MALTA

COURT OF APPEAL
(Inferior Competence)

HON. JUDGE
LAWRENCE MINTOFF

Sitting of the 27th November, 2024

Inferior Appeal number 8/2024 LM

Eve Russell (I.D. number 159057(M))
('the appellant')

***vs*.**

Boris Archidiacono Ltd (C 159057)
('the appellee')

The Court,

Preliminary

1. This appeal has been filed by the applicant **Eve Russell (I.D. number 159057(M))** ['the appellant'] from the decision of the Consumer Claims Tribunal ['the Tribunal'] of the 29th April, 2024, ['the appealed decision'], wherby the said Tribunal decided to abstain from considering her complaint against the

respondent company **Boris Archidiacono Ltd (C 159057)** ['the appellee Company'], and ordered each party to burden its own costs.

Facts

2. The facts of the case concern the purchase of a Swiss manufactured *Strässle* recliner leather chair by the appellant from the appellee Company in 2016 under a ten year reducing warranty. In April 2023 the appellant noticed that the left arm of the recliner was splaying outwards, and she immediately wrote to the appellee Company to address the issue. The latter informed her that the foreign supplier had terminated all contact with it, and that her request to repair the chair was not being accepted.

Merits

3. The appellant filed a claim against the appellee Company before the Consumer Claims Tribunal on the 20th July, 2023, where she requested a full refund of the price of the chair which she had bought for €3,260, together with expenses of the said procedure.

4. The appellee Company did not reply to the said claim.

The Appealed Decision

5. The Tribunal arrived at its decision after considering the following:

*"**Considered:***

Whereas through the instant proceedings, the applicant is requesting that the defendant company is condemned by this Tribunal to pay her the sum of three thousand, two hundred and sixty Euro (€3,260) which is the purchase value of a Strässle reclining chair which she had purchased on the 16th February 2016. She complains that after seven years of use, one of the chair arms bent sideways and also, a cable and gas lift broke.

Whereas the defendant company failed to file a formal reply however, Maurice Arcidiacono, attended the sitting of the 20th November 2023 and declared that defendant company will execute the necessary repairs to the chair. Applicant agreed to this proposal and in fact made the chair available for repairs.

Whereas the Tribunal notes that through these proceedings, the applicant is requesting a full refund of the price paid for the chair, a demand which by its very nature presupposes a declaration of rescission of the contract of sale [action redhibitoria]*. This remedy is allowed by Article 74(1) of Chapter 378 of the Laws of Malta, however, due to the nature of the defect complained of and also due to the fact that the parties agreed that defendant company is to undertake the necessary repairs, the Tribunal considers that Article 75 of said Act should apply as the remedy chosen would impose costs on the seller that would be disproportionate, taking into account all circumstances.*

Whereas during her testimony in cross-examination during the sitting of the 15th April 2024, the applicant declared that the ''initial complaint" about the chair has since been addressed during the course of these proceedings but qualified that according to her, there were still pending issues because "the chair is not fit for purpose and was mis-sold to me".

*Whereas the Tribunal makes it clear that even though proceedings before it allow for the application of a degree of equity, like all judicial proceedings, the terms of an action brought before it are defined by what is demanded and plead in the written pleadings ["*In-natura u l-indoli tal-azzjoni għandhom jiġu dežunti mit-termini tal-att li bih jinbdew il-proċeduri" *(Vol. XLII Pt. I p.86)].*

Whereas in the circumstances of the case, the Tribunal considers that at this point, the applicant's formal demand in these proceedings has been duly addressed by defendant company and therefore, the merits of the action have been exhausted. As a parenthesis, this Tribunal also considers it rather strange that an argument on a

product being mis-sold is raised after no less than seven years of enjoying the product."

The Appeal

6. The appellant felt aggrieved with this decision and filed an appeal before this Court on the 17th May, 2024, where she:

"...humbly asks this Honourable Court of Appeal (in its Inferior Jurisdiction) that it be pleased to cancel and annul the judgement handed down by the Honourable Tribunal for Consumer Affairs on the 29th April 2024 in the names of Eve Russell vs Boris Arcidiacono, in so far as the First Honourable Tribunal abstained from further considering the claim and instead reform it in so far as it upholds the appellant qua applicant's principal request of terminating the contract of sale and getting a full refund in the amount of €3,260 for the recliner she had purchased on the 16th of February 2016.

With costs for both instances against the appealed."

She explains that her grievances are the following: (a) the Tribunal did not evaluate the facts correctly, and instead it rested its decision on incorrect conclusions; (b) the Tribunal was wrong not to consider the fact that the recliner was mis-sold as an additional ground for the termination of the contract; and (c) the Tribunal misinterpreted and misapplied the law.

7. The appellee Company presented its reply on the 11th January, 2024, whereby it submitted that the present appeal should be dismissed, with costs.

Considerations

8. The Court will now consider the arguments put forth by the appellant to support her grievances, together with the submissions made by the appellee Company, whilst reviewing the Tribunal's decision.

9. Prior to presenting her submissions to further explain her grievances, the appellant puts forth a number of arguments regarding the appellee Company's failure to participate in the proceedings before the Tribunal, excepting her cross-examination. She states that the facts as presented by her on oath before the Tribunal, satisfy the probability test required in civil fora in respect of the production of evidence. She then explains her first grievance with the appealed decision, where she declares that the Tribunal did not correctly evaluate the facts as to the condition of the recliner and what she was expecting. The appellant says that this led the Tribunal to the wrong conclusions. Whilst she refers to the various documentation filed together with her claim, the appellant states that it is evident from the said documentation that the recliner was truly damaged and needed repairs. She explains that repairs were actually carried out by the appellee Company, but these were not carried out correctly, and it could not do so because it had lost all contact with the manufacturer/supplier. The appellant says that however the Tribunal attributed her request for a full refund to her statement that the recliner had been mis-sold, rather than that it had not been repaired properly. As to her second grievance, she contends that the Tribunal was wrong when it did not consider the fact that the recliner was mis-sold, as another ground for termination of the contract of sale. The appellant refers to the provisions of subsection 73(1) of Cap. 378, which outline

what is expected from the seller with respect to the goods delivered to the buyer, and insists that the recliner was not suited for her height and stature, and that the appellee Company was aware of this. The third grievance of the appellant is that the Tribunal misinterpreted and misapplied the law when it referred to article 75 of Cap. 378. She cites the provisions of both article 74 and article 75 of the said law, and argues that the choice offered is between repair and replacement and not the termination of the contract which is afforded by article 78A. The appellant contends that the Tribunal interpreted article 75 to mean that she was not allowed to terminate the contract since this was too burdensome on the seller. She says that this has resulted in a situation where she has been left without redress, since the Tribunal furthermore did not order the appellee Company to ensure the repair of the recliner.

10. In its introduction, the appellee Company outlines the facts of the case, and thereafter makes its submissions as to each grievance presented by the appellant. As to her first grievance, the appellee Company contends that the appellant has failed to prove that the damage to the recliner was due to a defect, and not attributable to use or misuse as she eventually acknowledged in her document 'ER1'. The appellee Company says that it was only out of goodwill that it repaired the damage at its own cost and expense. The appellee Company contradicts the appellant's statement that it could not adequately carry out repairs since it had lost contact with the supplier, and insists that there was no evidence to support her claim. It submits that the appellant had actually confirmed during her cross-examination that the alleged damages had been addressed by the appellee Company, but she also raised doubts when she

said '*I believe that there were still some pending issues consisting of the repairs not done properly',* without any evidence of same and made a fresh complaint of mis-selling. The appellee Company contends that the appealed decision is fair and just from a legal and factual point of view, and certainly the circumstances outlined under article 74 of Cap. 378 do not result in any manner to allow the termination of the contract. As to the second grievance presented by the appellant, the appellee Company contends that the issue of mis-selling was only raised by the said appellant in her affidavit presented during the sitting of the Tribunal of the 26th February, 2024, following repairs to the recliner. It submits that the Tribunal was therefore more than justified when it did not consider the said issue. The appellee Company submits that the complaint raised by the appellant is however unjustified, since it is not supported by any evidence and therefore para. (b) of subarticle 73(1) of Cap. 378 is not applicable. The appellee Company contends that this grievance should therefore be dismissed, as should her third grievance. As to the latter, it explains that the appellant is incorrect in her argument because the Tribunal considered that since the said appellant was requesting the termination of the contract, then article 74 of Cap. 378 was applicable. But since it was agreed that the recliner would be repaired, there was no issue as to the termination of the contract.

11. The Court considers that the Tribunal correctly decided the appellant's complaint. After outlining the said complaint as presented in her Notice of Claim, whereby she was asking for a full refund of the price paid, the Tribunal noted that although the appellee Company had failed to file a formal reply, Maurice Arcidiacono had attended the sitting of the 20th November, 2023, and

declared that the said appellee Company was prepared to repair the recliner and the appellant had agreed and made the recliner available. The Tribunal therefore rightly so took this into consideration, and declared that article 75 of Cap. 378 was applicable in the circumstances, since it fairly and rightly considered that the remedy chosen by the appellant would burden the appellee Company with disproportionate costs. The Court cannot but agree with the Tribunal, since clearly the circumstances outlined under article 74 of Cap. 378 were not applicable in this case where repairs had been carried out to the recliner. As to the appellant's contention that the recliner had been mis-sold to her, the Tribunal was also correct here to abstain from deciding the matter, because this did not form part of her initial complaint. The appellant's grievances are therefore all together unfounded.

Decide

For all the above reasons, the Court rejects the present appeal, and confirms the appealed decision.

With costs against the appellant.

Read.

Hon. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar