at the outset that plaintiff cannot, in the circumstances of this particular case, avail herself of the *actio redhibitoria:* it is established in case-law that this action is not available when the buyer elects to keep the thing sold and that in order to successfully demand the restitution of the price paid, the buyer must have restored the thing. As is evident even from the demand in the Application for the defendant to be condemned to remove and transport the defective doors from plaintiff's residence at his expense, plaintiff failed to restore the thing sold and it is

[3] Article 215 of Chapter 12 of the Laws of Malta.
[4] Article 1424 of the Civil Code.

undisputed that to date, the doors have not been returned to defendant company or even deposited under the authority of the court in order that the buyer might be deemed to have satisfied the requirement of the restoration of the thing in accordance with article 1427 of the Civil Code.

Regarding this requirement, our courts have held:-

"*Fondamentali ... hu l-prinċipju li l-actio redhibitoria kienet timponi fuq il-kompratur 'li jagħti lura l-ħaġa' u ċjoe' r-restituzzjoni ta' l-oġġett mixtri mill-venditur u kontestwalment li 'jitlob ir-radd tal-prezz'. Il-liġi ma tippermetti allura l-ebda alternattiva oħra lill-kumpratur li jagħżel li jaġixxi bl-azzjoni redibitorja. Fil-verita' allura l-kompratur ma kellux id-dritt li jibqa' jżomm l-oġġett f'idejh u li jirrilaxxjah biss lill-venditur meta dan iroddlu l-prezz tiegħu. Hu kellu l-obbligu li minnufih appena jirrifjuta l-oġġett mibjugħ għaliex ikun irriskontra d-difett latenti jagħti lura l-ħaġa lill-venditur"*[5]*. Dan it-tagħlim jgħodd ukoll fejn l-azzjoni (jew l-eċċezzjoni) tkun dwar ħaġa mressqa mill-bejjiegħ li ma tkunx tal-kwalita' miftehma*[6]"

The *raison d'etre* of the requirement that, for the successful exercise of the *actio redhibitoria* in accordance with article 1427 of the Civil Code, the action for the rescission of the sale when the thing sold is not according to the stipulated quality or sample under article 1390 of the Civil Code and also of the right to terminate the sales contract in accordance with article 78A of the Consumer Affairs Act, the thing is restored to the seller, is essentially that the exercise of these rights is intended to bring about the annulment of the contract whereby the parties are placed in the same position obtaining immediately prior to the agreement. This means that the thing must be restored to the seller in the same condition and state that it was to be found at the time of the conclusion of the contract.

[5] App. Civ. 6.10.2000 : **Busietta noe vs Borġ Cardona et noe** (Kollez. Vol: LXXXIV.ii.1085).
[6] App. Civ. 28.1.2005 : **L & D Attard Co. Ltd. vs Eurometal Co. Ltd**.

Commenting on this requirement from the perspective of both the *actio redhibitoria* and the action pertaining to the buyer under article 1390 of the Civil Code, that is, when the thing is not according to the stipulated quality or sample, the First Hall of the Civil Court explained:-

"Għalhekk, jekk kemm-il darba l-ħaġa ddum f'idejn ix-xerrej u tilħaq titgħarraq, ma jkunx jista' jintlaħaq l-għan tar-rexissjoni.

...

Illi huwa minħabba f'hekk li l-awturi jisħqu li ż-żamma min-naħa tax-xerrej tal-ħaġa mixtrija meta ma tkunx tal-kwalita' miftehma "preclude l'azione di risoluzione, non per la sola materiale impossibilita` di rimettere le parti nelle condizioni nelle quali si trovavano nel momento del contratto, bensi` in quanto costituisca una non equivoca dimostrazione di un comportamento incompatibile con la volonta` e con la finalita` di provocare lo scioglimento del vincolo ed una dimostrazione del fatto che l'acquirente abbia inteso accettare la res compravenduta nonostante la presenza dei vizi o difetti[7]"[8]

Moreover, the Court understood that plaintiff repeatedly stated in her testimony, and in the exchange of email correspondence which is exhibited in the acts of the proceedings, that the alleged defects are the result of defective installation of the doors, rather than a defect in the quality, material or functionality of the doors purchased from defendant company. In any event, most of these alleged defects, were visible and apparent from the outset, upon installation or within a short time following installation[9] and consequently, the exercise of the *actio redhibitoria* would be

[7] Cassaz. 8.11.1965 nru. 2327.

[8] **Louis Farrugia v. S&R (Ħandaq) Limited**, decided by the Civil Court, First Hall, 12th March 2012.

[9] This is confirmed by her husband, Raj-Lokesh Vaswani who testified that the poor quality of the doors and the shoddy workmanship was evident "*from the outset*" and the first complaint was made to defendant company two days after delivery. In fact upon examining the thread of email correspondence exchanged between plaintiff and defendant company in connection with plaintiff's complaints regarding the doors and her repeated requests for their repair (Doc. 8), the Court observes that the flaws and shortcomings described by plaintiff were in any event all identified by her within the first year of installation, by December 2020. From then on, it was a matter of a recurrence of the same problems that had already been identified by plaintiff, namely the rotating mechanism installed in two of the doors and the sagging door which each time despite being repaired, would sag again after one or two months.

excluded by virtue of the provisions of article 1425 of the Civil Code which excludes the liability of the seller for any apparent defects which the buyer might have discovered for himself.

In addition, defendant company pleaded that the *actio redhibitoria* is time-barred by the lapse of six months from the both the date of the delivery of the thing sold and the date when the plaintiff discovered the defects and the Court is satisfied, even from plaintiff's own testimony, that in the case under review, the defective installation and or mechanism of the affected doors, were discovered by plaintiff and known to her at most within the first few months following delivery and installation. This means that the action, which was commenced by means of the Application filed on the 15th February 2022, that is, almost two years from the date of installation, is undisputedly time-barred.

It is established in relevant case-law that the statutory time-limit for the limitation of the action is considered as a term of forfeiture as opposed to a term of prescription and is thus not susceptible of suspension or interruption.

The Court of Appeal in a judgement delivered on the 30th May 2003 on the matter of the statutory time-limit established for the exercise of *inter alia*, the *actio redhibitoria*, stated:-

"Jibda biex jinghad illi dan it-terminu huwa wiehed ta' dekadenza u mhux soggett ghall-interuzzjoni jew sospensjoni bhal fil-kaz ta' preskrizzjoni. Il-Qrati taghna dejjem irritenew dan it-taghlim u f'kawza tipika fl-ismijiet "William Savona vs Carlo Stivala" (Vol. XXVIII part II, pagna 922) il-Qorti irriteniet illi t-terminu imsemmi huwa terminu ta' dekadenza u ta' rigur u ghalhekk mhux soggett ghal interruzzjoni jew sospensjoni bhal fil-kaz tal-preskrizzjoni. L-istess Qorti ghamlet referenza ghal dak illi qalet il-Qorti fis-sentenza taghha "Ugo VanHall vs Alfredo Caruana" (16/4/1891) u cioe` li ghall-azzjoni redibitorja gie ffissat terminu qasir billi l-bejjiegh jekk jghaddi certu zmien ma jkunx f'posizzjoni illi jiddefendi ruhu sew kontra

allegazzjoni ta' vizzji okkulti li jizviluppaw jew wiehed jinduna bihom wara li jsehh in-negozju."

