MALTA

COURT OF APPEAL
(Inferior Competence)

HON. JUDGE
LAWRENCE MINTOFF

Sitting of the 6th November, 2024

Inferior Appeal number 115/2019 LM

Sophie Hervey (I.D. number 171635A)
('the appellant')

***vs*.**

Maria Baldacchino (I.D. number 130080(M))
and the joinder Steve Baldacchino (I.D. number 80579(M))
('the appellees')

The Court,

<u>Preliminary</u>

1. This appeal was filed by the applicant **Sophie Hervey (I.D. number 171635A)** ['the appellant'] from the judgement of the Court of Magistrates (Malta) ['the Court of Magistrates'], of the 27th November, 2023, ['the appealed

judgement'], wherby the said Court decided her claim against respondents **Maria Baldacchino (I.D. number 130080(M)) and the joinder Steve Baldacchino (I.D. number 80579(M))** ['the appellees'] as follows:

> ***"Decision***
>
> ***5.5 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 be borne equally by the parties".***

Facts

2. The facts of the present case involve damages which the appellant allegedly sustained in her personal belongings at 9, Triq Ġan Franġisk Abela, Birgu, which she attributes to the seepage of water from the appellees' property at 11, Triq Ġan Franġisk c/w Triq il-Foss, Birgu.

Merits

3. The appellant filed an application before the Court of Magistrates (Malta) against the appellee Maria Baldacchino on the 12th June, 2019, whereby she summoned her as follows:

> *"...tgħid 'il għaliex m'għandekx tkun ikkundannnata tħallas lill-attriċi s-somma ta' ħmistax-il elf euro (€15,000), oltre l-imgħax legali sad-data tal-pagament effettiv, rappreżentanti danni kkawżati lilha konsistenti,* inter alia, *fi ħsarat u/jew distruzzjoni ta' għamara,* furnishings, *ħwejjeg u oġġetti mobbli oħra, li għandhom jiġu riparati jew mibdula fl-intier tagħhom, il-kiri ta'* movers, *l-ingaġġ ta' terzi persuni għall-iskop*

ta' riparazzjonijiet meħtieġa inkluż dawk fil-fond di proprjetà tal-attriċi u kif ukoll il-kiri ta' storage space *biex jinżammu l-oġġetti li kienu miżmuma fil-fond di proprjetà tal-attriċi 9, Triq Ġan Franġisk Abela, Birġu, u dan bħala riżlutat ta' ingress ta' ilma mill-proprjetà tiegħek 11, Triq Ġann Franġisk, kantuniera ma' Triq il-Foss, Birgu.*

Bl-ispejjeż, inklużi tal-ittri legali li ntbagħtulek, u bl-inġunzjoni tiegħek għas-subizzjoni."

4. The appellee Maria Baldacchino replied on the 2nd September, 2019, as follows:

"Bir-rispett teċċepixxi:

1. Illi preliminarjament, l-attriċi għandha taħtar mandatarju sabiex jidher għaliha la darba hija tkun sikwit assenti minn dawn il-Gżejjer.

2. Illi bla preġudizzju għall-premess, il-ġudizzju mhux integru stante li żewġ l-eċċipjenti, Steve Baldacchino, ma ġiex ukoll imħarrek.

3. Illi bla preġudizzju għall-premess, l-eċċipjenti ma kkaġunatx danni lill-attriċi, u l-kuntrarju għandu jiġi ippruvat mill-istess attriċi skont il-liġi.

4. Illi bla preġudizzju għall-premess, l-attriċi għandha tressaq prospett li juri dettaljatament l-ammont mitlub minnha f'hiex jikkonsisti, u f'kull każ, l-ammont pretiż mill-attriċi huwa fermement ikkontestat, u għalhekk l-attriċi għandha ġġib prova skont il-liġi dwar il-konsistenza sħiħa tal-ammont pretiż minnha.

Salv eċċezzjonijiet ulterjuri skont il-liġi.

Bl-ispejjeż kontra l-attriċi, li hija minn issa nġunta in subizzjoni."

Following the decree of the Court of Magistrates of the 4th November, 2019, allowing the appellee Steve Baldacchino to be joined in the suit as a respondent, the said appellee during the hearing of the 27th January, 2020, declared that he was assuming the same defence presented by the appellee Maria Baldacchino.

The Appealed Judgement

5. The following are the considerations made by the Court of Magistrates (Malta) which led to its final decision:

"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 case-law 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. (fn. 37: 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 & Insfrastructure Services Limited*** *(App. Nru. 238/218, Judge Grazio Mercieca) Furthermore, Art. 180(1) of Chapter 12 of the Laws of Malta provides as follows:*

'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 (fn. 38: 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) 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 prinċipju kwalifikat fil-liġi illi "kull wieħed iwieġeb għall-ħsara li tiġri bi ħtija tiegħu" (Artikolu 1031, Kodiċi Ċivili). Din in-norma tikkostitwixxi l-punt kardinali tar-responsabilità extra-kontrattwali u tenunċja r-regola li l-awtur tal-leżjoni għandu jagħmel tajjeb għall-konsegwenzi negattivi patrimonjali subiti mit-terz. Din ir-responsabilità għandha bħala fonti tagħha l-imġiba imputabbli, li tista' tkun doluża jew kolpuża. Imġiba din li għandha jkollha neċessarjament ness ta' kawżalità mal-event dannuż".

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 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-Imħallef Philip Sciberras Proċedura Ċivili L-Ewwel Volum" (fn. 39 P. 498)":*

    1. Ibda biex ir-regola tradizzjonali dwar **tal-piż tal-provi timponi a karigu tal-parti li tallega fatt l-oneru li ġġib il-prova tal-eżistenża tiegħu.** Tali oneru hu ugwalment spartit bejn il-kontendenti, sija fuq l-attur li jsostni l-fatt favorevoli li jikkostitwixxu l-bażi tad-dritt azzjonat minnu (actori incumbit probatio), sija fuq il-konvenut għas-sostenn tal-fatt miġjub minnu biex jikkontrasta l-pretiża tal-attur (reus in excipendo 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 stabilit fatt li juri prima facie li t-teżi tal-attur hija sostenuta". (Kollez. V**ol. XXXVII.I.577**)

3. Il-ġudikant adit mill-mertu tal-każ hu tenut jiddeċiedi iuxta alligata et probata, u dan jimporta illi **d-deċizjoni tiegħu tiġi estratta unikament mill-allegazzjonijiet tal-partijiet.** Jiġifieri, minn dawk iċ-ċirkostanzi tal-fatti dedotti għab-bażi tad-domanda jew tal-eċċezzjoni u l-provi offerti mill-partijiet. Jikkonsegwi illi **d-dixxiplina tal-piż tal-provi ssir bażi tar-regola legali tal-ġudizzju in kwantu timponi fuq il-ġudikant il-konsiderazzjoni li l-fatt allegat m'huwiex veru għax mhux ippruvat;**

4. Il-valutazzjoni tal-provi hu fondat fuq **il-prinċipju tal-konvinċiment liberu tal-ġudikant**. Lilu, hu mogħti l-poter diskrezzjonali tal-apprezzament tar-riżultanti probatorji u allura hu liberu li jibbaża l-konvinċiment tiegħu minn dawk il-provi li hu jidhilrlu li huma l-aktar attendibbli u idoneji għall-formazzjoni tal-konvinċiment tiegħu. Naturalment dik id-diskrezzjoni tiegħu hi soġġetta għal dak il-limitu legali impost fuqu mill-Artikolu 218 tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili li jrid li fis-sentenza tingħata **motivazzjoni raġunata u tikkonsenti l-kontroll tal-ħsieb loġiku segwit** fuq appell interpost mis-sentenza. Motavizazzjoni din, li jekk jinstab li tirrispondi mal-loġika u r-razzjonalità, kif ukoll koerenti mal-elementi utilizzati allura skont ġurisprudenza konkordi, ma tiġix disturbata minn Qorti ta' revizzjoni. Ara, b'eżempju, Kollez. Vol. **XXIV.i.104**".

39. Furthermore, case-law has established that:

1. "L-Artikolu 1031 tal-Kodiċi Ċivili jippreċiża li 'kull wieħed iwieġeb għall-ħsara li tiġri bi ħtija tiegħu'. Din in-norma tal-liġi fil-kamp tar-**<u>responsabilità akwiljana</u>** jew extra-kontrattwali tikkostitwixxi l-punt kardinali in subjecta materia, u tenunċja l-prinċipju in virtù ta' liema l-leżjoni kaġjonata lis-suġġett tobbliga lill-awtur tal-leżjoni li jirriżarċixxi l-konsegwenzi negattivi, ossija d-danni, kompjuti bl-att tiegħu. Issa kif saput, il-fonti primarju tar-responsabilità ċivili hi ravviżata fl-imġiba imputabbli għal dolo jew kulpa. Il-liġi ċivili tagħna ma tiddefinixix il-kolpa ċivili fl-għemil iżda tagħmlu jikkonsisti fin-nuqqas ta' prudenza, nuqqas ta' diliġenza u nuqqas ta' ħsieb tal-bonus paterfamilias [Artikolu 1032 (1), Kodiċi Ċivili]..." ***<u>Michael</u>***

D'Amato noe et. v. Filomena Spiteri et*. (PA, Ċit Nru 886/1993/2 PS, 03/10/2003)*

2. "Intqal diversi drabi li biex tirriżulta responsabbilità għall-ħsara, irid ikun hemm **ness ta' kawża u effett**, u dan in-ness irid jiġi pruvat mill-vittma tal-ħsara". ***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 għalhekk lill-atturi f'dan il-kaz li jagħtu prova tal-effettiva eżistenza 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' rizarċiment ta' danni, id-danneġġjat għandu jkollu d-dritt jikkonsegwixxi **riżarċiment effettiv** li jirrientegra l-patrimonju tiegħu minn kull konsegwenza ekonomika tal-event dannuż. Li jfisser li dan l-istess riżarċiment jista' jikkonsisti f'somma li tekwipara l-valur tal-utilitjiet mitlufa" – ***Marco Buttigieg et. v. Rose Cini*** *(Qorti tal-Appell Inferjuri, App 21/1999/1 PS, 17/11/2004)*

5. "Issa hu prinċipju gwida regolanti materja ta' riżarċiment ta' danni illi min isofri dannu **għandu jiġi re-integrat f'dak li jkun tilef** b'konsegwenza tal-event dannuż u mhux dak li jieħu vantaġġ meta dan ikun indebitu jew mhux mistħoqq" - ***Sylvia Degiorgio et. v. Massimiliano Da Crema*** *(PA, Ċit Nru 1560/1995/1 PS, 13/10/2004)*

6. "... di regola d-danneġġjat għandu d-dover li jagħmel dak kollu li hu raġonevoli biex inaqqas il-ħsara konsegwenti għall-fatt illeċitu [Vol.XL.II.653] b'mod li jiġi eskluż fil-każijiet kongruwi, mir-risarċiment ta' dik il-parti tad-danni dovuta għan-nuqqas tiegħu li jieħu dawk il-passi. Jibqa' però dejjem il-fatt illi huwa **ma huwiex obbligat jitgħabba b'piżijiet biex inaqqas il-ħsara**" ***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." (fn. 40: Halsburys Laws of England Vol. 11 page 289, 3rd Edition 1955)

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"** *(fn. 41: Fol 15)*

The photographic evidence submitted by the witness is also strongly indicative of this water percolation. (fn. 42: by way of example the photographs exhibited a fol 44 and 45)

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 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 1st 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:*

No.	Type of damages	Inv/Quo	Date	Amount	Fol no.	Details
	Structural Damages					
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)
	Furniture relocation					
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
	Furniture damaged					
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	*Fol 27*	Online quotation Next Malta
18	Duvet double			€ 103	*Fol 28*	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	*Fol 30,31*	Quotations Magasin Sennelier
23	Wooden shoe rack			€ 38.99	*Fol 33*	Quotation ManoMano
24	Wooden coat hanger			€ 64	*Fol 34*	Quotation le-portemanteau
25	2 Wooden trestles			€ 50		Quotation Ikea
26	Beach umbrella			€ 18.95	*Fol 35*	Quotation Homemate
			Sub-total	**€ 15,200.62**		

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."*

The Appeal

6. The appellant felt aggrieved with the appealed decision, and it filed an appeal before this Court on the 27th December, 2023, where she is requesting that:

> *"...this Honorable Court of Appeal to uphold the grounds of appeal and whilst confirming that part of the judgment whereby it ordered the defendants to pay* in solidum *between them the sum of €1,475, to revoke and annul the rest of the judgment dated 27th November, 2023, and uphold Appellant's requests in their entirety, whilst rejecting all of the defendants' pleas, with costs of both instances against the defendants."*

The appellant says that her grounds of appeal are the following: (i) she could not in any way be deemed responsible for the damages sustained; (ii) the latter damages were adequately proven.

7. The appellees replied on the 16th February, 2024. They insist that the appealed decision is just and correct and should be confirmed, whilst the present appeal should be dismissed.

Considerations

8. The Court will now consider the grievance of the appellant, whilst taking into account the deliberations of the Court of Magistrates and the submissions presented by the appellees.

9. The appellant explains that her first grievance is that she could not in any manner be held responsible for the damages she had incurred. She submits that the Court of Magistrates had been correct to say that contrary to the appellees'

argument, it had been sufficiently proved that the percolation of water had actually caused the said damages. However she disagrees with the argument raised by the same Court that time is of the essence where furniture, wood or fabric items have become wet, and that therefore she was partially responsible for the formation of mould and for the resulting damages due to her delay in removing the items. The appellant contends that it is not possible that she had told the appellee Maria Baldacchino about the leak in her property in April 2018, because as Architect Rory Apap Brown stated in his evidence, the company he worked with was carrying out routine inspections in the garage and it had been the first to notice the ingress of water in the property in May 2018. The appellant submits that as is evident from the photos annexed to the reports submitted by the architects AP Valletta, the garage was full with over three hundred packages and it was therefore impossible for her to remove them more expeditiously. She says that after all, the appellee Maria Baldacchino confirmed that she was shown the damaged sofas in mid-June 2018, after the message she had received on the 25th May, 2018, and the items were removed around two weeks after the leak had been noticed. From her end, the appellant had taken all precautions even by engaging architects to certify that the property could be used for storage purposes, and she had adhered to all recommendations that they had made. She explains with reference to the evidence tendered by Architect Rory Apap Brown, that she could not have detected the water leak herself. The appellant concludes that it is thus unclear how the Court of Magistrates came to the conclusion that there was contributory negligence on her part as a result of the delay in transporting the packages from the affected area. The appellant explains that her second grievance is that the damages she

suffered had been adequately proven. She insists that she was due to prove her case on a balance of probabilities. The appellant says that the packers and shippers had made a sworn declaration that the goods were packed and delivered in a good condition, and she had obtained quotations and receipts in respect of the repairs or the replacement of the damaged items, and confirmed them on oath. The appellant contends that no cross-examinati`on was held in respect of the said receipts, and no evidence was presented to contest same. With reference to the observation made by the Court of Magistrates that the amount claimed had not been proved by means of *ex parte* experts, the appellant argues that nothing more would have been achieved through the oath of a third party expert. She says that after all the authenticity of the invoices, receipts or quotations was not contested by the appellees, and the appointment of *ex parte* experts would have resulted in a waste of judicial resources, where according to the provisions of subarticle 22(1) of Chapter 13, the said documents were sufficient evidence of their contents. The appellant submits that she is also claiming fees for the storage of the items in another property which belonged to Parmacosdiane Malta Limited, of which she is the sole director. She explains that the company had issued invoices for storage fees because it would have otherwise used the property in a different way.

10. The appellees contend that the appealed judgment is just and correct and ask for it to be confirmed by this Court. As to the the appellant's first ground of appeal, they submit that she is not correct when she states that she *"could not in any way have been deemed to have been at fault for the damages she incurred",* and they argue that the Court of Magistrates did not hold her responsible for the damages she had incurred. They cite what the said Court

said in this regard, and argue that in the circumstances, damage to the appellant's belongings was not only foreseeable but also inevitable. The appellees argue that the percolation of water from above was hardly to blame, and the damage sustained by the said belongings was the result of the chosen location, and the fact that these were left there for months after the problem had been detected. Regarding the second ground of appeal presented by the appellant, the appellees submit that the Court of Magistrates did not find that the appellant had sufficiently proven all damages allegedly due on a balance of probabilities. They argue that the said appellant did not adhere to *'the best evidence rule'* enshrined in article 559 of Cap. 12. The appellees submit that the appellant cannot in the circumstances of the case ask for damages to be liquidated *arbitrio boni viri,* because she could have proven such damages in a number of ways.

11. The Court finds that the Court of Magistrates was correct in its decision. After dismissing the first two preliminary pleas raised by the appellees, it examined the merits of the present case. It took into consideration the provisions of article 1031 and those of subarticle 1032(1) and 1033 of the Civil Code, and said that the legal principles applicable to the examination it must carry out were explained well by Judge Grazio Mercieca in his book 'Massimarji tal-Imhallef Philip Sciberras Proċedura Ċivili L-Ewwel Volum'. It quoted the author in great length, and also cited various judgements of the Maltese Courts, and 'Halsbury's Laws of England'. The Court of Magistrates considered that it must determine foremost whether the water did actually leak from the appellees' property, and whether they were at fault, or if it was the result of a fortuitous event. It declared that it must examine whether appellant had

contributed to the resulting damages. The Court of Magistrates noted that A.I.C. Rory Apap Brown in his testimony, stated that on or before the 7th May, 2018, a considerable amount of water had seeped into the appellant's property from the overlying shaft belonging to the appellees. It took into account the report prepared by A.I.C. David Drago, and stated that the appellees had not presented any evidence of a technical nature to refute the architect's findings. The Court of Magistrates took into consideration that there were no more complaints of water leaking into the appellant's property after works in the overlying property were finished. It took into account that according to the appellee Maria Baldacchino and her architect, there had been high levels of humidity in her property, especially before works had been concluded, due to an underlying well shared with the appellant, and A.I.C. Aaron Abela had stated that during his inspection of the garage in February 2017, there had been signs of continuous water seepage from the property above. On the other hand it said A.I.C. Rory Apap Brown had asserted that when he had inspected the garage prior to its purchase, there was no such evidence of humidity. It also noted that the appellee Maria Baldacchino had explained that the above-mentioned well was on the other side of the shaft. The Court of Magistrates concluded that on a balance of probabilities the appellees were responsible for the water ingress from their overlying property, and this because the membrane and the system of drains leading to the open gully, were deficient.

12. However the Court of Magistrates remarked that the inspection carried out by Architect Emilie Van Look, who was present when the appellant's belongings were unpacked, took place on 1st August, 2018, which was nearly almost three months from when the water ingress had been discovered by the

appellant's architects. It considered that the appellee Maria Baldacchino had stated that when she was contacted by the appellant in April 2018, she was only shown two beach armchairs and a sofa cushion that appeared to be damaged, and that the remaining items were still in their packaging. The Court of Magistrates noted that she had also said that on 14th June, 2018, the applicant had shown her another two sofas which allegedly suffered damage, and she had told her that she had yet to ascertain whether there were further damages in the items that were yet to be unpacked.

13. The Court of Magistrates correctly stated that no special expertise is required to recognise the fact that time is of the essence when damage is to be avoided to furniture, wood or other items made of fabric which have received water, as stains and mould can appear quickly. This Court must also affirm that it is a generally applied principle, that it is always one's duty to ensure that as far as possible damages are reasonably contained and not allowed to escalate. The Court of Magistrates further declared that it was not satisfied that the appellant had taken the necessary steps to avoid damage to her belongings, and therefore it found that she must also be held responsible together with the appellees for the damage sustained to the said belongings.

14. This Court finds no reason to doubt these considerations made by the Court of Magistrates, and considers that the arguments brought forward by the appellant do not persuade it to overturn the appealed judgement. The same must be said in respect of the submissions made by the appellant to substantiate her second grievance. The appellant submits that she has adequately proven the damages she suffered to her property. She contends

that although the appellees had contested the amounts being claimed representing the damage sustained, they had failed to make any cross-examinations in respect of the receipts presented or to present evidence to prove that those same receipts or quotations or any of them were excessive or incorrect, which documents according to subarticle 22(1) of Cap. 13 constitute valid evidence. The appellant opposes the argument of the Court of Magistrates that she had failed to prove the sums claimed by means of *ex parte* experts, and argues that they could not have done more than she had by obtaining quotations for repairs and replacement. She further explains that she was also claiming fees for storing the items in another property, until the dampness had disappeared, which property belonged to the company Parmacosdiane Malta Limited of which she was sole director.

15. The appellees submit that contrary to the appellant's arguments, the Court of Magistrates had not reached the alleged conclusion. They contend that the appellant had utterly failed to adhere to the fundamental principle of the best evidence rule as replicated in article 559 of Cap. 12. The appellees also argue that the appellant cannot expect that the damages she suffered be liquidated *arbitrio boni viri.* They submit that this is only allowed where the plaintiff does not have at his disposal the means to prove the damages sustained, but in the present case the appellant could have proved the said damages in multiple ways.

16. The Court of Magistrates understandably expressed its perplexity to the fact that the appellant had not summoned any witnesses to confirm the invoices, quotations, estimates and values on oath, especially where the

appellees were expressly disputing the amounts claimed as part of their defence. This Court cannot but agree that the appellant had truly failed here to ensure that she produces the best evidence, which after all was easily accessible. The Court of Magistrates further considered that the appellant could have done so in different ways, also through the engagement of *ex-parte* experts or through the presentation of sworn affidavits, but even when she summoned her own architects to testify, she had somehow failed to ask them to confirm the amounts that they had billed for their own particular services. The Court of Magistrates was also correct in taking into consideration that a number of invoices which were addressed to the company Pharmacosdiane Malta Limited and paid by same, could not be claimed by the appellant since according to law the said company had a separate legal personality. As the appellant pointed out, the Court of Magistrates did accept invoices 701, 732 and 753 issued by the abovementioned company, since it believed the billed amounts had been sufficiently proven in view of the fact that applicant was the sole director and shareholder of that company, and therefore her validation was sufficient proof. However the Court of Magistrates correctly considered that as affirmed above, the appellant was partially responsible for the damages suffered, and her assertion that she had to wait for six months prior to placing her belongings back in the garage, had not been substantiated by witnesses, including her own architects. The Court of Magistrates noted that on the contrary, A.I.C. Rory Apap Brown had stated that he was not informed of any further percolation of water after May 2018. Therefore the Court of Magistrates was both correct and just when it decided to award compensation of €1,475 for the storage period between the 1st August, 2018, and the 31st January, 2019.

17. This Court therefore finds that the grievances of the appellant are not justified, and rejects them.

Decision

For these reasons, the Court rejects the present appeal, and confirms the appealed decision in its entirety, with costs against the appellant.

Read.

Onor. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar