



## **Court of Magistrates (Malta)**

**APPLICATION NUMBER 59/2021: GASANMAMO INSURANCE LIMITED (C3143) AS SUBROGATED IN THE RIGHTS OF THEIR INSURED CHRISTOPHER GHERXI ACCORDING TO LAW AND TO THE INSURANCE POLICY (CLAIM NUMBER N19003459) V. DEREK FRANCIS BYRNE (ID. 584517L)**

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

**03.02.2025**

THE COURT,

having seen the application filed by GasanMamo Insurance Limited (referred to as “the claimant company” or “the claimant”) filed on 1<sup>st</sup> March 2021<sup>1</sup> by means of which it called upon Derek Francis Byrne (referred to as “the respondent”) to appear before the Court to answer to its claim and say why he should not be ordered to:

**“Pay the sum of nine thousand, five hundred and seven Euros (€9,507) being damages suffered as a result of an incident which took place in November 2019 when damage was caused to the property of applicant’s insured, namely in the property L’Enotica, 28, Triq San Kataldu, Rabat, which damage was caused solely for reasons attributable to you since you left the properties 29 and 30, Triq San Katald, Rabat, badly maintained and consequently, due to rain water seepage, such water went into the property of applicant’s insured causing damage to the insured’s property, for which damage the insured was compensated by claimant company which was consequently subrogated in his rights.**

**With costs and interest according to law against defendant who is hereby being summoned for reference to his oath”**

---

<sup>1</sup> Fol 1-2

having seen the reply filed by the respondent on 22nd December 2021 by means of which he held that:

- “1. Primarily, the respondent does not understand the Maltese language and therefore asks that said proceedings be conducted in English language;**
- 2. The amount claimed is not due as shall be proven throughout the proceedings of the case;**
- 3. The claimant company’s allegations are manifestly unfounded at fact and at law due to the fact that the alleged damage is not attributable to him;**
- 4. Without prejudice to the above, the amount claimed is excessive as shall be proven in these proceedings.**

**Save for further pleas.**

**With costs.”**

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 heard final submissions made during the sitting held on 17<sup>th</sup> June 2024 by:

- Dr. Claudine Pace Zarb for the claimant and
- Dr. Rebecca Gauci for the respondent.

gives the following

## **Judgment**

### *Evidence*

1. On 15th November 2021, **John Galdes**<sup>2</sup>, Senior Manager at the claimant company, gave his testimony. *Inter alia*:
  - a) He confirmed that a claim had been filed by Chrisopher Gherxi<sup>3</sup>, as the owner of the restaurant L’ Enoteca in Rabat, wherein it was claimed that he had suffered damages in his property following rainfall and this due to neighbouring construction works, the owner of which was Derek Francis Byrne. He explained how they appointed Architect Alfred Grech to visit the site and carry out a survey.<sup>4</sup> The site visit was held on 29th November 2019.

---

<sup>2</sup> Fol 20A et seq.

<sup>3</sup> In November 2019 and on the 1<sup>st</sup> February 2020

<sup>4</sup> Report marked as Dok JG1 – Fol 21 et seq.

- b) He explained that Architect Grech had concluded that any water ingress in the restaurant came from the construction site and this due to a serious lack of water management.
  - c) Following Christopher Gherxi's claim, the insurance company verified the claim as well as the damages suffered and the expenses made<sup>5</sup>. Subsequently it quantified the amount due by way of compensation and paid the amount of € 9,507 representing:
    - i. € 8,400 in plastering, painting, gypsum works and woodworks,
    - ii. € 449 in wireless charges,
    - iii. € 423.27 to replace a damaged compressor
    - iv. € 355.08 to replace a damaged amplifier
    - v. Deduction of EUR120 policy excess fee
  - d) The witness also submitted documentation indicating that Derek Francis Byrne did not deny that he was the owner of the construction site<sup>6</sup>.
2. On 21st March 2022 **Architect Alfred Grech** testified by way of a sworn affidavit<sup>7</sup> that he had been engaged by GasanMamo Insurance Limited to visit L'Enoteca at 28, St. Catald Street, Rabat following damages that were allegedly caused by water percolation from the overlying property:
- a) He explained that he went on site on 29th November 2019 and prepared a report based on his findings<sup>8</sup>. The scope of his visit was to view the damages that had been suffered as well as to ascertain their value. He re-visited the site on 1st February 2020 and prepared a second report.<sup>9</sup>
3. On 20th June 2022 **Christopher Gherxi**<sup>10</sup>, owner of the property L'Enoteca, testified by way of a sworn affidavit that his property in St. Catald Street, Rabat, underlies that of Derek Francis Byrne at 29/30 in the same road.
- a) He explained that after some months of opening the bar Derek Francis Byrne had started demolition works in the property adjacent to his. This was the cause of

---

<sup>5</sup> By means of the receipts presented by the insured – Dok JG3 and Dok JG 4 – Fol 74 – Fol 80

<sup>6</sup> Dok JG5 – Fol 81 et seq.

<sup>7</sup> Fol 100-129

<sup>8</sup> Dok AG1 – Fol 102 et seq.

<sup>9</sup> Dok AG2 – Fol 117 et seq.

<sup>10</sup> Fol 140-148

the first damages that he incurred and later a second incident had led to more damages.

- b) Christopher Gherxi always informed the respondent with said damages when they would have occurred and he would respond by apologising and blaming the contractor. In November 2019 a third incident occurred wherein, due to heavy rainfall, the witness' property suffered a lot of damage due to the construction works being carried out by Derek Francis Byrne.
  - c) The witness explained that he was abroad when this occurred. Upon his return he found his property flooded and with no electricity as the circuit breaker had tripped. He attempted to inspect the property with the use of a torch and found a lot of water damage in different parts of the property, starting from the top floor all the way down to the cellar and the cave.
  - d) He explained that he had immediately informed the claimant company who sent an architect to inspect the property. He found out that the cause of the damage stemmed from the fact that Derek Francis Byrne did not have a rainwater drain and that, instead, a hole had been drilled in the wall on his roof so that all water would flow onto the witness' property and then into his drains, and this without his consent. Upon drilling said hole, damage was caused to the waterproofing membrane, and as a result there was water seepage into the property.
  - e) The claimant company compensated Christopher Gherxi for damages relating to plastering, painting and gypsum works, carpentry, shelving, electrical equipment, wireless chargers, a compressor and an amplifier, and this in the amount of € ,9507.<sup>11</sup> He confirmed signing the relevant subrogation form attached to his affidavit a fol 148.
4. **Karl Vella**, an appliance and refrigeration technician, operating under the name K-Tech Technician and Repair Services confirmed in his affidavit<sup>12</sup> that:
- a) He had been contacted by Christopher Gherxi in November 2019 to inspect a display fridge which had been damaged due to water ingress. He explained that he visited the property in question and found that the motor compressor of the fridge had been damaged, having been exposed to water. As a result it had to be

---

<sup>11</sup> Having deducted the excess in the amount of € 120.

<sup>12</sup> Fol 149-150

replaced together with the filter drier. Moreover the gas 404A had to be removed and refilled and the entire system had to be cleaned by means of a vacuum.

- b) He confirmed that he had charged Christopher Gherxi € 500<sup>13</sup> for these services.
5. An affidavit was also submitted by **Philip Agius**<sup>14</sup>, who had been engaged by Christopher Gherxi to manufacture wooden shelving. The witness charged him the sum of € 2,596 for his services.
6. In his affidavit **Dominic Catania**<sup>15</sup> confirmed that he had been approached by Christopher Gherxi to supply and install a new amplifier in the property known as L'Enoteca in Rabat. He supplied an amplifier of the brand Marantz for the price of EUR149<sup>16</sup>.
7. On 24th April 2023 respondent **Derek Francis Byrne**<sup>17</sup> gave his testimony in court. He confirmed that Christopher Gherxi had informed him that there had been a water leak in his property whilst he was living abroad. At the time of this incident Francis (Frankie) Micallef (Frankie Installations) was performing restoration works on his property. Upon being informed of the water ingress he immediately instructed said person to attend to the water leak.
8. **Francis Micallef**<sup>18</sup> testified on 5th June 2023. He stated that he had been contacted by his client, respondent Derek Francis Byrne:
- a) He had been told that water had seeped into Christopher Gherxi's property and was instructed to attend to this matter. He explained that the membrane was not sealed properly with the wall and therefore he added some liquid membrane to it and sealed it. He had done this in February 2020.
- b) He explained that in houses located in Rabat it was common to find a hole on roofs in order to drain water to the adjoining property's roof. He confirmed that the hole had been made by a neighbour who had an English accent (whose wife was called Rita and had a shop nearby).

---

<sup>13</sup> Dok KV1- Fol 150

<sup>14</sup> Fol 151

<sup>15</sup> Fol 152 et seq.

<sup>16</sup> Dok DC1 – Fol 153

<sup>17</sup> Fol 168 et seq.

<sup>18</sup> Fol 171A – 171H

- c) Asked whether he knew why this hole had been made, he explained that this was to allow water to pass through, as otherwise the consequences would have been much more dire resulting in greater accumulation of water. He stated that since it was Derek Francis Byrne's roof that was filling up with water due to rainfall, had he not had that hole, the water would not have had any outlet and would have seeped everywhere.
  - d) At the time of the incident he confirmed that Derek Francis Byrne was abroad and the witness was instructed to fix the problem.
  - e) The witness confirmed under cross-examination that water had entered the restaurant known as 'Agape' but later clarified that this was known as "L'Enoteca". He went on site the morning after the incident had occurred and the owner had told him that water had seeped into his premises.
  - f) He explained that he was about to start electricity works in Derek Francis Byrne's property and that the outside was plastered. Due to the fact that a water drain couldn't be placed on the facade of the property, the only other outlet for water drainage would have been onto the restaurant's roof. He stated that water was also flowing onto Derek Francis Byrne's property from another property adjacent to it.
  - g) He claimed that water seeped into the restaurant as the liquid membrane was not sealed properly. He subsequently resealed and placed the liquid membrane on the common wall between the respective properties.
9. In his testimony of 5<sup>th</sup> June 2023 **Jonathan Borg**<sup>19</sup> was asked about a quotation<sup>20</sup> that had been provided to respondent Derek Francis Byrne:
- a) He stated that he works as a plasterer and carries out gypsum work and plastering. He explained that the quotation provided was calculated on the measurements provided by respondent Derek Francis Byrne<sup>21</sup> three weeks prior to his testimony and that he had used the rates/prices that were applicable in 2020. He had visited the restaurant where they had taken all the relevant measurements together.

---

<sup>19</sup> Fol 171F – 171H

<sup>20</sup> Doc JB1 – Fol 177

<sup>21</sup> Doc DMP2 – Fol 173

- b) He confirmed that he could not see the extent of the damage that had been caused as the damage had already been made good. The witness stated that he never spoke to the architect about this quotation.

10. **Architect David Mifsud Parker**<sup>22</sup> testified in Court on 5<sup>th</sup> June 2023:

- a) He stated that he had taken on respondent Derek Francis Byrne's project in 2018.
- b) The project involved internal demolition workings, retaining the façade, and construction of a shop at ground floor level and a residential unit in the first and second floor. Demolition commenced in February/March and construction was completed in May.
- c) The witness remembers an initial incident involving infiltration of water, being called in again in November due to an accident in pipework and again due to a storm and subsequent further water infiltration. He explained that the first incident occurred in March 2018 when he had inspected the property and related his findings to the client who was abroad at the time, following which there was an agreement that all issues would be resolved.
- d) In November 2018 he stated that he was called in again due to an issue regarding the coring of a hole for the passage of water which was found over the roof screed. He explained that he had been sent pictures of the damage and visited the site and proceeded to write a report. The damages were very similar to what he had seen in March and described it as superficial water infiltration and staining.
- e) With regard to the hole found in the roof level in question, he explained that the final concrete screed layer was done in May. Further to this some remedial works had to be carried out due to water infiltration which would resolved all issues of water seepage. He urged the respondent to ensure that he carries out the said remedial works and to his knowledge they were carried out.
- f) The witness explained that the respondent had shown him the reports and surveys written by Architect Grech. He explained that the damages were in line with what he had found but he felt that the quotation given was excessive. He therefore asked the respondent to get a new quote, which he did from a certain Jonathan Borg..

---

<sup>22</sup> Fol 171 I – 171 N

- g) The witness also submitted a comparative analysis of the prices given by Jonathan Borg and those put forward by Architect Grech on behalf of claimant company.<sup>23</sup>
- h) In cross examination, the witness was asked whether the roof of respondent's property had been replaced, to which he replied in the affirmative. He further confirmed that conditional reports were carried out on the neighbouring properties prior to commencement of the works<sup>24</sup>.
- i) The witness also explained the term 'coring'. He said that after construction works are completed, the next step would be for piping services to be carried out, including the rainwater pipe. He explained that between the preparation of these piping works and the laying of the same, it had rained. As there was no drain yet in order to have temporary water management, a temporary core was done. This meant that any water on the roof would drain into the respondent's own property. The core was done to avoid flooding.
- j) He remembered that he visited the site in March and had visited once again following the November incident<sup>25</sup>. On the day of the incident the owner of the restaurant had sent him photos of the damages.

### Considerations

- 11. The respondent's main defence is that he was not at fault and could not be blamed for the damages caused to the claimant. Additionally he claims that the amounts requested were excessive.
- 12. 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 tigi 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"

---

<sup>23</sup> Doc DMP1

<sup>24</sup> Doc DMPX1-Doc DMPX3 – Fol 178 et seq.

<sup>25</sup> Not at the time of the incident



13. According to the relevant provisions of the Civil Code:

**‘1029. Any damage which is produced by a fortuitous event, or in consequence of an irresistible force, shall, in the absence of an express provision of the law to the contrary, be borne by the party on whose person or property such damage occurs.**

**1031. Every person, however, shall be liable for the damage which occurs through his fault**

**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.**

**1045. (1) The damage which is to be made good by the person responsible in accordance with the foregoing provisions shall consist in the actual loss which the act shall have directly caused to the injured party, in the expenses which the latter may have been compelled to incur in consequence of the damage, in the loss of actual wages or other earnings, and in the loss of future earnings arising from any permanent incapacity, total or partial, which the act may have caused ...’**

14. 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-Imhallef Philip Sciberras Proċedura Ċivili L-Ewwel Volum”*<sup>26</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-bażi 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 stabbilit 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-deċizjoni 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 offerti 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' huw iex veru għax mhux ipprovat**;
4. Il-valutazzjoni tal-provi hu fondat fuq **il-prinċipju tal-konvinċiment liberu tal-ġudikant**. Lilu, hu mogħti l-poter diskrezzjonali tal-apprezzament tar-rizultanti probatorji u allura hu liberu li jibbaża l-konvinċiment tiegħu minn dawk il-provi li hu jidhirlu li huma l-aktar attendibbli u idoneji għall-formazzjoni tal-konvinċiment 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. Motavizzazzjoni 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**"

15. The jurisprudence of our Courts regarding damages in tort has established *inter alia* as follows :

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

"L-Artikolu 1031 tal-Kodiċi Civili jippreciza li 'kull wiehed iwiegeb għall-ħsara li tigri bi htija tiegħu'. Din in-norma tal-ligi fil-kamp tar-**responsabilita' akwiljana** jew extra-kontrattwali tikkostitwixxi l-punt kardinali in subjecta materia, u tennuncja l-prinċipju in virtut ta' liema l-lezzjoni kagjonata lis-suggett tobbliga lill-awtur tal-lezzjoni li jirrizarcixxi l-konsegwenzi negattivi, ossija d-danni, kompjuti bl-att tiegħu. Issa kif saput, il-fonti primarju tar-responsabilita' civili hi ravvizata fl-imgieba imputabbli għal dolo jew kulpa. Il-ligi civili tagħna ma tiddefinixx il-kolpa civili fl-għemil izda tagħmlu jikkonsisti fin-**nugqas ta' prudenza, nugqas ta' diliġenza u nugqas ta' ħsieb tal-bonus paterfamilias** [Artikolu 1032 (1), Kodiċi Civili]..."

- b. **L-Avukat Dr. Louis Cassar Pullicino noe. v. Angelo Xuereb noe. et** (03.07.2003, Ċit Nru. 1264/1991/TM):

"ir-responsabbilita' għad-danni tista' tkun wahda minn zewg tipi – (i) dik magħrufa bħala responsabbilita' kontrattuale u (ii) dik magħrufa bħala responsabbilita' extra kontrattuale jew aquiliana...Fil-kaz ta' azzjoni għad-danni nascenti mir-responsabbilita' kontrattuale l-attur għandu jipprova li huwa kellu favur tiegħu dik l-obbligazzjoni kuntrattwali u li l-konvenut kien inadempjenti fl-esekuzzjoni ta' dik l-obbligazzjoni fil-konfront ta' l-istess attur. F'din it-tip ta' azzjoni huwa l-konvenut li għandu oneru ta' prova iktar diffiċli impost fuqu, stante li l-konvenut

ghandu jiggustifika l-inadempjenza kontrattwali tieghu u jipprova li tali inadempjenza se mai rizzultat minhabba fattur fuq liema ma kellux kontroll...

... **Fil-kaz ta' azzjoni ghad-danni nascenti mir-responsabbilita' extra-contrattuale huwa l-attur li ghandu oneru ta' prova iktar diffici li impost fuqu** ghaliex f'tali kaz huwa jrid jipprova n-nexus bejn l-agir tal-konvenut u d-dannu minnu soffert. Ir-responsabbilita' ghad-danni tirrizzulta mir-rabta guridika jew nuqqas taghha, u dana skond il-kaz, li hemm bejn il-partijiet kontendenti. Torrente jaghti ezempju car sabiex ikun jista' jaghraf id-distinzjoni bejn rabta kontrattwali li taghti lok ghar-responsabbilita' contrattuale u n-nuqqas ta' rabta kontrattwali li taghti lok ghar-responsabbilita' extra contrattuale.

*"Se io viaggio in tram, e, quindi, ho concluso un contratto di trasporto, e mi ferisco in un incidente, e' sufficiente che io provi di essermi trovato nel tram e di essere stato ferito. Se, invece, mentre passo per la strada, sono investito dal tram, ho l'onere di provare non soltanto l'incidente, ma anche il dolo o la colpa del vettore o dei suoi agenti". (Torrente & Schlesinger "Manuale Di Diritto Privato", para. 394 pg 639)"*

- **Mary Vassallo v. Giovanni Mizzi et.** (PA, Imħallef A. V. Camilleri, 09.04.1949, Vol. XXXIII.II.379):

"il-htija meta tigi kkunsidrata fl-entita' taghha, hija wahda; u taht dan l-aspett ma hemmx distinzjoni bejn kolpa kontrattwali u dik komunement imsejha aquiliana, li titnissel minn delitt jew kwazi delitt. Id-**differenza bejniethom tinsab fil-kawza u fil-grad**. In kwantu għall-kawza, il-htija kontrattwali tippresupponi obbligazzjoni pre-ezistenti li maghha hija marbuta; mentri l-htija aquiliana tippresupponi fatt li minnu titnissel ex nunc. In kwantu għall-grad id-differenza hija riposta fl-estensjoni tar-responsabbilita' fis-sens illi **fil-kolpa kontrattwali wiehed jista' jirrispondi ta' htija hafifa skond il-kaz, mentri fil-kolpa aquiliana r-responsabbilita' testendi ruhha b'mod li dwarha ma hemmx grad**."

- c. **Pamela Fears v. Leo Grech et.** (PA, Rik. Nru. 480/11GM, 08/10/2019):

"**"Differenzi bejn l-illegittimita' akwiljan u l-illegittimita' kuntrattwali.... Illi skont l-imħallef Caruana Curran « l-colpa aquiliana tirrikorri meta d-dannu jigi kagonat f'rapport ekstrakuntrattwali, cioe' tillimita ruhha għal fatt tal-bniedem bħala ksur tad-dover ta' protezzjoni jew ta' dover generali tan-neminem laedere kombinat man-negligenza taht l-art. 1075, 1076 tal-Kodici mentri l-colpa jew responsabbilita' kuntrattwali tirrisali għal kuntratt u hija fondata fuq il-vjolazzjoni tad-dover tal-prestazzjoni li l-obbligat għandu favur il-parti l-oħra »**"<sup>27</sup>

---

<sup>27</sup> Gaetano Spiteri v Thomas Castle 18.08.1965 (First Hall Civil Court per Judge M. Caruana Curran )- XLIX.ii.1027

Illi skont **Castronovo**<sup>28</sup> “mentre nel torto extracontrattuale la colpa e` elemento costitutivo della responsabilita` e cioe` di un’obbligazione risarcitoria tra due soggetti fino ad allora irrelati, nella responsabilita` contrattuale il *vinculum iuris* esistendo gia`, la colpa non puo` esplicare quella funzione costitutiva di un’obbligazione che invece le e` propria nella responsabilita` aquiliana. In pari tempo nella responsabilita` contrattuale e` l’obbligazione medesima che, in quanto si traduce nella necessita` giuridica dell’adempimento, da` vita a` responsabilita` per il fatto stesso della sua mancata attuazione, talche` solo l’impossibilita` di adempiere esclude la responsabilita` ma nel momento stesso in cui e per la ragione che estingue l’obbligazione (art. 1256 c.c.)”;

Illi skont dottrina maggoritarja fl-Italja, id-differenza ewlenija bejn iż-żewġ tipi ta’ illecitu tinstab fix-**xorta u piz tal-prova**: “diverso e` infatti il contenuto della prova che spetta al danneggiato, il quale in caso di inadempimento dell’obbligazione (contrattuale) deve provare soltanto tale inadempimento, spettando poi al danneggiante la prova liberatoria sulla responsabilita`; mentre nella responsabilita` aquiliana, il danneggiato deve provare non solo il fatto dannoso, ma anche la responsabilita` del danneggiante<sup>29</sup>”;

Illi fi kliem il-**Bianca**: “Come la prova degli altri elementi costitutivi dell’illecito, la prova della colpa e` a carico del danneggiato. In cio` si riscontra una delle piu` vistose differenze della responsabilita` extracontrattuale rispetto a quella contrattuale, dove e` il debitore che ha l’onere di provare la sua mancanza di colpa<sup>30</sup> ... Per quanto si attiene al contenuto della prova liberatoria incombente in generale sul debitore inadempiente, va rilevato che a quest’ultimo **non e` sufficiente dare una prova generica delle proprie capacita` o della idoneita` della propria organizzazione o dei mezzi predisposti per l’adempimento**...Occorre piuttosto che egli dia la prova della sua assenza di colpa in relazione alla causa che ha impedito l’adempimento o l’esatto adempimento, **che cioe` tale causa era imprevedibile e inevitabile alla stregua della dovuta diligenza** ... Questa prova implica l’identificazione della specifica causa impeditiva (il fortuito)”<sup>31</sup>... Mentre la prova della mancanza di colpa e` a carico del debitore, la prova dell’inadempimento e` a carico del creditore”<sup>32</sup>

- d. **Carmelo Farrugia et. v. Victor Conti** (PA, Ċit Nru 1060/1995/2 TM, 09/10/2003):

“Intqal diversi drabi li biex tirrizulta responsabbilita' għall-hsara, irid ikun hemm **ness ta' kawza u effett**, u dan in-ness irid jigi pruvat mill-vittma tal-hsara”.

---

<sup>28</sup> Carlo Castronovo, La Nuova Responsabilita` Civile, 3a ed., 2006, pagina 456

<sup>29</sup> Enciclopedia Forense

<sup>30</sup> C. Massimo Bianca, Diritto Civile Vol 5 **La Responsabilita`** para. 253: seconda edizione 2012

<sup>31</sup> op.cit, para. 27

<sup>32</sup> op.cit. para. 28

- e. **Margaret Camilleri et. v. The Cargo Handling Co. Ltd** (PA, Ċit Nru 1560/1995/1 PS, 13/10/2004):
- “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”
- f. **Marco Buttigieg et. v. Rose Cini** (Qorti tal-Appell Inferjuri, App 21/1999/1 PS, 17/11/2004):
- “Tibqa' dejjem, fil-fehma konsiderata ta' din il-Qorti, regola sana illi f' materja ta' rizarciment ta' danni, id-danneggjat ghandu jkollu d-dritt jikkonsegwixxi rizarciment effettiv li jirrientegra l-patrimonju tieghu minn kull konsegwenza ekonomika ta' l-event dannuz. Li jfisser li dan l-istess rizarciment jista' jikkonsisti f' somma li tekzipara l-valur ta' l-utilitjiet mitlufa”
- g. **Sylvia Degiorgio et. v. Massimiliano Da Crema** (PA, Ċit Nru 1560/1995/1 PS, 13/10/2004):
- “Issa hu principju gwida regolanti materja ta' rizarciment ta' danni illi min isofri dannu ghandu jigi re-integrat f' dak li jkun tilef b' konsegwenza ta' l-event dannuz u mhux dak li jiehu vantagg meta dan ikun indebitu jew mhux misthoqq”
- h. **Percius Car Hire Limited v. Richard Schembri** (Qorti tal-Appell Inferjuri, App Nru 616/2001/1 PS, 20/10/2003):
- “... di regola d-danneggjat ghandu d-dover li jaghmel dak kollu li hu ragjonevoli biex inaqas 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 jiehu dawk il-passi. Jibqa' pero' dejjem il-fatt illi huwa ma huwiex obligat jitghabba b' pizijiet biex inaqas il-hsara”)
- **Joseph Aquilina v. Emmanuele Schembri** (App. Ċiv. 24/01/1969)
- “...il-kwistjoni ta' x' inhu ragjonevoli li jaghmel id-danneggjat biex jimmitiga l-hsara hi kwistjoni ta' fatt li ghandha tigi konsiderata fic-cirkostanzi ta' kull kaz partikolari, u l-oneru tal-prova f' dan ir-rigward specifiku jaqa' fuq il-konvenut”

16. In *Halsbury's Laws of England* it was held 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>33</sup>

17. The first thing that needs to be determined by the Court is therefore whether the water indeed entered from the respondent’s property. If this is the case then the Court must consider whether the respondent was 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’s client, 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.
18. In his affidavit **Christopher Gherxi** explained that in November 2019, following heavy rainfall, his wine bar incurred substantial damages due to water ingress and this due to the construction works that were being carried out on the respondent’s property<sup>34</sup>. At the time he was abroad, and he therefore inspected the property upon his arrival. Respondent Derek Francis Byrne<sup>35</sup> confirmed that Christopher Gherxi had informed him that water was seeping into his property following which he asked the person working on the property at the time to attend to the issue.
19. The insured also pointed out that this was not the first time that he had suffered damages in his property due to the said construction works. Indeed this had been the third such occurrence. Previously he had been offered apologies and there was an attempt to shift the blame onto the contractor. This version of facts is corroborated, in fact, by the Architect David Mifsud Parker, who was the architect engaged by the respondent working on the project. The latter explained that upon commencing demolition works in 2018, in February/March, the first incident occurred when there was infiltration of water in the neighbour’s property (the insured’s property) due to a storm. Further to this there seems to have been another similar incident in November 2018 and then finally the incident in question took place. The last incident was the one that caused most damages.

---

<sup>33</sup> Halsbury H. S. G. (1955). Halsbury’s Laws of England (3rd ed.) Vol. 11 page 289

<sup>34</sup> Fol 140

<sup>35</sup> Fol 168

20. The report issued by **Architect Alfred Grech**, that is claimant company's architect, clearly set out both the extent of the damages and their proximate cause:

*"3. Causes*

*From the survey carried out into the next door property which is under construction, the following were noted:*

- 1. There are no apertures on the façade, back.*
- 2. There is an opening in the ceiling of the first floor which lead to the roof.*
- 3. The room on the roof, have no closure across the large door opening into the terrace.*
- 4. Along the party wall with the insured, on all floors, heavy stains of damp walls were noted, which signify that water was cascading along the wall. This could be due to the fact that the roof when the incident happened did not have a drain. In fact the third party abusively drilled a hole for water to drain on to the insured roof. In drilling the said hole, the waterproofing membrane of the insured roof, was breached. In fact water collecting on the roofs of the third party, in drawing away through the hole, is seeping into the said breached membrane.*

*In conclusion, the third party construction site does not have any water management whatsoever and is the cause of the water infiltration into the insured property..."<sup>36</sup>*

21. Drawing from these conclusions, the Court is going to further consider the issues relating to the hole that had been drilled as well as the insured property's waterproof membrane. In his affidavit the insured explained that he had found out that the respondent did not have a rainwater drain on his roof and therefore he had drilled a hole in the wall of his roof, without his permission, so that any rainwater would flow onto his roof and then flow down his own drains. In doing so the waterproofing membrane had been breached and this led to the water seepage.

22. In his testimony **Francis Micallef** confirmed that he had found the hole in the membrane and fixed it by applying liquid membrane:

*" Qalli biex nidhol, li daħal l-ilma għand ta' ħdejh, qalli mur ara x'gara, kien hemm toqba u kemm mort nissiljah jien. Jigifieri bejn il-membrane u l-ħajt kien inqata' l-membrane, kemm issiljajtaha"<sup>37</sup>*

23. The same witness attempted to explain to the Court that in Rabat, it was common for roofs to drill a hole to enable rainwater flow from one property's roof to the adjacent

---

<sup>36</sup> Fol 22 – Doc JG1

<sup>37</sup> Fol 171 A

one. The respondent's defence therefore appears to be that coring this hole was necessary as there would have been greater damage had it not been done, due to the fact that he was not allowed to install a water drain along the facade of the property. Nevertheless it is clearly evident, as confirmed by this witness that the waterproofing membrane had in fact been breached when drilling this hole and this is what led to the water ingress and to the damages that ensued in the insured's property. Any potential remedial works provided by the respondent in this regard were carried out after the heavy rainfall that led to this incident <sup>38</sup>

24. In cross examination, the respondent's *ex-parte* architect, **AIC David Mifsud Parker**, provided a clearer explanation of how the construction works proceeded. He explained that following completion of the construction works, it was time for the installation of services.

*Perit D Mifsud Parker:                      The services come in , they start passing pipes and coring to the structure, to pass the drainage system*

*Dr. Claudine Zarb:                              ehe*

*Perit D Mifsud Parker:                      And there was a period between this work of preparing for the pipes and when the actual pipe was inserted that it rained*

*Dr. Claudine Zarb:                              When you refer to a pipe what kind of pipe are you...*

*Perit D Mifsud Parker:                      Drain, drain, rain water"<sup>39</sup>*

25. He confirmed that the rainwater pipe had not been installed yet and when asked as to what kind of water management was in place at the time, he explained that:

*" Perit D Mifsud Parker:                      ehe. What they did is since the roofs used to drain from one roof to another, what they did is they did a temporary core so that if water goes on the roof it goes into his same property that wasn't finished*

*Dr. Claudine Zarb:                              The core, the temporary core went into which property?*

---

<sup>38</sup> In fact he mentions having gone to seal the breach in February 2020

<sup>39</sup> Fol 171 L



*Perit D Mifsud Parker:*

*His, Derek, same property*

*Dr. Claudine Zarb:*  
*property”<sup>40</sup>*

*So the water management was within his own*

26. He further contended that the core had been drilled further in to the path wall and that any drainage had to occur in the respondent’s own property as it was still in shell form.
27. As to the level of proof necessary to establish the link of cause and effect, in the case **Albert Farrugia vs. Peter Galea et**<sup>41</sup> the Court held that:

**“kull ma kellu jipprova l-attur kien il-fatt ta’ l-ingress ta’ l-ilma fil-fond tiegħu provenjenti mill-appartament sovrastanti, proprjetà ta’ l-appellanti. Hi din il-prova tan-ness materjali tal-kawżalita bejn l-ingress ta’ l-ilma u d-dannu verifikat li kienet tinkombi fuq l-attur. Dan għaliex fil-każ preżenti ninsabu fil-presenza tar-responsabilità oġġettiva, hekk krejata mis-sitwazzjoni taż-żewġ fondi, għal liema jgħoddu wkoll il-prinċipju tar-res ipsa loquitur.”**  
Jikkonsegwi minn dan illi r-responsabilità tissussisti ma’ l-aċċertament pożittiv ta’ l-ingress ta’ l-ilma mill-fond ta’ l-appellanti u li dak il-fatt kellu effikaċja kawżali fil-produzzjoni ta’ l-event tal-ħsara;”<sup>42</sup>

28. It is clear that while it may well have been the case that a core, temporary or otherwise, was need for water management, the manner in which this was done resulted in the breach of the waterproofing membrane. Architect Alfred Grech, in his report, described it as ‘abusive’, as this was done without the insured’s knowledge and furthermore was done negligently, resulting in the damage to the insured’s property.
29. No evidence of a technical nature was submitted by the respondent that in any way contrasts with these findings. Indeed, Architect David Mifsud Parker, once again acting in his ex-parte capacity, confirmed under cross examination

---

<sup>40</sup> Fol 171M

<sup>41</sup> **Albert Farrugia vs Peter Galea et**, decided on the 7<sup>th</sup> of February 2007, Court of Magistrates – Magistrate Rachel Montebello as cited in GasanMamo Insurance Limited (C3143) as subrogated in the rights of the insured James Jonathan King according to the law and policy (N188001941) vs. Water Services Corporation – 138/18RM decided on the 7<sup>th</sup> of March 2022 - cited also in Emanuel Spiteri et vs Director of Joint Office et – 22nd June 2017 – First Hall of the Civil Court

<sup>42</sup> ibid

*“ Dr. Claudine Zarb: And you established that you, basically agree, with regard to the damages listed by Perit Alfred Grech*

*Perit D Mifsud Parker: Yes, his reasoning*

*Dr. Claudine Zarb: But you are not in agreement*

*Perit D Mifsud Parker: His reasoning was ok*

*Dr. Claudine Pace: With regard to the quotation*

*Perit D Mifsud Parker: To the quotation”<sup>43</sup>*

30. Therefore it has been established that the water ingress was the proximate cause of the damages caused to the insured, that this occurred due to the negligence of the respondent’s contractor and that the insured did not contribute, in any manner, to the damages that he suffered.

31. Regardless of who was the individual that carried out the works, he was engaged to do so by the respondent and this as a part of the contracted works. In the judgment **Gasan Mamo Insurance Limited pro et v. Doreen Vella et** (App 488/2008/1 PS,decided on 23/04/2010), the Court of Appeal held as follows:

“Ma jista’ qatt ikun dubitat in linea ta’ principju ġenerali illi kull sid ta’ bini hu preżunt li għandu taħt il-kontroll u disponibilita’ tiegħu mhux biss l-istruttura ut sic imma wkoll l-impjanti u l-installazzjonijiet ta’ go fih. Ġie ritenut għaldaqstant minn din il-Qorti kif presjeduta illi “*huwa għalhekk preżunt illi kull wieħed iwieġeb għall-ħsara kaġjonata anke minn dawn l-impjanti u installazzjonijiet taħt il-kontroll tiegħu. Li jfisser allura illi jissussisti d-dover ta’ kontroll u ta’ kustodja adegwata ta’ dawn il-ħwejjeg li fuqhom is-sid jew detentur għandu l-poter materjali.*” Ara “Giovanni Vella et -vs- Michael Cilia”, Appell mit-Tribunal għal Talbiet Żgħar, 23 ta’ Ġunju, 2004;”

“Anzi, dejjem fil-kaz ta’ l-ispeċje hawn eżaminat, strettament id-danneġġjat mhux tenut jipprova x-xorta ta’ kondotta kolpuża fmin iġib fis-seħh l-event dannuż u, kważi, kważi, din hi wkoll irrilevanti in kwantu hu lanqas ma għandu l-possibilita li jaċċedi fil-fond li minnu oriġinat il-ħsara u, allura, teżisti għalih anke id-diffikolta` estrema li hu jipprova l-kondotta effettiva ta’ sid dak il-fond”

32. It has also been held in caselaw that:

---

<sup>43</sup> Fol 171M – 171N

“non puo’ un vicino esimersi dallo obbligo di rimuovere la causa dei danni che soffrisse l’altro vicino nel proprio fondo quantunque in tale causa concorresse il fatto di altri; contro questi competerebbe tutto al piu’ un diritto di rilevanza”.<sup>44</sup>

In other words the respondent cannot shift the blame onto the individual or individuals who actually drilled the hole in question. If anything, he may have a right of action against him by way of compensation for damages that he may be compelled to pay by virtue of this judgement.

33. For these reasons the Court is satisfied that the respondent is responsible for the damages incurred by the insured and that subsequently he should make good the damages caused to the claimant company.

#### Consideration regarding the amount of damages

34. By way of a summary, the amounts claimed by the claimant company as compensation are as follows:

<i>Description</i>	<i>Amount</i>	<i>VAT</i>	<i>Supplier</i>	<i>Fol</i>	<i>Doc</i>
Plastering and related works (receipt dated 18/02/2020)	€7,300.00	excl	Pietro Ortoleva	75	JG4
Woodworks: Bottle shelving units x 2 (part of receipt dated 06/03/2020)	€1,100.00	excl	Philip Agius Woodwork	77	JG4
Wireless kit	€449.00	exptd	GU Capital	78	JG4
Display fridge, motor compressor change, clean system, labour	€423.72	excl	K-Tech Technician	79	JG4
Amplifier	€355.08	Excl	Dominic Catania	80	JG4
Sub-total	€9,627.80				
(deduct excess)	-€120.00				
<b>Total</b>	<b>€9,507.80</b>				

35. The respondent contends that the amount claimed is excessive and indeed this constitutes the fourth plea in his reply. From the evidence submitted it appears that the only contestation concerns the receipt amounting to € 7,300 (plastering and minor works).

36. According to AIC David Mifsud Parker this amount was on the high side whereas the quotation given to him by the respondent was much more reasonable<sup>45</sup>.

---

<sup>44</sup> **Borg v. Falzon** decided on 21st January 1864 and **George Bonnici noe v. Phoenicia Hotel Company Limited** (A.C. – 12th January 2005)

<sup>45</sup> Fol 171K

37. Architect Alfred Grech visited the premises on two separate occasions and provided two survey reports. In his first report dated 6<sup>th</sup> December 2019 the total estimated amount for the remedial works was € 6,400 excluding VAT<sup>46</sup>:

<i>Description</i>	<i>Amount</i>
Sand down gypsum soffit bulhead, plaster where necessary and paint ceiling	€1,700.00
Scrape loose paint, plaster where necessary, apply two coats plating emulsion paint to make good to paint in basement walls and ceiling	€675.00
Change three tables	€1,050.00
Remove damaged wine rack and cart away	€500.00
Manufacture and install timber wine rack	€1,850.00
Scrape loose paint, plaster where necessary, apply two coats plating emulsion paint to make good to paint in first floor walls and ceiling	€625.00

<b>Total (excl. VAT)</b>	<b>€6,400.00</b>
--------------------------	------------------

His second report dated 3<sup>rd</sup> February 2020<sup>47</sup> was a reassessment carried out in more detail. In this report the estimated value of the remedial works was €7,309.20 excluding VAT.

<i>Description</i>	<i>Amount</i>
<b>BASEMENT</b>	
Remove damaged bulkhead and partition wall and cart away	€500.00
Supply and install L shaped bulkhead, inclusive of plastering and sanding to receive paint	€500.00
Erect gypsum wall lining using moist resistant material all plastered and sanded to receive paint	€850.00
Paint two walls and bulkhead using special patterned paint	€534.20
Repair shelving unit In main dining hall (well) and repaint	€300.00
Replace wine rack display unit	€1,100.00
Replace three tables damaged in basement during flooding	€1,050.00
Remove damaged wine rack unit and cart away	€225.00
<b>GROUND FLOOR</b>	
Repair and make good to gypsum corner meter unit at entrance	€250.00
<b>FIRST FLOOR</b>	

<sup>46</sup> Fol 103

<sup>47</sup> Fol 117

Remove any damaged plaster in the ceiling, plaster and sand and make good to paint to all ceiling.	€500.00
Remove any damaged plaster in the wall lining, plaster and sand and make good to paint to all ceiling and make good to paint to all ceiling	€750.00
Remove any damaged plaster in the ceiling, plaster and sand and make good to paint to all ceiling and make good to paint to all ceiling	€750.00
<b>Total (excl. VAT)</b>	<b>€7,309.20</b>

38. This amount is almost identical to the amount charged by Pietro Ortoleva a fortnight later<sup>48</sup>. Although the receipt for the amount of € 8,614 representing “*plastering*” does not give a breakdown of the services given and in the absence of this witness’ testimony<sup>49</sup> it is more likely that the insured and Mr. Ortoleva agreed on this amount based on AIC Grech’s estimate. Alternatively, AIC Grech may have been made aware of the amount that the insured had already agreed to pay Mr. Ortoleva in advance.
39. It is to be noted however that the amounts representing “*replace wine rack display unit*”, “*replace three tables damaged in basement during flooding*” and “*remove damaged wine rack unit and cart away*” (a total of € 2,375) strictly speaking are unrelated to any plastering and ancillary works that would have been carried out by Pietro Ortoleva. Therefore the amount of **€4,934.20** (excluding VAT) represents a fairer value of the plastering and ancillary works that should have been charged by the said Ortoleva based on the estimates given by AIC Grech.
40. On his part, the respondent submitted a quotation obtained from Jonathan Borg dated 12<sup>th</sup> April 2023 that was purportedly based on the rates that were prevalent in 2019/2020<sup>50</sup>. The document includes one quotation for *replacement* costs and another for *repair costs*. The quotation for *replacement costs* amounting to € 3,744 (and not € 3,167 as erroneously indicated on the same document) is as follows:

<b>Description</b>	<b>Amount</b>
<b>BASEMENT</b>	
Remove damaged bulkhead and partition wall and cart away	€150.00
Supply and install L shaped bulkhead, inclusive of plastering and sanding to receive paint	
Erect gypsum wall lining using moist resistant material all plastered and sanded to receive paint	
Paint two walls and bulkhead using special patterned paint	€777.00

<sup>48</sup> Fol 75

<sup>49</sup> The claimant company made several unsuccessful attempts to subpoena the witness and ultimately was compelled to renounce to his testimony.

<sup>50</sup> Fol 177

Repair shelving unit In main dining hall (well) and repaint	€607.00
Replace wine rack display unit	
Replace three tables damaged in basement during flooding	
Remove damaged wine rack unit and cart away	
<b>GROUND FLOOR</b>	
Repair and make good to gypsum corner meter unit at entrance	€215.00
<b>FIRST FLOOR</b>	
Remove any damaged plaster in the ceiling, plaster and sand and make good to paint to all ceiling.	€180.00
Remove any damaged plaster in the wall lining, plaster and sand and make good to paint to all ceiling and make good to paint to all ceiling	€600.00
Remove any damaged plaster in the ceiling, plaster and sand and make good to paint to all ceiling and make good to paint to all ceiling	€1,215.00
Sub-total (excluding VAT)	<b>€3,744.00</b>

41. This amount however does not include a quote for the “Supply and installation of L shaped bulkhead, inclusive of plastering and sanding to receive paint” (valued at € 500 by AIC Grech) and the “Erection of gypsum wall lining using moist resistant material all plastered and sanded to receive paint” (valued at € 850 by AIC Grech) both of which were included in the estimates provided by AIC Alfred Grech. This means that the quotation for *replacement costs* amounting to € 3,744 provided by Jonathan Borg is not significantly less than the fair value of **€4,934.20** (excluding VAT) established by Court when considering that the quotation is incomplete.

42. The Court shall therefore be reducing the amounts due by way of compensation as follows:

<b>Description</b>	<b>Amount</b>
Plastering and related works	€ 4,934.20
Woodworks: Bottle shelving units x 2 (part of receipt dated 06/03/2020)	€1,100.00
Wireless kit	€449.00
Display fridge, motor compressor change, clean system, labour	€423.72
Amplifier	€355.08
Sub-total (excluding VAT)	<b>€7,262.00</b>
(deduct excess)	-€120.00
<b>Total</b>	<b>€7,142.00</b>

**Decision**

**43. For these reasons the Court partially accepts the claimant company's claim and condemns the respondent to pay the claimant the amount of seven thousand one hundred and forty-two euro (€ 7,142) by way of compensation together with interest accruing as from 1<sup>st</sup> March 2021 until date of effective payment. The costs of this lawsuit are to borne by the respondent.**

V.G. Axiak  
Magistrate

Y.M. Pace  
Dep. Registrar