This position was reaffirmed and reiterated consistently and in a more recent judgement in the names **Tancred Manfre' vs Carmel sive Charles Micallef**[10], it was held:-

"*Illi, fis-sewwa, huwa meqjus li ż-żmien maħsub fl-artikolu 1431 m'huwiex daqstant żmien preskrittiv daqs kemm wieħed ta' dekadenza (Ara, b'eżempju, Kumm. 26.3.1976 fil-kawża fl-ismijiet Emanuel Cauchi vs Francis Portelli noe (mhix pubblikata) u P.A. 6.7.1982 fil-kawża fl-ismijiet Antoinette Baldacchino vs Charles Baldacchino Lia (mhix pubblikata)), b'mod li l-azzjoni trid tinbeda sa ma jagħlaq dak iż-żmien u ma jistax jitwal bil-ħruġ ta' att ġudizzjarju (P.A. TM 9.6.2005 fil-kawża fl-ismijiet Joseph Vella noe vs Anthony Migneco et).*"

Therefore, since the action is time-barred and in addition, one of the essential elements for the exercise both of the *actio redhibitoria* and the right of termination of the sales contract under article 78A of the Consumer Affairs Act, is lacking in the case under review[11], plaintiff's action cannot succeed under article 1424 and 1427 of the Civil Code.

Having considered;

It remains to be seen whether plaintiff's demand for the liquidation and payment of damages suffered as a result of the defective goods that were supplied and as a result of the alleged lack of skill and diligence manifested in the installation of the doors, and moral damages suffered, is merited.

[10] First Hall of the Civil Court; decided in 9th February 2012.
[11] That is, the restitution of the thing sold.

As for the demand for payment of moral damages, this is manifestly unfounded because the payment of moral damages is envisaged only in respect of an action exercised under the Consumer Affairs Act before a tribunal. Since the plaintiff has chosen to exercise the action before the ordinary courts as opposed to a tribunal, the provisions of article 21, which envisage an order for the payment by the trader in a sum of not less than €35 and not more than €500 by way of moral damages for any pain, distress, anxiety and inconvenience caused to the consumer.

As for the plaintiff's demand for the liquidation and payment of material damages, it has already been established that plaintiff's action, founded as it is on the relevant provisions of the Consumer Claims Act, cannot succeed in so far as the demand for the refund of the price paid for the goods sold and for their return to defendant company. Therefore, since the doors remain installed in plaintiff's residence, it is to be seen whether she is entitled to the payment of damages as a result of the alleged defective installation of some of the doors. Although in her note of submissions, plaintiff made no reference to her claim for material damages and insisted on the demand for the refund of the price, which demand as already established, cannot be acceded to, the Court shall nevertheless proceed to examine and determine this claim.

It is undisputed that the parties entered into a contract where defendant company agreed to supply and instal a number of internal doors in plaintiff's residence. This contract falls sqaurely to be regulated as a contract of works or *locatio operis* and thus by the provisions of Article 1633 *et sequitur* of the Civil Code.

It is an established principle of law that in a matter of a contract of works:

"*Min iwettaq bicca xoghol li ghaliha jkun gie inkarigat ghandu obbligu jaghti rizultat tajjeb u ta' vantagg ghall-klijent, u jekk jonqos li jaghti dan ir-rizultat, huwa jkun responsabbli ghad-danni, u la jista' jwahhal fl-ghodda, la fil-materjal li juza', la fl-intromessjoni tal-klijent u lanqas fl-istat jew il-kundizzjoni tax-xoghol preparatorju li fuqu jkun irid iwettaq ix-xoghol tieghu. L-appaltatur ghandu obbligu li jwettaq xoghol*

li jaghti rizultat konformi mal-htigijiet tal-klijent, u ghandu jirrifjuta jwettaq xoghol li jaf jew li messu kien jaf, mhux se jaghti rizultat utili."[12]

In a judgement delivered on the 6th October 2004[13], the Court reaffirmed the principle that the contractor is liable for all damages caused by defective works:-

"*Bhala l-ewwel principju huwa dottrinalment u gurisprudenzjalment ricevut illi l-appaltatur ghandu l-obbligu li jezegwixxi x-xoghol lilu kommess fis-sens li huwa ghandu l-obbligu wkoll li jara li dan ix-xoghol 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 capacita` ordinaria" (Kollez Vol XXVII pI p373). Dan fis-sens li hu "ghandu jiggarantixxi l-bonta` tax-xoghol tieghu" (Kollez Vol XL pI p485).*

"It-tieni principju jghid illi "l-appaltatur li jezegwixxi hazin ix-xoghol li jifforma l-oggett ta' l-appalt huwa responsabbli ghad-dannu kollu li jigi minn dik l-ezekuzzjoni hazina" (Kollez. Vol XXXVII pIII p883). Ghax kif jinsab ritenut ukoll "f'kaz bhal dan hu ghandu mill-ewwel ma jaghmelx ix-xoghol jew ikollu jirrispondi ghad-difetti li jigu 'l quddiem" (Mario Blackman -vs- Carmelo Farrugia et noe", Appell Kummercjali, 27 ta' Marzu 1972). Dan hu hekk avvolja jkun hemm l-approvazzjoni tax-xoghol (Kollez. Vol XLI pl p667) jew l-appaltatur ikun mexa skont l ispecifications jew l-istruzzjonijiet lilu moghtija mill-kommittent."

In another judgement, **Francica vs Buhagiar**, delivered on the 28th April 2004:-

"*... l-appaltatur ghandu jesegwixxi x-xoghol lilu kommess fis-sens li huwa ghandu l-obbligu wkoll li jara li dan ix-xoghol ikun sejjer issir utilment u mhux b'mod li 'l quddiem juri difetti. F'kaz bhal dan hu ghandu mill-ewwel ma jaghmilx ix-xoghol jew ikollu jwiegeb ghad-difetti li jigu 'l quddiem, izda galadarba huwa accetta li jahdem*

[12] **Coleiro Yacht Finishes Limited vs Easysell Kia (Malta) Limited**, decided 9th November 2012
[13] **Pierre Darmanin v. Moira Agius**.

ix-xoghol, dejjem jibqa' obbligat u responsabbli li jaghti lill-appaltant opera sodisfacenti u spondet peritiam artis u hu obbligat jirrezisti kwalunkwe intromissjoni tal-komittent"

The basic underlying principle that emerges from settled case-law on this matter is that the contractor who executes works entrusted to him is bound to carry out the works in conformity with the employer's requirements and in a manner that produces an advantageous and positive result to the employer, failing which he is not only not entitled to payment but he is also responsible for ensuing damages that may be suffered.

As far as the remedies available to the employer in the event that the contract of works is not executed diligently or in accordance with the instructions given by the employer or where the contractor produced defective works, the First Hall of the Civil Court in the judgement **Lawrence Formosa et vs Silvio Felice**, explained how different remedies have been afforded according to the particular circumstances of each case, and held:-

"Kif jidher mis-sentenzi fuq citati, il-Qorti taghna f'certi kazijiet ordnaw il-hlas ta' prezz tal-appalt stabbilit "a misura" meta kien hemm difett parzjali mhux sostanzjali fix-xoghol, izda awtorizzaw lill-komittent jirritjeni parti mill-prezz sakemm l-appaltatur isewwi d-difetti. F'kazijiet ohra, fejn ix-xoghol gie ezegwit in parti sewwa u in parti hazin, giet negata lill-appaltatur kull parti mill-prezz fuq il-motiv li x-xoghol ma kienx sar skond ma titlob is-sengha. F'kazijiet ohra, l-Qorti ordnat li titnaqqas, mis-somma li tigi mhallsa, s-somma stmata mill-perit bhala kumpens ghad-difett fix-xoghol."[14]

And, in the judgement **Borg et vs Galea et**[15], the Court of Appeal stated the following:-

[14] Cit. Nru. 1249/90, decided on the 27th June 2002.
[15] Decided on appeal, 19th May 2009.

