MALTA

COURT OF APPEAL
(Inferior Competence)

HON. JUDGE
LAWRENCE MINTOFF

Sitting of the 25 of September, 2024

Inferior Appeal number 108/2014 LM

Fabrizio Gatt (K.I. nru. 462676(M))
('the appellant')

***vs*.**

Jean Carnevillier
('the appellee')

The Court,

<u>Preliminary</u>

1. This appeal has been filed by the applicant **Fabrizio Gatt** [hereinafter 'the appellant'] from the judgment delivered on the 8th of January, 2024, [hereinafter 'the appealed judgment'] by the Court of Magistrates (Malta) [hereinafter 'the Court of First Instance'], whereby it decided his claims against **Jean Carnevillier** [hereinafter 'the appellee'] and the latter's counter-claim, as follows:

- *With regards to the plaintiff's claim, the Court orders that the defendant is to pay the plaintiff the amount of two thousand six hundred and fifty three Euros and eighty one cents (€2,653.81), with legal interests running from the 1st of April 2014;*
- *With regards to the defendant's counter-claim, the Court orders that the plaintiff is to pay the defendant the amount of fifteen thousand Euros (€15,000), with legal interests running from the 1st of April 2014;*

  The Court futher orders that fifteen per cent (15%) of this case's costs and expenses are to be borne by the defendant, whereas the plaintiff is to bear eighty five per cent (85%) of this case's costs and expenses.

Facts

2. The facts of the present proceedings concern works carried out by the appellant in Garden House, Mosta, following the award of the relative tender in his favour issued by the appellee. Following the commencement of the said works, the appellee allegedly started to fall back on monthly payments for completed works which would have been duly certified by the Architect of the said appellee. Consequentially the appellant was faced with a number of financial problems with all sub-contractors, and eventually the appellee even withheld payments all together upon the pretext of bad workmanship.

Merits

3. The appellant instituted the present proceedings by filing an application befor the Court of First Instance on the 1 April, 2014, whereby he summoned the appellee to appear before the said Court to answer to his claim as follows:

"...Tħallas lil attur is-somma komplessiva ta' disgħat elef tmin mija u sitta u sebgħin ewro (€9,876) rappreżentanti spejjeż inkorsi għax-xiri u fornitura ta' materjal kif wkoll drittijiet għal xogħlijiet reżi u esegwiti fuq il-fond proprjetà tiegħek magħruf aħjar bħala 'The Garden House', fi Triq il-Kbira Mosta u hekk kif ċertifikat mil-Perit Paul Cuschieri kopja tar-rapport hawn annessa u markata Dok A, liema materjal ġie fornit u xogħlijiet esegwiti fuq struzzjonijiet tiegħek

Bl-ispejjeż u bl-imgħaxijiet legali sad-data tal-pagament effettiv kontra l-konvenut li min issa qiegħed jiġi nġunt sabiex jixhed u in subizzjoni"

4. The appellee pleaded as follows:

"1. Illi t-talbiet tar-rikorrenti huma infondati fil-fatt u fid-dritt u għandhom jiġu respinti bl-ispejjeż;

2. Illi x-xogħol eżegwit mir-rikorrenti fil-fond magħruf bħala 'The Garden House', fi Triq il-Kbira, Mosta ma sarx skont is-sengħa u l-arti u dana kif jirriżulta mir-rapport imħejji mill-Perit Elena Borg Costanzi (hawn anness u markat Dok Y);

3. Illi r-rikorrenti ma esegwiex l-appalt lilu mogħti skont il-ftehim raġġunt u inoltre kkawża danni lill-esponenti li għalihom l-esponenti qed iżommu responsabbli u għal dan il-għan qed jipprevalixxi ruħu mill-preżenti azzjoni sabiex jiċċita lir-rikorrent in via rikonvenzjonali għall-istess danni.

