



## Court of Magistrates (Malta)

**APPLICATION NUMBER 115/2019: SOPHIE HERVEY (ID. 171635A)  
V. MARIA BALDACCHINO (ID. 130080M) AND BY MEANS OF A  
DECREE GIVEN ON 4<sup>TH</sup> NOVEMBER 2019 STEVE BALDACCHINO  
(ID. 80579M) WAS JOINED IN THE SUIT**

**MAGISTRATE: DR. VICTOR G. AXIAK**

**27 November 2023**

THE COURT,

having seen the application filed by Sophie Hervey (“the applicant”) on 12 June 2019<sup>1</sup> by means of which she called upon Maria Baldacchino (“the respondent”) to appear before the Court to answer to her claim and say why she should not be ordered to:

**‘pay the sum of fifteen thousand Euros (€15,000), including legal interest accruing up to the date of effective payment representing damages caused to her, including *inter alia* damage to and/or destruction of furniture, furnishings, clothes and other movable items that need to be repaired or replaced, monies disbursed by way of rent paid to movers and third parties that were engaged to carry out the necessary repairs in the applicant’s property and as well for the renting of storage space to store the movables that were previously in the applicant’s property at 9, Triq Gann Frangisk Abela, Birgu, and this as a result of water ingress into the applicant’s property from the overlying property belonging to the respondent situated at 11, Triq Gann Frangisk, corner with Triq il-Foss, Birgu.**

**Together with expenses including those disbursed by way of professional fees in connection with the legal letters sent to the respondent, who is summoned to appear for a reference to her oath’**

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<sup>1</sup> Fol. 1

having seen the reply<sup>2</sup> filed by the respondent by means of which she held that:

- '1. Preliminarily, the applicant should appoint a mandatary to appear on her behalf given that she is often absent from these Islands.**
- 2. That without prejudice to the above, the proceedings are not complete given that the respondent's husband, Steve Baldacchino, was not summoned as a respondent.**
- 3. Without prejudice to the above, the respondent did not cause any damages to the applicant and the contrary should be proven by the applicant in terms of law.**
- 4. Without prejudice to the above, the applicant should present a statement showing in detail what the amount claimed consists of. In any case, the amount claimed is being firmly contested and therefore the applicant is bound to provide evidence backing up the amount claimed in its entirety.**

**Save for further pleas in terms of law.**

**With costs against the applicant, who is summoned to appear for a reference to her oath.'**

having seen the decree given by the Court on 4<sup>th</sup> November 2019 by means of which the respondent's spouse, Steve Baldacchino, was joined in the lawsuit ("the joined party"),  
having seen that in the sitting held on 27<sup>th</sup> January 2020 the joined party declared that he was replying to the applicant's claim by adopting the same pleas of the respondent<sup>3</sup>,  
having heard the witnesses summoned before it and having read the transcripts of their testimony,

having seen all the other documents in the Court file,

having seen the final notes of submissions of:

- the applicant, submitted by Adv. Dr. Carl Grech and Adv. Dr. Maria Camilleri<sup>4</sup>,
- the respondent and the joined party, submitted by Adv. Dr. Mark Simiana who has in the meantime been elevated to the position of Judge of the Superior Courts<sup>5</sup>

gives the following

## **Judgment**

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<sup>2</sup> Fol 8-9

<sup>3</sup> Fol 13

<sup>4</sup> Fol 263-301

<sup>5</sup> Fol 303-315

*Evidence*

1. On 27 January 2020, applicant **Sophie Hervey**<sup>6</sup> testified that she bought the garage, having its address at 9, Triq Gann Frangisk Abela, Birgu and decided to use the property as storage space. She explained how she made the necessary verifications regarding the possible presence of humidity in the garage by engaging AP Architects. These informed her that there was no humidity and that she could use the garage for storage purposes. She stated that she brought several items and furniture from Barcelona, Spain, where she used to reside at the time and stored them in the garage. She insisted that these were in a good condition. After some time water entered into the garage from the overlying property and this caused damages to these items.
2. The water ingress occurred in the rear side of the garage. Water entered through the ceiling onto the mezzanine and the ground floor, damaging some of the furniture that was being stored there. The items were stored in their original packaging. Not all items were damaged. The leak also caused structural damage. Works that were carried out in the property following the leak have to be carried out once again. Moreover, the items that were not damaged had to be relocated to another storage place.
3. The applicant submitted a document (Dok SH1<sup>7</sup>) showing the expenses incurred and the damages that she suffered. As part of the said document she submitted an extract of a report prepared by Architect David Drago (representing AP Architects) who concluded following a site inspection carried out on 28 May 2018 by Architect Rory Apap Brown and Architect Emilie Van Look that:

***“Upon inspection of the overlying property it became evident that the overlying yard was collecting rain water and there were penetrations in the membrane coating. Besides the rain water collection there are several buried water supply pipes within the floor build up and overlying the roof of the garage”***<sup>8</sup>

4. On 29 November 2021 the applicant **Sophie Hervey**<sup>9</sup> testified in cross-examination. She stated that she purchased the garage in April 2017 and that in the ensuing period nothing happened to wood that was stored inside and therefore the garage never suffered from any humidity. When asked if she knew about the well beneath her

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<sup>6</sup> Fol 13A-13D

<sup>7</sup> Fol 14-35

<sup>8</sup> Fol 15

<sup>9</sup> Fol 123A-123O

- property she answered in the negative. She confirmed that she had engaged AP Architects to inspect the garage before she proceeded to purchase it. The architects had issued some recommendations as to what she could do to use the garage as a storage space. When asked about the condition of the walls, floor and roof, she confirmed that these were not in a good state of finish. For instance, the paint on the wall was peeling off. She also stated that no plastering or painting works were ever carried out in the garage<sup>10</sup>.
5. Asked about her relationship with the company Pharmacosdiane Malta Limited, which company she had engaged to store the items that were previously stored in the garage, she confirmed that she is the owner and sole director of this company. She explained that this company's main activities are cultural events and admitted that it is not engaged in the storage business. The applicant testified that all the items that were previously stored in the garage number 9, Triq Gann Frangisk Abela, Birgu are now stored in the garage of the company situated at 11, Triq Papa Alessandru, Birgu. With reference to the invoices exhibited a fol 23 and 24 she confirmed that the amounts indicated in the said invoices were paid by the company.
  6. With regard to the document exhibited a fol 25 showing the compensation requested for the damaged items the applicant said that lounge chair had been restored and that she had already paid for such restoration, while the pouffe and the carpet were valued according to their purchase price. She said that the cleaning costs had already been incurred and paid. The values of the other items that needed to be replaced were quoted from online shops. The applicant confirmed that the ingress of water occurred only once. When asked as to why the items were still stored at another location given that there were no further water leaks she said that initially she had been advised to wait for six months for the garage to dry completely. Her architect then advised her not to put the items back into the garage as the works carried out to stop the percolation of water were not executed correctly and that there was a risk that water might enter her property once again. The applicant also confirmed that the company had claimed back the VAT in connection with the invoices paid by the company<sup>11</sup>.
  7. On 12 October 2020 Architect **Rory Apap Brown**<sup>12</sup> testified and exhibited two documents. Dok RAB1<sup>13</sup> consists of site photos of the applicant's property taken on 13 March 2017, photos of the damages caused by the water ingress taken on 7 May

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<sup>10</sup> See doc . 123C

<sup>11</sup> Fol 123 'O'

<sup>12</sup> Fol 48A-48H

<sup>13</sup> Fol 41-48

- 2018 and photos of the overlying yard taken on 27 September 2018. Dok RAB2<sup>14</sup> consists of the architect report that had been partially exhibited by the applicant during her testimony together with several photos showing the damages caused by the water ingress. The architect explained that the firm had been engaged by the applicant *inter alia* to inspect the garage prior to its purchase. The applicant had intended to use the garage for storage purposes. **The architects assigned to the task took several photos of the garage and concluded that that this was in a good state of repair and fit for the intended purpose.** They also advised her to take certain precautions or preventive measures such as the installation of a smoke detector and an intruder alarm as well as to place the items on plastic pallets such that they do not directly touch the ground. These recommendations were taken on board by the applicant.
8. In May 2018, during one of their periodical inspections, the architects discovered that water had leaked from the ceiling at the level of the mezzanine in the rear of the garage, where there were a number of stored items. The witness testified that the water was leaking from a shaft overlying the ceiling. The applicant was immediately informed. From her end the applicant instructed the architects to inspect the property once again to assess the damages and to assist her in removing the contents of her property. According to the witness when the overlying property was inspected they found that there was a shaft directly over the area in question containing an open gully as well as a number of drains and other plumbing installations. Although the shaft has a liquid membrane nonetheless the witness stated that these drains should be removed and rerouted and that the open gully should be replaced by a close system following which the shaft should be sealed once again with liquid membrane.
  9. The architects were mainly involved in ascertaining the source of the water ingress and inspecting the structural damage. They were not engaged to inspect the damages caused to the furniture and items although they did take photographic evidence in this regard.
  10. The witness categorically excluded that the water ingress could be a consequence of a high level of humidity. He also confirmed that although the volume of water that had penetrated the ceiling was significant, nonetheless the floor was not flooded and the water did not reach the level of the packaging stored on the pallets. Water had

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<sup>14</sup> Fol 49-83

penetrated in a slow but steady manner both from the ceiling as well as down the walls.

11. Under cross-examination during the sitting held on 16 May 2022, Architect **Rory Apap Brown**<sup>15</sup> testified that he wasn't aware of the existence of the well below the garage. He insisted that there were no signs of humidity and that the walls and the floor were not damp with moisture. When the previous owner removed his items from the garage they also stripped the electricity that was passing through the wall. He stated that he never saw any water percolation apart from the one time that they had discovered the water ingress in May 2018. In this regard the witness said:

*"From what we've seen on the site em our our kind of understanding is that it has entered from the back right hand side of the site there's an area which is at the very rear corner em which is essentially behind the last arch and it seems the water ingress from that side at the back it seems it have come partially from the ceiling and through the wall em and our our understanding is that even following the inspection of the property above is that there is a yard over this part of the garage and that most probably water has come in from that point because that will be the most plausible plus there is a number of services pass in the yard above are quite quite intense in the place"*<sup>16</sup>

The witness confirmed that he hadn't inspected the shaft prior to the water ingress and only did so subsequently. He also confirmed that at that stage the works on the shaft had been completed. When asked if he had carried out any tests to verify whether the services beneath the shaft were leaking water he replied in the negative. He added that no tests could be carried out to understand if it was rainwater, drainage, or any other water because all of those three were present in the shaft. He didn't recommend to the applicant to carry out any tests although he did admit that identifying the source of the water ingress is of paramount importance.

The architect also confirmed that he did not ascertain the condition of the movable effects stored in the applicant's garage and neither did he inspect them after the water ingress. After May 2018 there were no further water leaks. He confirmed that another inspection was scheduled after 2018 but the architects didn't have access to the garage. The scope of the inspection was to verify whether there was any other water ingress and the inspection was requested by the applicant. In 2019 he also became aware that some roofing had been installed in the overlying property but he did not

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<sup>15</sup> Fol 187-191

<sup>16</sup> Fol 189

carry out any inspections in this regard. He couldn't recall whether a skylight was installed over the shaft's opening.

12. In re-examination, the architect stated that the only tests that could have been carried out to ascertain the source of the water leakage, i.e., the pigment test, could only be carried out from the overlying property. He did confirm though that the respondent was always cooperative. He also insisted that in his opinion there were too many services draining into the gully which was also exposed.
13. On 23 November 2020 the applicant filed an authenticated declaration by **Anna Schmiedova** representing the Spanish company Crown Worldwide Movers S. L. Though poorly drafted and replete with grammatical errors, the declaration appears to state that the company was responsible for the packing and transportation of 302 items from Barcelona to Malta. The packaging was new and the items were in top condition. The correspondent company in Malta transported the items from the harbour to the storage place. The goods were opened by the workers of the correspondent company who found them to be in a good condition.
14. On 25 January 2021 the applicant submitted the sworn affidavit of Architect **Konrad Buhagiar**<sup>17</sup>, who is a partner of the architectural firm AP Architects. He confirmed that an employee of the firm, Ms. Emilie Van Look, had been tasked with assisting the applicant. One of her duties was to be present for the opening of the packages that were stored in the garage, following the discovery of the water ingress. The witness attached a photographic report prepared by Van Look following a site visit that she had carried out on the applicant's property on 1 August 2018.
15. Respondent **Maria Baldacchino**<sup>18</sup> testified, initially by way of a sworn affidavit submitted on 28 March 2022, that she and her husband Steve Baldacchino, the joined party, had purchased the property situated at 11, Casa Cara, Triq Gann Frangisk Abela, Birgu in June 2016. The house was in a very poor state so much so that part of it had caved in in the past. In this regard the respondent attached a copy of a lawsuit that had been opened by the previous owners of her property against the previous occupants of the property of the applicant. The property was over 500 years old and required a lot of alterations including a replacement of the ceiling<sup>19</sup>. She explained that the house consists of a corner townhouse at first floor level and beneath it there

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<sup>17</sup> Fol 95-109

<sup>18</sup> Fol 130-161

<sup>19</sup> Fol 130

are several properties, among them the applicant's property, which has a footprint of approximately 50m<sup>2</sup>.

16. The respondent insisted that there is a big problem of humidity in her house, especially at ground floor level, specifically below the entrance hall where there is an underlying well that is shared with the applicant. The well's opening is on the left side of the entrance hall which leans onto the common wall with the applicant's property.<sup>20</sup> She explained that the level of humidity is so high that food items kept in a cupboard in the entrance hall used to spoil fairly quickly. Moreover, a number of guests at her property left comments on travel websites such as booking.com and complained about this matter. In this regard the respondent exhibited a document (Dok MB3)<sup>21</sup> When restoration works were carried out at the property, her architect, AIC Aaron Abela, advised her to remove all floor tiles at ground level and replace them with a series of vents that would help increase air circulation. This system was installed and photographic evidence was exhibited as Dok MB4 and MB5<sup>22</sup>. She explained that prior to construction works at her property, Architect Aaron Abela was commissioned to carry out a condition report on neighbouring properties including the applicant's garage which at the time belonged to third parties. She submitted this report as Dok MB6<sup>23</sup>. In this report AIC Abela stated *inter alia* that the garage:

**"... is in a fair good condition with the walls and ceiling lime washed. It is clear that interventions have been carried out in the property and parts of the structure replaced with steel beams. It was also noticed that some of the roof slabs are broken and have been propped while others are not propped. The finishes are not maintained and parts of the lime-washing is flaking and in some other areas there are hairline cracks and also humidity, as can be seen in the photos below. The steel door to the property does not close and remains partially open due to rust."**

She also exhibited the contract of sale by which the applicant had acquired the garage wherein the well is also mentioned<sup>24</sup>.

17. The respondent explained that in April 2018, when construction works were still being carried out, she received a phone call from the applicant who informed her that water had entered in the garage. It was at this point that the respondent found out that the garage had been acquired by someone else and that it was being used. On the

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<sup>20</sup> Doc MB1 and Doc MB2

<sup>21</sup> Fol 136-138

<sup>22</sup> Fol 139-140

<sup>23</sup> Fol 141-147

<sup>24</sup> Fol 148-152



same day the applicant showed the respondent the spot where water appeared to be coming in. She also showed her two beach armchairs as well as a sofa cushion which had black spots. These items had been wrapped in packaging although they hadn't been opened in her presence. The respondent took photos of the damaged items.<sup>25</sup> All the rest of the items were stored in cardboard boxes and wrapped in bubble paper. The respondent informed her that she would settle the amount due by way of compensation. She also took her to her own property and showed her the works that were going on in the shaft. She explained to her that the liquid membrane was not yet completed as there were still some pipes that needed to be installed. Furthermore, she was going to enclose the shaft with a skylight so as to avoid more problems in future. The envisaged works were completed to the satisfaction of Architect Rory Apap Brown and the shaft was eventually enclosed as per photograph exhibited as Dok MB9<sup>26</sup>.

18. The respondent explained that on 25 May 2018 she was again approached by the applicant who wished to meet her as she wished to change the wood of the loft. A carpenter came on site, took measurements and the parties agreed that they would discuss this again once the applicant was back in Malta. They met again on the 14 June 2018 when the applicant showed her two other sofas which had allegedly been damaged by the ingress of water. The respondent told her that she should have shown her these damaged items on the first day that they met. Nonetheless she offered to pay her the sum of five hundred euro. However, the applicant informed her that she would need to open the other boxes before considering her offer. The respondent became angry and informed her that she would not be assuming responsibility for the other items as these should have been opened in her presence on the day that they had first met (i.e., a month and a half before). In the meantime her husband and a worker that was working in her property assisted the applicant by moving a number of sofas from the garage to the applicant's residence which was three hundred meters away<sup>27</sup>.
19. At the end of September 2018, the respondent received a legal letter from the applicant who demanded compensation in the sum of € 12,000. A meeting was scheduled in the presence of the respective lawyers. During this meeting the respondent was presented with a list of items that were allegedly damaged. However this list was different from the list of damaged items that was submitted by the

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<sup>25</sup> Fol 153

<sup>26</sup> Fol 154

<sup>27</sup> Fol 159-160

- applicant in this lawsuit. The respondent insists that the cause of any damages suffered was not due to the water ingress but due to the high level of humidity.
20. The respondent concluded her affidavit by saying that ever since the lawsuit was filed by the applicant the latter insisted on several occasions that the water ingress was still occurring. However when a site inspection was scheduled upon the respondent's request, in the presence of the parties' respective architects, the latter did not bring the keys to the garage. They agreed to meet once again but the meeting never took place.
21. On 24 October 2022 the respondent testified once again and submitted more documents regarding her property. She reiterated that when she purchased the property, it was in a very bad state and was so run down that legal proceedings were initiated against the previous owners. She also submitted photographs of the well, shared with the applicant, which photos were taken by Steve Mallia<sup>28</sup>.
22. Under cross-examination respondent confirmed that she does not know if the applicant has an opening to the well. She also confirmed that the well head in her property is on the side of the front door while the ingress of water in the underlying property occurred on the opposite side, that is, through her shaft.
23. On 28 March 2022, Architect Aaron Abela<sup>29</sup> testified that he had been engaged by the respondent to inspect the property before it was purchased and subsequently to restore the property. Amongst other things, he confirmed that a condition report of the neighbour's property including the applicant's garage was carried out on 17 February 2017. This report was previously submitted by the respondent as Dok MB6<sup>30</sup> and was resubmitted in its original by the witness as Dok AA1.<sup>31</sup>
24. He described the state of the garage at the time of the condition report as follows:

*"...the property which we are talking about is a ground floor garage roofed with arches and stones slabs. It's an old building actually, built you might say more than two hundred years old. It was empty and the condition is clearly shown in the photos which I submitted with the report which show flaking partly of the structure, there was some small damages, some broken 'xorok'..."*<sup>32</sup>

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<sup>28</sup> Doc SHX1 – Doc SHX10

<sup>29</sup> Fol 161A-161J

<sup>30</sup> Fol 141-147

<sup>31</sup> Fol 162-169

<sup>32</sup> Fol 161B

25. The witness testified that the cause of the paint peeling off and the poor state of finishes of the garage was clearly due to the high level of humidity present apart from water ingress from the overlying property.
26. AIC Abela explained that when spouses Baldacchino acquired the property, they had to replace parts of the ceiling due to water percolation from the roof. They also strengthened the structure of the ceiling, made the necessary waterproofing works, and restored the beams and the slabs. When asked when the works were carried out, the architect explained that this was at the time of the submission of the second application to the Planning Authority in November 2017. He submitted photos marked as Doc AA2<sup>33</sup> and Doc AA3<sup>34</sup> that were taken prior to this submission. The Architect added that prior to the works in question, the entrance hall of the respondent was not habitable. After submission of the second planning application they created a metal structure in order to use the height of the space to create a bedroom. When asked about the level of humidity found in the garage the witness testified as follows:

*“Well. Humidity was not measured instrumentally, but I mean, as a professional I go into places and you notice being an old property the, most of these old properties do not have damp proof courses, the floors primarily not even there they don't have damp proof courses. Therefore, you have rising damp. Considering also that the property above had leaking roofs, apart from raising damp, it had damp coming from above during the winter season, because the one from below comes, it's all year round. But during precipitation in rainfall, you get rainfall, depending on the season as well, on how much rain it creates, rain there is”<sup>35</sup>*

He also said that he never entered the property of the applicant following the inspection carried out on 17 February 2017. However he always supervised the respondent's works and confirmed that these were completed in their entirety by the end of the year 2018.

27. Under cross-examination, the architect held that when he inspected the garage he didn't witness any water percolation but observed dampness due to humidity. The witness argued that he had to be there during a thunderstorm to notice any water ingress from the ceiling but it was clear that there was water ingress from the overlying property. He also confirmed that he was not responsible for the works

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<sup>33</sup> Fol 171

<sup>34</sup> Fol 172

<sup>35</sup> Fol 161E

carried out in the shaft although he saw them carried out. He wasn't aware whether tests were carried out to certify the plumbing works. He also stated that the garage did not have any ventilation except for the main door.

28. On 16 May 2022 **Jonathan Mifsud**<sup>36</sup> testified and confirmed that he had been engaged to carry out electrical and plumbing works in the respondent's property. The works commenced at the beginning of summer 2018 and were complete by the end of the summer 2019. When he started working, the alterations on his client's property had just been completed. He had installed the drain as well as the gulley in the shaft in question and this was meant to take away rainwater falling in the shaft. He explained that the gulley was at the same level of the floor of the shaft and that this was connected to a series of drains leading to the street. The latter had been installed by the builders during the construction works. He explained that he had done several water tests to check for leaks and he had never found one.
29. Under cross-examination, the witness stated that he didn't know if there was any membrane or waterproof material beneath the concrete flooring of the shaft. He confirmed that he abided by the instructions given by AIC Aaron Abela. He recalled that the respondent had informed him about the possible water leakage but when he went on site, he could not find any problems coming from the plumbing system. **The witness also confirmed that he had already completed his work when he was informed about the issue of water leaking into the underlying property.** When he visited the applicant's garage he took the view that there was humidity coming from the ceiling.

*Preliminary pleas*

30. The first plea filed by the respondent and the joined party is that the applicant should have appointed a mandatary to appear on her behalf given that she is often absent from these Islands.
31. In this regard local caselaw has rather consistently established that whoever files a lawsuit in the Maltese courts needs to be present in Malta at the commencement of the proceedings but need not remain here for the duration of the proceedings.<sup>37</sup> Furthermore, Art. 180(1) of Chapter 12 of the Laws of Malta provides as follows:

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<sup>36</sup> Fol 178-186

<sup>37</sup> An excellent exposition and analysis of jurisprudence on this matter was made by the First Hall Civil Court in its judgement of 17 November 2020 in the names: **ESA Asset Management S.r.l v. Solutions & Infrastructure Services Limited** (App. Nr. 238/2018, Judge Grazio Mercieca)

**'180. (1) Subject to the provisions of article 181, written pleadings may be filed -**

**(a) personally by the party pleading in his own name, or by the person pleading in a representative capacity as the parent of the children placed under his paternal authority, or as the tutor, curator, administrator of the community of acquests, executor, head of a department or other public administrator, or as attorney on behalf of any church, community, hospital, or other pious institution or as administrator of property under litigation, or as partner or representative of a commercial firm, or as any of the persons mentioned in article 181A(2) in the case of a body having a distinct legal personality, or as agent or representative of any other lawful association, or as attorney on behalf of persons absent from the Island, either of Malta or Gozo, in which the written pleading is filed;**

**(b) by a legal procurator;**

**(c) by any other partner of a commercial firm to which the written pleading refers;**

**(d) by an ascendant, descendant, brother or sister, uncle or aunt, nephew or niece, any one of the parents of his spouse, any one of the spouses of his children, spouse, appointed as an attorney for the purpose, by the party pleading whose signature is duly attested in accordance with article 634(2);**

**(e) by any joint party to the suit;**

**(f) by an advocate, if the written pleading is to be filed in any of the inferior courts, or in the Court of Appeal in cases of appeal from judgments of the inferior courts.'**

32. Although it resulted from the evidence that the applicant Sophie Hervey resides abroad and is often absent from the Maltese Islands, no evidence was brought whatsoever that she was absent from Malta at the time of filing of the lawsuit. Indeed, at no point was she ever asked, whether in examination or in cross-examination, whether she was present in Malta on 12 June 2019.

33. In any case, the Court is not convinced that the law requires the applicant to be physically present in Malta to be allowed to sue the respondent personally in her own name rather than through a mandatary. Art. 180(1) of Chapter 12 only regulates the actual filing of legal pleadings and does not purport to exclude anyone from suing in their own name. This is in contrast with Art. 1866 of Chapter 16 of the Laws of Malta that expressly states that a mandatary may not sue or be sued, on behalf of the mandator when the latter is not absent from the Island in which the action is to be tried, In this case the lawsuit was filed in the Registry of the Inferior Courts by the legal representatives of the applicant as per Art. 180(1)(f) and there was no

impediment at law barring the applicant from suing the respondent personally in her own name. Therefore the Court shall reject the first plea of the respondent and the joined party.

34. With regard to the second plea<sup>38</sup> this was resolved when the Court issued its decree on 4 November 2019 ordering the joinder of the respondent's husband Steve Baldacchino. For all intents and purposes the Court agrees with the respondent that the proceedings would not have been complete without the presence of the joined party not only because he is the respondent's spouse but also because it was proven that he is the co-owner (together with his wife) of the property overlying the applicant's property.

*Considerations regarding the third plea*

35. The third plea is that the respondent and the joined party did not cause any damages to the applicant.
36. It is a fundamental legal principle that **'every person...shall be liable for the damage which occurs through his fault'**. (Art. 1031, Civil Code). As held by the Court of Appeal (Inferior Jurisdiction) in the judgement **Kevin Mifsud v. Sparkasse Bank Malta plc et** (App. No. 637/2003/1 PS, 09/02/2005):

*"huwa principju kwalifikat fil-ligi illi "kull wiehed iwiegeb għall-ħsara li tigri bi htija tiegħu" (Artikolu 1031, Kodici Civili). Din in-norma tikkostitwixxi l-punt kardinali tar-responsabilita` extra-kontrattwali u tenuncja r-regola li l-awtur tal-lezjoni għandu jagħmel tajjeb għall-konsegwenzi negattivi patrimonjali subiti mit-terz. Din ir-responsabilita` għandha bħala fonti tagħha l-imgieba imputabbli, li tista' tkun doluza jew kolpuza. Imgieba din li għandha jkollha necessarjament ness ta' kawżalita` ma' l-event dannuz"*

37. According to Art.1032 (1) and 1033 of the Civil Code:

**'1032. (1) A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias.**

**1033. Any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission**

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<sup>38</sup> Although the joined party declared in the sitting of 27 January 2020 that he was adopting the same replies of the respondent, in truth this second plea could only be filed by the respondent for obvious reasons.

**constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom.'**

38. The Court is here required to conduct an analysis of the facts established by the evidence. The legal principles governing this analysis are well explained by Judge Grazio Mercieca in his book: "*Massimarji tal-Imhalled Philip Sciberras Proċedura Ċivili L-Ewwel Volum*"<sup>39</sup>:

1. *Ibda biex ir-regola tradizzjonali dwar **tal-piz tal-provi timponi a karigu tal-parti li tallega fatt l-oneru li ġġib il-prova tal-eżistenza tiegħu**. Tali oneru hu ugwalment spartit bejn il-kontendenti, sija fuq l-attur li jsostni l-fatt favorevoli li jikkostitwixxu l-baži tad-dritt azzjonat minnu (actori incumbit probatio), sija fuq il-konvenut għas-sostenn tal-fatt miġjub minnu biex jikkontrasta l-pretiza tal-attur (reus in excipiendo fit actor). **Ara Kollez Vol. XLVI.i.5***
2. ***Fil-kors tal-kawża dan il-piż jista joxxilla minn parti għall-oħra**, għax kif jingħad "jista' jkun stabilitt fatt li juri prima facie li t-teżi tal-attur hija sostenuta". (Kollez. Vol. XXXVII.I.577)*
3. *Il-ġudikant adit mill-mertu tal-każ hu tenut jiddeċiedi iuxta alligata et probata, u dan jimporta illi **d-deċizzjoni tiegħu tiġi estratta unikament mill-allegazzjonijiet tal-partijiet**. Jiġifieri, minn dawk iċ-ċirkostanzi tal-fatti dedotti għab-baži tad-domanda jew tal-eċċezzjoni u l-provi offeriti mill-partijiet. Jikkonsegwi illi **d-dixxiplina tal-piż tal-provi ssir baži tar-regola legali tal-ġudizzju in kwantu timponi fuq il-ġudikant il-konsiderazzjoni li l-fatt allegat m' huwiex veru għax mhux ipprovat**;*
4. *Il-valutazzjoni tal-provi hu fondat fuq **il-prinċipju tal-konvinciment liberu tal-ġudikant**. Lilu, hu mogħti l-poter diskrezzjonali tal-apprezzament tar-rizultanti probatorji u allura hu liberu li jibbaża l-konvinciment tiegħu minn dawk il-provi li hu jidhirlu li huma l-aktar attendibbli u idoneji għall-formazzjoni tal-konvinciment tiegħu. Naturalment dik id-diskrezzjoni tiegħu hi soġġetta għal dak il-limitu legali imposti fuqu mill-Artikolu 218 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili li jrid li fis-sentenza tingħata **motivazzjoni raġunata ku tikkonsenti l-kontroll tal-ħsieb loġiku segwit** fuq appell interpost mis-sentenza. Motavizzjoni din, li jekk jinstab li tirrispondi mal-loġika u r-razzjonalita', kif ukoll koerenti mal-elementi utilizzati allura skond ġurisprudenza konkordi, ma tiġiex disturbata minn Qorti ta' revizzjoni. Ara, b' eżempju, Kollez. Vol. XXIV.i.104"*

39. Furthermore, caselaw has established that:

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<sup>39</sup> P. 498

1. “L-Artikolu 1031 tal-Kodici Civili jippreciza li ‘kull wiehed iwiegeb ghall-hsara li tigri bi htija tieghu’. Din in-norma tal-ligi fil-kamp tar-**responsabilita` akwiljana** jew extra-kontrattwali tikkostitwixxi l-punt kardinali in subjecta materia, u tennuncja l-principju in virtu ta' liema l-lezjoni kagjonata lis-suggett tobbliga lill-awtur tal-lezjoni li jirrizarcixxi l-konsegwenzi negattivi, ossija d-danni, kompjuti bl-att tieghu. Issa kif saput, il-fonti primarju tar-responsabilita` civili hi ravnizata fl-imgieba imputabbli ghal dolo jew kulpa. Il-ligi civili taghna ma tiddefinixxi il-kolpa civili fl-ghemil izda taghmlu jikkonsisti fin-nuqqas ta' prudenza, nuqqas ta' diligenzau nuqqas ta' hsieb tal-bonus paterfamilias [Artikolu 1032 (1), Kodici Civili]...” **Michael D'Amato noe et. v. Filomena Spiteri et.** (PA, Ċit Nru 886/1993/2 PS, 03/10/2003)
2. “Intqal diversi drabi li biex tirrizulta responsabbilita' ghall-hsara, irid ikun hemm **ness ta' kawza u effett**, u dan in-ness irid jigi pruvat mill-vittma tal-hsara”. **Carmelo Farrugia et. v. Victor Conti** (PA, Ċit Nru 1060/1995/2 TM, 09/10/2003)
3. “Il-**prova tad-dannu tispetta lil min jallega li sofrih**. Jinkombi ghalhekk lill-atturi f' dan l-kaz li jaghtu prova ta' l-effettiva ezistenza tad-dannu” – **Margaret Camilleri et. v. The Cargo Handling Co. Ltd** (PA, Ċit Nru 1560/1995/1 PS, 13/10/2004)
4. “Tibqa' dejjem, fil-fehma konsiderata ta' din il-Qorti, regola sana illi f' materja ta' rizarciment ta' danni, id-dannegjat ghandu jkollu d-dritt jikkonsegwixxi **rizarciment effettiv** li jirrintegra l-patrimonju tieghu minn kull konsegwenza ekonomika ta' l-event dannuz. Li jfisser li dan l-istess rizarciment jista' jikkonsisti f'somma li tekwi para l-valur ta' l-utilitjiet mitlufa” – **Marco Buttigieg et. v. Rose Cini** (Qorti tal-Appell Inferjuri, App 21/1999/1 PS, 17/11/2004)
5. “Issa hu principju gwida regolanti materja ta' rizarciment ta' danni illi min isofri dannu **ghandu jigi re-integrat f' dak li ikun tilef** b' konsegwenza ta' l-event dannuz u mhux dak li jjehu vantagg meta dan ikun indebitu jew mhux misthoqq” - **Sylvia Degiorgio et. v. Massimiliano Da Crema** (PA, Ċit Nru 1560/1995/1 PS, 13/10/2004)
6. “... di regola d-dannegjat ghandu d-dover li jaghmel dak kollu li hu rajonevoli biex inaqqas il-hsara konsegwenti ghall-fatt illecitu [Vol.XL.II.653] b' mod li jigi eskluż fil-kazijiet kongruwi, mir-risarciment ta' dik il-parti tad-danni dovuta ghan-nuqqas tieghu li jjehu dawk il-passi. Jibqa' pero' dejjem il-fatt illi huwa **ma huwiex obligat jitghabba b' pizijiet biex inaqqas il-hsara**” **Percius Car Hire Limited v. Richard Schembri** (Qorti tal-Appell Inferjuri, App Nru 616/2001/1 PS, 20/10/2003)

40. In *Halsbury's Laws of England* it is stated that:



*“The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best he may, not only in his own interests, but also in those of the defendant. He is, however, under no obligation to injure himself, his character, his business, or his property, to reduce the damages payable by the wrongdoer. He need not spend money to enable him minimize the damages, or embark on dubious litigation. The question what is reasonable for a plaintiff to do in mitigation of his damages is not a question of law, but one of fact in the circumstances of each particular case, the burden of proof being upon the defendant.”<sup>40</sup>*

41. The first thing that needs to be determined by the Court is therefore whether the water indeed leaked from the respondent and joined party’s property. If this is the case then the Court must consider whether the respondent and the joined party were at fault for this occurrence. The Court must also determine whether the water ingress was indeed the proximate cause of the damage caused to the applicant, whether the latter also contributed to the damages or whether the damage was produced by a fortuitous event as a consequence of an irresistible force. In the latter case, according to Art. 1029 of the Civil Code any such damage would generally be borne by the party suffering such damage.
42. From the testimony of AIC Rory Apap Brown it clearly results that on or before 7 May 2018 a significant amount of water entered into the applicant’s premises from the overlying shaft belonging to the respondent and the joined party. This testimony was backed up by a detailed report that was compiled by AIC David Drago following AIC Brown and Emilie Van Looks’ inspections carried out on site on both properties. The architect found *inter alia* that:

***“Upon inspection of the overlying property it became evident that the overlying yard was collecting rain water and there were penetrations in the membrane coating. Besides the rain water collection there are several buried water supply pipes within the floor build up and overlying the roof of the garage”<sup>41</sup>***

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<sup>40</sup> Halsburys Laws of England Vol. 11 page 289, 3rd Edition 1955

<sup>41</sup> Fol 15

The photographic evidence submitted by the witness is also strongly indicative of this water percolation.<sup>42</sup>

43. The same witness also testified that in his opinion there were too many services draining into the gully which was also exposed. The Court notes that the photograph on the back of page 47 appears to confirm this assertion.
44. No evidence of a technical nature was submitted by the respondent and the joined party that in any way contrasts with the findings of the applicant's architect. Indeed, AIC Aaron Abela, who *inter alia* was engaged by the respondent and joined party to inspect their property before it was purchased, confirmed that he never inspected the applicant's property following the alleged water percolation. Moreover no further water leaks were reported following completion of the works in the overlying property possibly when the shaft was enclosed by the respondent and the joined party.
45. The respondent and her architect both attested to the high level of humidity in the respondent's property (particularly before works were carried out), due to the presence of a well that is shared between the parties. AIC Abela also insisted that when he inspected the garage in February 2017, the dampness on the ceiling and the walls and the poor state of finishes in the garage were indicative of continuous water ingress from the application's property. However AIC Rory Apap Brown contended that when he inspected the garage before it was purchased by the applicant there were no overt signs of dampness and humidity so much so that his firm ascertained that the premises was in good structural condition and that it could be used by the applicant for storage purposes after taking a number of preventive measures.
46. The respondent also admitted in her cross-examination that the well to which she had referred in her testimony was on the other side from the shaft.
47. The Court notes that there is consensus between the parties that the finishes of the garage were not in a good state of repair prior to the water percolation and photographs exhibited in the acts of the case by both parties clearly show this lack of maintenance on the part of the previous owner. Indeed, although the applicant testified that the leak caused structural damages to her property, the Court notes that no compensation is being sought for such damages. Nonetheless the Court is satisfied on a balance of probabilities that the water ingress from the overlying property was

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<sup>42</sup> See by way of example the photographs exhibited a fol 44 and 45

due to the respondent and joined party's fault given that both the membrane coating and the system of drains leading to the open gully were inadequate.

48. As to whether the water ingress was indeed the proximate cause of the damages caused to the applicant and whether the latter also contributed to the damages incurred, the Court notes that according to the applicant's architect this led to damages to the client's belongings that were stored in the garage. The architect testified that while he did not personally inspect the items for damages, a colleague of his, Architect Emilie Van Look was present on site when the items were unpacked and took several photos. The latter was not summoned to testify but the photographs attached to Architect Konrad Buhagiar's affidavit clearly show the presence of widespread stains and spots on various items of furniture, wood and fabric. The Court however cannot ignore the fact that Emilie Van Look's inspection took place on 1<sup>st</sup> August 2018, that is, almost three months from the discovery of the water ingress by the applicant's architects. The respondent also confirmed that when she was initially contacted by the applicant in April 2018 she was only shown two beach armchairs and a sofa cushion that appeared to be damaged and that the rest of the items were still in their packaging. Then on 14 June 2018 the applicant showed her two other sofas which had allegedly sustained water damage and informed her that she still needed to open the packaging of the other items to ascertain the amount of damages that were caused.
49. It is a known fact that does not require any special expertise that time is of the essence to avoid damage when furniture, wood or items made of fabric become wet. Water stains and mould form relatively quickly unless remedial measures are taken immediately to save the affected items. The Court is not convinced that these steps were taken in a judicious manner by the applicant. As a result, it cannot be said that the respondent and the joined party bear sole responsibility for the damages caused to the movable items stored in the garage.

#### *Damages*

50. By way of a summary, the amounts claimed by the applicant as compensation (outlined in pages 14-35) are as follows:

<b>No.</b>	<b>Type of damages</b>	<b>Inv/Quo</b>	<b>Date</b>	<b>Amount</b>	<b>Fol no.</b>	<b>Details</b>
-						
	<b><u>Structural Damages</u></b>					
1	Visit and Report	Inv AP14	01/07/2018	€ 150.45	Fol 16	Inspection of garage following report of water damage (Rory Apap Brown)
2	Visit and Report	Inv AP16	01/08/2018	€ 236	Fol 17	Assisting client with removal of items from garage (Emile Van Look)
	<b><u>Furniture relocation</u></b>					
3	Moving	Inv	01/08/2018	€ 750	Fol 18	Lifter hire and transport (one way) - Formston Lifting Service Jason Transport
4	Moving	Quot	25/07/2018	€ 1500	Fol 19	Transport (one way) to home - Dom Transport Ltd
5	Storage	Inv 701	01/08/2018	€ 1500	Fol 20	Storage 6 months 18 August 2018 - 19 January 2019
6	Storage	Inv 732	01/02/2019	€ 1500	Fol 21	Storage 6 months 19 February 2019 - 19 July 2019
7	Storage	Inv 753	01/08/2019	€ 1500	Fol 22	Storage 6 months 19 August 2019 - 20 January 2020
8	Lock	Inv 2	02/08/2018	€ 139.24	Fol 23	Fixed 3 locks - Emilio Bilocca Handyman
9	Lock	Inv 241	29/08/2019	€ 88	Fol 24	Lock & Installation - All Locks Professional Locksmith Service
	<b><u>Furniture damaged</u></b>					
10	Cleaning			€ 436		Portugues
11	Cleaning			€ 75		Eco
12	Lounge chair			€ 2089.81		Invoice Camilleriparismode
13	Pouffe			€ 1447.4		Quotation Ligne B
14	Rug			€ 850	Fol 14	Letter by Ishafan Handmade carpets re current market value of damaged rug

15	3 Boots			€ 354		Shoemarket quotation
16	2 Convertible seats			€ 1357		Quotation Camilleriparismode
17	4 Pillows			€ 112	<i>Fol 27</i>	Online quotation Next Malta
18	Duvet double			€ 103	<i>Fol 28</i>	Online quotation Next Malta
19	2 Metal shelves			GBP 425		Quotation Muji
20	„			GPB 35		Quotation Shipping
21	4 Pulp Unit Shelves			€ 199.8		Quotation Muji
22	6 black cardboards			€ 180.98	<i>Fol 30,31</i>	Quotations Magasin Sennelier
23	Wooden shoe rack			€ 38.99	<i>Fol 33</i>	Quotation ManoMano
24	Wooden coat hanger			€ 64	<i>Fol 34</i>	Quotation le-portemanteau
25	2 Wooden trestles			€ 50		Quotation Ikea
26	Beach umbrella			€ 18.95	<i>Fol 35</i>	Quotation Homemate
			Sub-total	<b>15200.62</b>		

51. Although the total amount of damages listed a fol 14, 17 and 29 exceed € 15,000, the applicant has capped the total sum claimed to €15,000.
52. Having considered the invoices, quotations, estimates and values listed in the said documents the Court is perplexed as to why the applicant did not deem it fit to summon any witnesses to confirm them on oath particularly when one of the pleas of the respondent and the joined party was precisely a contestation of the amounts claimed. The applicant had different methods at her disposal to establish such proof such as through the engagement of *ex-parte* experts or through the submission of sworn affidavits but failed to utilise any one of them. Indeed even when she summoned her own architects to testify she failed to ask them to confirm the amounts that had been billed for their services. Furthermore the invoices a fol 16, 17, 18, 23 and 24 were addressed to the company Pharmacosdiane Malta Limited and paid by the said company, which is a separate legal person in terms of law and cannot therefore be claimed by the applicant.
53. The only amounts which the Court considers to have been sufficiently proven on a balance of probabilities are those listed in invoices no. 701, 732 and 753 issued by the company Pharmacosdiane Malta Limited for the storage of the furniture at its property. These amount to € 1,475 each (rather than € 1,500 as claimed in the statement a fol 14) and relate to the periods 1 August 2018 to 31 January 2019, 1 February 2019 to 31 July 2019 and 1 August 2019 to 31 January 2020. The Court considers these amounts to be sufficiently proven given that the applicant also occupies the position of sole director and shareholder of this company and therefore her confirmation of the invoices is sufficient evidence in this regard. It is also possible for the Court to consider these amounts by applying the principle of *ius superveniens* despite the fact that in part these amounts were incurred after the lawsuit was filed.
54. Nonetheless the Court needs to take into consideration that the applicant is partly at fault for the damages incurred. Moreover despite the applicant's assertion that she was initially advised to wait for six months for the garage to dry completely and then subsequently not to put the items back into the garage as there was a risk of further leaks, this was not confirmed by any other witnesses including the applicant's architects. On the contrary AIC Rory Apap Brown confirmed that he wasn't informed of any other water ingress after May 2018. In these circumstances the Court shall only grant the amount of € 1,475 by way of compensation representing the amount paid for storage for the period 1 August 2018 to 31 January 2019.

**Decision**

**55. For these reasons the Court partially accepts applicant's claim and condemns the respondent and the joined party *in solidum* to pay her the amount of one thousand four hundred and seventy-five euro (€ 1,475) by way of compensation together with legal interest accruing from today until date of effective payment. The costs of this lawsuit are to borne equally by the parties**

V.G. Axiak  
Magistrate

Y.M. Pace  
Dep. Registrar