"*Huwa principju assodat in materia li jekk n-nuqqasijiet riskontrati fix-xoghol esegwit huma essenzjali jew radikali, l-appaltant jista' jitlob li jigi dikjarat li l-kuntratt jinhall minhabba nuqqas ta' twettiq, u li jithallas id-danni minghand l-appaltatur. Jekk però n-nuqqasijiet riskontrati ma jkunux essenzjali jew radikali izda, jistghu jigu riparati, l-appaltatur ma ghandux jitqies inadempjenti izda, jkollu l-obbligu li jsewwi x-xoghol hazin jew jaccetta tnaqqis fil-prezz.*"[16]

It is therefore settled case-law that the contractor who carries out defective works or carries out works that are not in conformity with the standards of good workmanship or which produce no useful result to the employer, is liable for all damages that may ensue from the bad execution of the works and that consequently, as a corollary, the employer is not only entitled to reduce the price of those defective works which have no value for him, but also to claim by way of damages, compensation for resultant defects, which compensation may consist also, as the case may be, in those expenses which were incurred for the rectification of the bad workmanship or defective works or for the commissioning of replacement works.[17]

Applying these principles to the case at hand, the Court after having seen the photos and videos exhibited by plaintiff, finds that the defects consisting in the roughly-cut edge of one of the door frames ('door 5'), the small gaps between some of the door-frames and the walls ('door 6') and the minor scratches on the mechanism and door-frame of another door ('door 2'), are negligible aesthetic flaws that do not detract from the utility of the works and cannot be considered as defective works which would merit any reduction from the price of the works. However, the Court is of the view that the evidently some of the doors presented defects: in one case the door ('door 1'), despite repeated adjustments to the rotating mechanism, continues to sag

[16] Vide also **Jesmar Valletta et v. Patrick Grech et**, First Hall, Civil Court, 20th March 2003.

[17] This principle is reflected in the provisions of Article 1640 of the Civil Code which stipulate that when the contract of works is terminated by the employer for a valid reason, the contractor shall be entitled to receive only such sum which shall not exceed the expenses and work of the contractor, after taking into consideration the usefulness of such expenses and work to the employer as well as any damages which he may have suffered.

and scrape the floor tiles and in the case of another door (‘door 3’), faults appeared in the rotating mechanism which led to the malfunction in the operation of the door, which cannot be closed completely. These two doors were never repaired or replaced and plaintiff confirmed that the problems persist to date.

As for the door (‘door 3’) which were installed with a rotating mechanism, defendant company did not bring any evidence to show that the malfunctioning of the rotation mechanism was due to improper use of the doors by plaintiff or that plaintiff caused the damage. On the contrary, the recurrent nature of the defect, consisting in the recurrent loosening of screws from the rotation mechanism and resultant damage to the door frame, convinces the Court that the door presetns a lack of conformity based on a defect that affects the functionality and operability of the product.

Moreover, the Court is not convinced of defendant company’s argument that the door (‘door 1’) which began to rub against the floor as a result of the underfloor heating installed under the tiles of plaintiff’s residence. Although plaintiff agrees that the premises is equipped with an underfloor heating system, she denied that this caused or contributed to the sagging of the door and insisted that the problem recurs every one or two months even during the summer months. Defendant company did not satisfactorily prove that the heated flooring would negatively affect the functioning of the door or cause it to sag and in any event, it remains unexplained how the heating would affect only one door of the six that were installed in the premises when it does not result that the underfloor heating was installed only in that part of the residence where the defective door was installed.

In any event even if the Court had to accept, for argument’s sake, that the malfunctioning of the door is due to the heat generated by the underfloor heating, in accordance with settled principles of relevant case-law it was defendant’s responsibility to inspect the premises in order to ensure that the installation of the doors would not be affected by extraneous factors existing in the premises and to refuse installation should circumstances so require.

The Court is therefore of the view that defendant company carried out defective works or works which, in any event, were not in conformity with the standards of good workmanship. However, the Court does not consider that the defects are substantial and extensive or material enough to warrant a refund of the entire price of the doors and is of the view that, by applying the principles established by case-law in the matter, plaintiff is entitled to compensation in the form of a refund of part of the price that was paid to defendant company for the supply and installation of these two doors, representing the expenses that would be necessary in order to repair the doors.

Having considered;

However, having established that plaintiff is entitled to the payment of damages to make good for the evident defects in two of the doors installed in her residence, the Court observes that she brought no evidence in support of the amount of damages she claims to have suffered. As already pointed out, although in such cases the client would be entitled to deduct an amount from the price of the works, representing the expenses required to rectify the defective installation or the defective mechanism, no valuation of the expenses required for the repair of the doors exists in the acts of the proceedings. Such evidence could not have been impossible to bring and plaintiff did not show that she was prevented from obtaining an estimate of the value of the repairs, not necessarily of an *ex parte* or a court-appointed expert, but even of a person in the trade such as a carpenter[18]. Moreover, as already pointed out, no submissions whatsoever were made in the note filed by plaintiff on the 3rd May 2023 in connection with her demand for the liquidation and payment of damages

Even if plaintiff's claim for damages must be examined under article 74(3) of the Consumer Affairs Act, which entitles the consumer to a proportionate reduction of the price where *inter alia* the seller has not completed repair or replacement or has been

[18] Indeed, the Court must point out that plantiff testified that she engaged a handyman to examine the cause of the sagging door and also an architect to determine the impact if any of the underfloor heating on the said door (see page 55 of the record of proceedings, email dated 22nd September 2021).

unsuccessful or refused to bring the goods into conformity, still no evidence was brought to enable the Court to establish the proportionate reduction of the price. In fact, the said article 74(3) of the Act provides that the reduction of the price is to be calculated in proportion to the decrease in the value of the goods which were received by the consumer, compared to the value the goods would have if they were in conformity.

While the Court agrees that two of the doors were not in conformity in terms of article 73(1)(2) of the Act and that the provisions of subarticle (3) of article 74 of the Act are satisfied in this case to entitle plaintiff to a proportionate reduction of the price, plaintiff failed to bring proof of the decrease in value of the doors as compared to the total price paid for the supply and installation of the doors, in order that the proportionate reduction might be calculated.

The Court emphasises that it cannot, in the absence of concrete evidence, liquidate damages in favour of plaintiff and neither can it apply its discretionary powers on considerations of equity *arbitrio boni viri*, which consideration would have been relevant and applicable in the event that the cause was brought before the Consumer Claims Tribunal and adjudged by an arbiter, but not when the cause was brought before the ordinary courts. Indeed, according to settled case-law in the matter, the ordinary courts may use their discretion to liquidate damsges *arbitrio boni viri* only when precise quantification of the damages is impossible and the use of equity becomes indispensable to avoid an injustice to the plaintiff, but not when the claimant himself fails to bring the necessary evidence in order that the court may quantify the damages claimed. Naturally, the court must avoid making good itself for the shortcomings of one of the parties when this might potentially prejudice the interests of the opposing party:-

"*Dan id-dritt [ta' rizarciment tad-dannu] pero` mhix wiehed awtomatiku jew li din il-Qorti tista' tistabillih ex gratia jew arbitrio u boni viri minghajr kwalsiasi prova ta'*

telf. Id-dannu jrid jigi ippruvat kif titlob il-ligi u l-prova tinkombi lil min ikun allegah."[19]

It has also been held:-

"*Indiskutibilment il-gudikant ma jistax lanqas f' dawn il-kazi jipprexxendi mill-fatt illi l-parti istanti mhix ezonerata mid-dmir li tipprovdi dawk l-elementi probatorji u dawk il-fattijiet li hi tkun taf bihom ghall-iskop tad-determinazzjoni tat-telf*."[20]

Consequently the Court cannot accede to plaintiff's demand for the liquidation and payment of damages in the absence of adequate evidence in support of this demand.

For all these reasons, the Court, while rejecting the second plea and upholding the remaining pleas raised by defendant company in its Reply to the Application, in so far as they are compatible with this judgement, rejects plaintiff's demands in their entirety. Costs to be borne by plaintiff.

DR. RACHEL MONTEBELLO
MAGISTRATE.

[19] **Ferdinand Portelli vs Maria Dolores sive Lola Portelli** – deciza 9 ta' Lulju, 2015.
[20] **Margaret Camilleri et v. The Cargo Handling Co. Ltd** – deciza mill-Prim'Awla tal-Qorti Civili fit-13.10.2004.