4. Salvi eċċezzjonijiet oħra permessi mil-liġi."

5. The said appellee also filed the following counter-claim:

"Jgħid ir-rikorrenti rikonvenzjonat għaliex, previa d-dikjarazzjonijiet neċessarji u okkorrendo bl-opera ta' periti nominandi, m'għandux ikun ikkundannat li jħallas lill-esponenti s-somma ta' ħdax-il elf u ħames mitt ewro (€11,500) eskluż it-taxxa fuq il-valur miżjud (VAT) jew somma oħra verjuri li tista' tiġi determinata minn din il-Qorti, rappreżentanti danni sofferti mill-esponenti bħala konsegwenza tal-esekuzzjoni tax-xogħlijiet imwettqa mir-rikorrent rikonvenzjonat fil-fond proprjetà tal-esponenti bl-isem ta' 'The Garden House', fi Triq il-Kbira, Mosta liema xogħlijiet ma sarux skont ma titlob is-sengħa u l-arti u mhux skont il-ftehim raġġunt bejn il-partijiet, kif iċċertifikat fir-rapport peritali hawn anness u markat Dok Y imħejji mill-Perit Elena Borg Costanzi u kif ser jirriżulta aħjar waqt it-trattazzjoni tal-kawża.

Bl-ispejjeż u bl-imgħaxijiet legali mid-data tan-notifika ta' din il-kontrotalba sad-data tal-pagament effettiv kontra l-istess rikorrent rikonvenzjonat, li minn issa huwa ngunt in subizzjoni."

6. The appellant replied as follows to appellee's counter-claim:

"1. Illi t-talba tar-rikorrent rikonvenzjonat hija nfondata fil-fatt u fid-dritt u għandha tiġi respinta bl-ispejjeż.

2. Illi kontrarjament għal dak allegat mir-rikorrent rikonvenzjonant, ix-xogħlijiet saru skont kif miftiehem, dirett u skont is-sengħa u l-arti kif ċertifikat u stabbilit mil-Perit Paul Cuschieri li kien il-Perit nkarigat direttament mir-rikorrent rikonvenzjonat u responsabbli mill-proġett u dan kif jiġi ppruvat waqt it-trattazzjoni tal-każ għal liema raġuni, jekk r-rikorrent rikonvenzjonant għandu xi ilment jew jippretendi xi danni, tali talba għandu jiddiriġieha lil istess Perit Cuschieri.

3. Illi jekk ix-xogħlijiet ma tkomplewx skont il-ftehim milħuq, għal dan jaħti unikament l-istess rikorrent rikonvenzjonant stante ksur tal-istess ftehim da parti tiegħu nonostante li ġie nterpellat diversi drabi u dan kif jigi ppruvat waqt it-trattazzjoni tal-każ

Salv eċċezzjonijiet oħra".

The Appealed Judgment

7. The Court of First Instance made the following considerations pertinent to the present appeal:

"Having Considered

This Court states that considerations and consequent conclusions of a technical nature of an architect appointed by the Court such as those made in the present case constitute very important evidence for the Court to reach a decision. Concerning the findings of a technical expert, the Court of Appeal in its judgment of 19 November 2001 in the case ***'Calleja v Mifsud'*** *held that:*

> "Kemm il-kostatazzjonijiet tal-perit tekniku nominat mill-Qorti kif ukoll il-konsiderazzjonijiet u opinjonijiet esperti tiegħu jikkostitwixxu skont il-ligi prova ta' fatt li kellhom bħala tali jiġu meqjusa mill-Qorti. Il-Qorti ma kenitx obbligata li

> taċċetta r-rapport tekniku bħala prova determinanti u kellha dritt li tiskartah kif setgħet tiskarta kull prova oħra. Mill-banda l-oħra però, huwa ritenut minn dawn il-Qrati li kellu jingħata piż debitu lill-fehma teknika tal-espert nominat mill-Qorti billi l-Qorti ma kellhiex leġġerment tinjora dik il-prova. Hu manifest mill-atti u hu wkoll sottolinejat fir-rikors tal-appell illi l-mertu tal-preżenti istanza kien kollu kemm hu wieħed ta' natura teknika li ma setgħax jiġi epurat u deċiż mill-Qorti mingħajr l-assistenza ta' espert in materja. B'danakollu dan ma jfissirx illi l-Qorti ma kellhiex tħares b'lenti kritika lejn l-opinjoni teknika lilha sottomessa u ma kellhiex teżita li tiskarta dik l-opinjoni jekk din ma tkunx waħda sodisfaċentement u adegwatament tinvesti l-mertu, jew jekk il-konklużjoni ma kenitx sewwa tirriżolvi l-kweżit ta' natura teknika.

*In its judgment delivered on 25 September 2003 in the case '**Grech et v Grech et**' – the First Chamber of the Civil Court held:*

> "Bil-liġi u b'ħarsien tal-massima dictum "expertorum numquam transit in rem judicatam" il-Qorti mhix marbuta li taċċetta l-konklużjonijiet tar-rapport tal-perit maħtur minnha kontra l-konvinċiment tagħha nfisha. Imma l-fehmiet ta' perit maħtur minn qorti u magħmula f'rapport imressaq minnu m'humiex sempliċiment opinjonijiet iżda jikkostitwixxu prova ta' fatt, speċjalment f'oqsma fejn il-ħatra tkun dwar ħwejjeġ tekniċi. Fehmiet bħal dawk m'għandhomx, l-aktar fejn parti ma tkunx irrikorriet għall-ħatra ta' periti addizzjonali, tiġi mwarrba kif ġieb u laħaq, sakemm ma jkunx jidher sodisfaċentement li tali fehmiet huma, fil-kumpless kollu taċ-ċirkostanzi, irraġonevoli. (ara wkoll – **"Bugeja et vs Muscat"** – Appell Kummerċjali – 23 ta' Ġunju 1967).

*The Court stated in the case **Grima v Mamo et noe –** Court of Appeal – 29 May 1998 stated that:*

> "b'mod leġġer jew kapriċċjuż. Il-konvinzjoni kuntrarja tagħha (u ċioé ta' loti) trid tkun ben informata u bażata fuq raġunijiet li gravement ipoġġu fid-dubbju dik l-opinjoni teknika lilha sottomessa b'raġunijiet li ma għandhomx ikunu privi mill-konsiderazzjoni tal-aspett tekniku tal-materja taħt eżami".

*In the cases **Cauchi v Mercieca** – Court of Appeal – 6 October 1999; **Saliba v Farrugia** – Court of Appeal – 28 January 2000 and **Calleja noe v Mifsud** – Court of Appeal – 19 November 2001 stated that the Court cannot ignore the report submitted by the expert unless it is convinced that the conclusion of such a report was not just and correct. However, this conviction should have been motivated by a well-informed judgement, even where necessary from a technical point of view.*

This Court states that the merits of today's case are mainly focused on technical considerations, and not only on an appreciation of the evidence produced in a legal context. In particular, to draw up his report, the technical architect appointed by the Court took into account the works that were carried out. The technical architect appointed by the Court explained in detail the reasons which led to his conclusions. This Court considers the observations of the technical expert and his conclusions to be reasonable and well supported. Therefore, even after giving due consideration to the submissions of the parties, this Court does not find any grounds for not considering what the technical expert concluded in his report and analysis of the works that were carried out. It therefore states that those conclusions as submitted by the court appointed expert must be considered as evidence of the poor workmanship. As the Court of Appeal stated on 9 February 2001 in the case ***"Camilleri noe v Debattista"*** *-*

> "ikun prużuntuż għall-ġudikant illi jiddipartixxi bla raġuni verament valida mir-relazzjoni teknika. Dan mhux biss għax ma kellux il-mezzi għad-dispożizzjoni tiegħu biex serenament jinoltra ruħu fl-aspetti tekniċi tal-mertu, imma wkoll għaliex neċessarjament tkun tonqsu dik il-konoxxenza meħtieġa biex, b'mod kritiku, jasal għal konvinċiment divers minn dak li jkun wasal għalih l-espert nominat minnu."

Having considered*:*

The nature of the contract (appalt) was dealt with in the case of ***'Busuttil v Fedele et'****, decided on the 9th April 1968 citing* inter alia *the judgment of the Commercial Court delivered on 9 March 1939 in the case* ***'Micallef v Mamo et'*** *(Vol.XXX.III.433). In its judgment in* ***Busuttil v Fedele et****, the Court stated as follows:*

> ... il-kuntratt ta' appalt huwa kuntratt bilaterali u dejjem soġġett għal patt kommissorju taċitu. Konsegwentement meta d-difetti fl-eżekuzzjoni jkunu ppruvati, il-kriterju essenzjali tad-deċiżjoni tinsab fl-eżami jekk ix-xogħol ikunx affett jew le minn vizzji sostanzjali.
>
> Dawn huma dawk id-difetti, imsejħin ukoll essenzjali, li jipprivaw il-ħaġa mill-iskop jew mill-utilità tagħhom b'mod li ma tibqax tikkorrispondi mad-destinazzjoni proposta mill-kommittent u ndikata min-natura stess tax-xogħol waqt li l-oħrajn kollha għandhom jiġu ritenuti mhux essenzjali. Meta d-difetti jkunu essenzjali, l-kommittent għandu d-dritt jitlob ir-riżoluzzjoni tal-kuntratt minħabba l-inadempjenza. Meta għal kuntrarju d-difett ma jkunx sostanzjali, l-appaltatur ma jistax jiġi ritenut inadempjenti però jibqa' obbligat li jirripara d-difetti jew jaċċetta riduzzjoni.

*That judgment was followed by the decision of the Court of Appeal (Sede Kummerċjali) of the 22 June 1994 in the case **'Bonnici noe v Sammut'**. When a contract of works dispute arises, two are in general the matters that a court should consider –*

(1) jekk l-eżekuzzjoni tax-xogħlijiet kommissjonati saritx skont l-ispeċifikazzjonijiet u l-pattijiet l-oħra stipulati bejn il-kontraenti; u

(2) jekk l-eżekuzzjoni u l-prodott finali kienx konformi mar-regoli tal-arti u tas-sengħa.

*Jurisprudence has shown that the contractor should not only carry out the merit of the contract but should also ensure that that work is worth both for what is good and for what it was commissioned for by the person concerned. This principle is highlighted in the judgement of the Court of Appeal in the '**Darmanin v Agius'** case decided on 9th October 2004 which stated the following:*

"Bħala l-ewwel prinċipju huwa dottrinalment u ġurisprudenzjalment riċevut illi l-appaltatur għandu l-obbligu li jeżegwixxi x-xogħol lilu kommess fis-sens li huwa għandu l-obbligu wkoll li jara li dan ix-xogħol ikun sejjer isir utilment u mhux b'mod li 'l quddiem juri difetti. L'imprenditore ha l'obbligo di eseguire bene l'opera commessagli, secondo i dettami dell'arte sua, e deve prestare almeno una capacità ordinaria" (**Kollez Vol.XXVII.I.373**). Dan fis-sens li hu "għandu jiggarantixxi l-bontà tax-xogħol tiegħu" (**Kollez Vol XL.I.485**).

It-tieni prinċipju jgħid illi "l-appaltatur li jeżegwixxi ħażin ix-xogħol li jifforma l-oġġett tal-appalt huwa responsabbli għad-dannu kollu li jiġi minn dik l-eżekuzzjoni ħażina" (**Kollez. Vol XXXVII.III.883**).

Għax kif jinsab ritenut ukoll "f'każ bħal dan hu għandu mill-ewwel ma jagħmilx ix-xogħol, jew ikollu jirrispondi għad-difetti li jiġu 'l quddiem" (**Mario Blackman -vs- Carmelo Farrugia et noe**", Appell Kummerċjali, 27 ta' Marzu 1972). Dan hu hekk avolja jkunx hemm l-approvazzjoni tax-xogħol (**Kollez. Vol XLI.I.667**) jew l-appaltatur ikun mexa skont l-ispecifications jew l-istruzzjonijiet lilu mogħtija mill-kommittent.

The contractor who performs the works which form the subject of the contract shall be liable for all damage resulting from such improper works carried out because he is deemed to have been culpable by reason of the non-performance of his contractual obligation. In such situations the burden of proving that damages had occurred lies on the person who is alleging it. In fact, in the judgement il-Kmandant tal-Forzi Armata vs Francis Difesa decided on the 28th May 2003 (Prim Awla tal-Qorti Ċivili) stated that:

> "Issa hu paċifikament riċevut illi għalkemm l-onus probandi hu mixħut fuq minn jallega fatt spiss jiġri illi meta l-attur ikun assoda *prima facie* t-talba tiegħu, allura l-prova kuntrarja tinqaleb fuq il-parti l-oħra. Dan jissuċċiedi fejn il-konvenut jallega hu ċerti fatti. B'dan il-mod hu jqiegħed ruħu fl-istess sitwazzjoni tal-attur għal dak li hu l-oneru provanti l-bażi tad-difiża tiegħu. U jekk hemm konflitt, wieħed imbagħad, ma għandux faċilment jaqa' fuq ir-regola "actor non probante, reus absolvitur" jew ir-regola l-oħra inversa "reus in excipiendo fit actor";

Thus, on the issue of damages, this Court pointed out in the following judgement that:

> "hu rikonoxxut lill-ġudikant…il-poter diskrezzjonali li jillikwida t-telf u l-qligħ bl-adoperu tal-kriterju sussidjarju tal-valutazzjoni ekwitattiva. Ara a propozitu deċiżjoni a Vol. XXXV P III p 615 fejn ġie proprju rikonoxxut, fuq l-istregwa dak espress mill-Qorti Taljana ta' Kassazzjoni illi "vi hanno casi in cui, non potendosi avere mezzi istruttori, è rimesso al magistrato il valutare 'ex aequo et bono' secondo i dettami della sua ragione e coscienza, l'ammontare del danno al risacrimento del quale taluno fu condannato" ("**Camilleri et v. The Cargo Handling Co. Ltd**" - Prim Awla tal-Qorti Civili - 13 ta' Ottubru 2004).

It appears that in this case the defendant had contacted his architect to carry out works at his residence in Mosta. The architect had issued a tender for the works to be carried out and the only one to submit an estimate for the works to be carried out was that of the plaintiff namely Fabrizio Gatt. They entered into an agreement about what was to be done under the supervision of the architect. Payments were made to certain tasks that were completed but issues arose to some final payments because of bad workmanship. In fact, the dispute arose when hairline cracks and chipping of the imprinted concrete were being observed as well as other defects which the defendant had listed. No agreement was reached between the parties and the plaintiff sought action against the defendant for the final payment. On the other hand, the defendant in his counter-claim requested the payment of a liquidated sum of money because of the damages that he had suffered.

The Court refers to the conclusions derived by the court appointed expert, the Court that the damages caused to the property of the defendant is a direct consequence of bad workmanship to which is attributed solely to the defendant. This Court is not in a position to challenge the conclusion reached by the court appointed expert because such a task rests on his technical experience."

The Appeal

8. The appellant filed an appeal before this Court on 29th January, 2024, whereby he is requesting the following:

> *"... whilst making reference to the evidence submitted and any other evidence that may be produced in this stage, the appellant humbly submits that this Honorable Court should cancel and revoke the judgment in the names* ***Fabrizio Gatt vs Jean Carnevillier given by the Court of Magistrates (Malta), on the 8th of January of the year two thousand and twenty-four (2024)****, and accept all requests made by the appellant as indicated in his preliminary application whilst rejecting all the pleas and requests made by the defendant both in his sworn reply and in his counter-claim, with expenses of both proceedings against the same defendant."*

The appellant says that his main grievance is that the Court of First Instance appreciated and applied wrongly the evidence submitted before it.

9. The appellee presented his reply on the 11th April, 2024, wherein he submitted that the grounds of appellant's appeal are not justified, and the said appeal should therefore be rejected with costs against him.

Considerations

10. This Court shall now proceed to consider the grievance of the appellant, whilst taking into consideration the appellee's submissions, as well as the deliberations of the Court of First Instance.

11. The appellant insists that the Court of First Instance made a wrong appreciation and application of the evidence presented before it. Whilst admitting that this Court merely reviews the entire process conducted by the Court of First Instance, without making a fresh appreciation of the facts, he

submits that in this particular case, it must disturb the appreciation of the evidence made by the Court of First Instance, since its conclusions were wrong in principle. The appellant submits that it is usual that contrasting versions of the same facts are presented before a Court, and he refers to what the various Courts have pronounced in this regard. The appellant clarifies that the dispute between the parties concerns a contact of works which was awarded to him by a tender procedure, and he outlines a number of principles which he submits emanate from this legal relationship. He explains that as he had testified during the sitting of the 4th December, 2014, the parties had signed a written agreement together with Perit Paul Cuschieri, which agreement consisted in a BOQ which included item rates, conditions of work and payment terms. The appellant says that although the architect would have regularly visited the site, measured the works and certified them, the appellee would fail to make payment and delay such payment, which resulted in the sub-contractors themselves delaying their work due to lack of funds. Eventually even the architect, he says, broke off his relationship with the appellee because of unpaid fees and various comments about his work. The appellant refers to Perit Paul Cuschieri's testimony of the 12th February, 2015, where he confirmed that the work carried out was good, and he submits that there were no complaints from the appellee's side. If there were any complaints, the appellant says that he would have addressed these immediately, but when he requested the last payment, the appellee raised further complaints to delay payment, whilst prohibiting the appellant from rectifying and finishing the works. Therefore in his humble opinion he says that the full amount he is claiming of €9,876 is due. As to the counter-claim presented by the appellee, the appellant submits that

the works commissioned had not been completed because the appellee had prohibited him from finishing off the said works. The appellant says that one of the appellee's main complaints regarded the hairline cracks in the concrete. He explains that Perit Paul Cuschieri had clearly stated that these usually appear in concrete works, and in his testimony he explained how the temperature and weather conditions affect concrete. The said architect had explained that the appellee eventually engaged Terracore to give its expert advice, but they too were of the same opinion. The appellant then refers to the said architect's testimony of the 28th January, 2014, where he testified that the hairline cracks were hardly visible and were of no harm to the concrete or the aesthetic value of the floor, and therefore he had approved the works. From his side, the appellant says he had even acceded to the appellee's request for a discount of €650, inclusive of VAT, to ensure that the issue had been settled. As to the photos of various works which were allegedly unfinished or defective, the appellant states that he had never been commissioned to carry out such works. As to the damaged plaster due to water seepage, the appellant admits that this was his fault, but he had offered to repair the damage at no cost to the appellee who preferred to engage his own plasterer, and instead ask for a discount of €1,347.56 (inclusive of VAT) which was granted by the appellant. As to the different levels in the respective stairs, the appellant refers to the testimony of Perit Paul Cuschieri who confirmed that he had discussed this with the appellee, and explained that this would be corrected by the mason engaged to lay the stone cladding. However the appellee, as Perit Paul Cuschieri also confirmed, had been uncertain as to the height to be maintained in respect of the last steps and the resulting issues in the levels was unfairly attributed to him as an excuse

to avoid payment. As to the allegedly incorrect sloping terraces, the appellant states that he did not build these. The appellant then refers to the bad workmanship alleged by the appellee, where he used screed instead of concrete, and charged the same rate. He says that the reason for this had been that it would facilitate the laying of services underneath the flooring. He says that this was explained to the appellee on four different occasions, and he had accepted that different material will be used. Moreover it was appellant's own architect who had instructed him as to the material to be used, and the appellee had agreed to the rate of payment together with the abovementioned architect. As to the appellee's complaints of delayed works, the appellant says that these were the result of delayed payments as well as delayed instructions from appellee. For these reasons, the appellant insists that the appellee's counter-claim should be rejected. The appellant then refers to the decision of the First Court to adopt the report by its own appointed architect Perit Mario Cassar. After referring to what our courts hold, the appellant declares that he does not agree with the conclusions of the said architect because of the numerous discrepancies, unfounded allegations and wrong considerations made by him. He says that Perit Mario Cassar stated in his report that the BOQ was not clear and Perit Paul Cuschieri should have explained its terms to the appellee. The appellant states that the appellee had accepted the BOQ, and if the architect had not explained it to his client, then he should not be burdened with the responsibility. In any case, the BOQ had been explained several times both before the commencement of the works, and even during the completion of the works. The appellant says that in his report Perit Mario Cassar says that there were instances where Architect Paul Cuschieri together with the

appellant, took decisions arbitrarily without consulting the appellee. The appellant insists that this allegation is unfounded because during the proceedings the appellee had confirmed that the appellant had never acted without his confirmation or approval. As to the extra works, it was the architect who was obliged to refer to his client, and if there were instances where he did not communicate with his client, the appellant had no means of knowing. He insists that from his end he had always communicated with the appellee and his architect as to the works to be carried out and the *modus operandi.* With regards to the issue highlighted by Perit Mario Cassar of the use of gravel insted of cement in the fountain area as was originally agreed, the appellant submits that a number of aspects were ignored here by the court-appointed expert, and he quotes what Perit Paul Cuschieri had to say about the different use in his testimony of 19th March, 2015. When Perit Mario Cassar had been asked for a breakdown of the amount of €10,695 or €12,620 inclusive of VAT, it was evident that he failed to take into consideration labour expenses and those incurred for the use of machinery. He submits that both the architect and he had explained this in their testimony. The appellant contends that the same court-appointed expert also failed to indicate in his report and in reply to the questions put to him, those instances resulting in bad workmanship. The appellant concludes his submissions by arguing that in his opinion he had successfully managed to prove his claims against the appellee and the Court should therefore decide in his favour.

12. The appellee in his reply firstly raises the argument that the appellant is here requesting this Court to carry out a fresh review of the evidence brought before the Court of First Instance, but fails to explain how the said Court was

'wrong in principle'. He submits that the principle that a court of appeal as a court of revision does not disturb the appreciation of the facts of the case made by the court of first instance, is particularly relevant here because the latter court was assisted by a technical expert whom it relied upon in reaching its conclusions. As to the facts of the case, the appellee contends that the facts referred to by the appellant are not correct, and in some instances they are also contested, and explains as follows: (a) evidence shows that all payments were made within two weeks from the request; (b) it results from the testimony of Perit Paul Cuschieri that contrary to the appellant's claim, it was not the first time that they worked together; (c) on the contrary, the evidence shows that the appellant failed to address defects and that the majority of such defects were serious in nature as evidenced by the value apportioned by the court-appointed expert; (d) the claim made by the appellant was not successful whilst the counter-claim was found to be correct on the basis of those principles affirmed by our courts; (e) the appellant cannot expect to be paid for works which have not been carried out satisfactorily and in an untimely manner; and (f) although it had been agreed in the contract of works that the said works were to be carried out within two months, completion was still pending nine months later. The appellee submits that there is abundant jurisprudence regarding the obligation of proper execution of the works, and cites what the different courts have said in this regard. He submits that the contractor is still liable for damages resulting from the lack of, or improper or defective execution of the works, in spite of the fact that they have been approved or that they conform to specifications or specific instructions from the person engaging him. He insists that the appellant acted in defiance of the terms of the

contract of works, but he had a duty to ensure that the works he executed were those that were expected of him. The appellee insists that the appellant contrary to what he asserts in his appeal application, failed to remedy all defects, and the appellee was then constrained to engage Perit Elena Borg Costanzi to obtain an independent view. He says that the said architect did in fact identify several defects in the works, and concluded that the works go *'against all principles of good design and workmanship',* and that they '*result from poor workmanship'.* The appellee contends that the views of the court-appointed expert and the latter architect, support his position not to pay the last claim made by the appellant due to faulty execution. As to his counter-claim, the appellee contends that this was supported by the conclusions of the *ex parte* expert Perit Elena Borg Costanzi, as well as the court-appointed expert Perit Mario Cassar. This is precisely why the Court of First Instance upheld the said counter-claim in its entirety. He insists that it results that the appellant in various instances acted without instruction from himself or from the project architect, and this was noted by the court-appointed expert. As to the defective work carried out by the said appellant, the appellee submits and explains how this claim was amply established in these proceedings with reference to the different issues addressed by the appellant in his appeal application. Whilst referring to the appellant's arguments as to why he does not agree with the findings of the court-appointed expert, the appellee submits that these cannot diminish the validity of the technical conclusions reached by the court-appointed expert. He insists that the said submissions are made superfluously and are not reason enough for this Court to overturn the conclusions which are of a technical nature.

13. The Court acknowledges that the decision of the First Court is founded upon fair and proper considerations, and its conclusion is therefore justified. It firstly considered that the considerations and consequent conclusions of a technical nature as are those of a court-appointed architect, constitute truly important evidence for the Court. It cited what the Courts of Appeal have said in this regard, and appreciated that the merits of the case were founded on technical considerations, and not merely on the evidence produced in a legal context. The Court of First Instance deemed the considerations and conclusions of the court-appointed expert as reasonable and properly founded, and after reflecting upon the submissions of both parties, it did not find reason to disregard the expert's report. It said that his conclusions should be considered as evidence of poor workmanship, and cited what the Court of Appeal pronounced in its judgment of the 9th February, 2001, in the names **Camilleri noe *vs.* Debattista**. After referring to the deliberations of the courts in their various judgments regarding a contract of works, it considered that the burden of proof of damages suffered lies on the person alleging such damages. The Court of First Instance referred to the conclusions reached by the court-appointed expert, which it said it was not in a position to challenge due to the technical expertise involved, and declared that the damages caused were a direct result of bad workmanship attributable to the appellant.

14. The Court has taken into account the considerations and conclusions of the court-appointed expert, and finds that the submissions of the appellant as presented in his appeal application do not provide sufficient justification to overturn the appealed judgment in its entirety or in any part of it. The Court finds no reason in the said appeal application to doubt the findings of the said

expert, which are laid down in precise detail, in contrast to the submissions of the appellant, which are without reference to satisfactory evidence or expert advice. The argument the appellant puts forward that the contested works were certified by an architect, cannot be successful in the light of the resulting bad workmanship which is evidenced by the court-appointed architect's report and which explains well his findings.

15. In view of the above, the Court does not find that the appellant's grievance is justified, and rejects it.

Decide

For the above reasons, the Court decides to reject the appellant's appeal, and confirms the appealed judgment in its entirety.

All expenses in respect of the present proceedings shall be borne by the said appellant.

Read.

Hon. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar