



QORTI TA' L-APPELL

**ONOR. IMHALLEF
RAYMOND C. PACE**

Seduta tat-28 ta' Gunju, 2011

Appell Civili Numru. 35/2010

Panta Marketing and Services Limited (C 11244)

VS

Joseph Brincat (ID. Nru. 550934 M)

Il-Qorti,

I. PRELIMINARI.

Illi fl-1 ta' Ottubru 2010 it-Tribunal tal-Arbitragg ippronunzja s-segwenti lodo fl-ismijiet premissi: -

“Award of the Arbitrators Dr. Richard Galea Debono (presiding), and Dr.Peter Caruana Galizia and Engineer Emmanuel Scerri.

By a notice of arbitration and a statement of claim dated the 11th September 2009 the Claimant submitted the following:

STATEMENT OF CLAIM

By virtue of a contract dated the 18th February 2008 (attached as document A to the statement of claim) the litigating parties had agreed on the sale, installation and commissioning by the Claimant of a lift to the Respondent who accepted. Under the contract terms, the balance due on the price of the sale, installation and commissioning, amounting to €18,568 was to fall due upon certification that the lift was CE Compliant, Such certificate of compliance had been duly issued by engineer Ray Spiteri on the 9th October 2008, as evidenced by document B attached to the statement of claim.

Notwithstanding the issue of this certificate, Respondent has so far failed to honor his duty of payment of the above mentioned sum.

Claimant therefore has asked the tribunal to find, that such payment is indeed due and to order Respondent to pay the sum of €18,568 with interests and costs including those of a precautionary garnishee order issued on the 11th September 2009.

STATEMENT OF DEFENCE

Respondent pleaded that notwithstanding the issue of the compliance certificate, the lift in question was not installed according to the required standards of the trade, as borne by the fact that between the 8th November 2008 and the 28th February 2009. The lift was out of order on fourteen separate occasions. Furthermore even after the 2nd March 2009, the lift persisted in showing faults. Reference was made to two legal letters of the 2nd March 2009 and the 20th April 2009 exhibited as documents JB1 and 2 with the statement of defense. Respondent does not dispute the balance due but claims that the lift is still under guarantee, and the Claimant failed to honor its contractual guarantee obligations. Respondent had even offered to make a deposit of €5,000 on condition that the lift should be inspected and put to rights by the Claimant. Respondent

has no objection toward paying the balance due, provided that the lift in question is functioning normally.

In his reply to the points at issue Respondent states that as far as he is concerned the Claimant has not yet completed its obligations, and has not delivered the object of the sale according to the standards of the trade.

In the relief or remedy sought Respondent claims that he expects the lift to be properly repaired so as to function regularly, by having the Claimant carry out whatever works are required to this end, and should Claimant be unwilling to carry out such works, he expects to be authorized to carry out any such works himself, and to be able to deduct the cost of any such works from any balance due.

SITTINGS

The following sittings were held:

27th November 2009 at which it was agreed that the order of evidence should be inverted;

3^d December 2009, on site meeting at which the technical arbitrator attended and inspected the lift in the presence of the parties;

29th March 2010 at which the evidence of the Respondent, Joseph Farrugia, Pierre Brincat, Darren Borg, Rose Brincat and Maurice Borg were heard;

30th April 2010 at which the evidence of Eng. Ray Spiteri and Joseph Brincat was heard;

12th July 2010 at which the evidence of Engineer Carmel Cuschieri was heard;

19th July 2010 at which the evidence of Fabio Ruscio and Eng. Charles Barbara was heard;

23rd July 2010 at which Eng. Charles Barbara was cross examined and the parties agreed that all evidence had

been completed, and at which they authorized the tribunal to proceed to hand down the award.

EVIDENCE

Part 1 - Documentary Evidence

The documentary evidence in this arbitration consists of documents filed with the opening pleadings and others filed with the tribunal during the course of the sittings.

The following are the documents filed by the parties with the opening pleadings:

CLAIMANT

Document "A" is entitled "Contract of Sale of Lift Equipment", and bears contract number L00328 and is dated the 18th February 2008. The client is Mr. Joe Brincat. The first three sections are technical specifications and time frames. Section four shows a price inclusive of VAT of €24,857.88, a deposit of €4,971.58 upon order confirmation and a balance of €19,886.30 "on CE certification".

Under section 5, clause 3 provides this warranty wording :

The equipment will be guaranteed for a period of twelve months from the date of commissioning. During this period the company shall be obliged to repair or replace faulty parts and modify or repair defects due to bad workmanship and to ensure the proper functioning of the equipment within the parameters of the specifications of the said equipment which the Client declares to be aware of. Furthermore it is expressly agreed that this warranty shall not cover repairs due to ordinary wear and tear, willful or accidental damage or other causes beyond the Company's control.

It is to be clearly understood, that for any warranty as above to subsist the equipment must be used for the

purpose stipulated, that is the carriage of goods/passengers only.

Although the Respondent signed the covering letter to which this document is appended, he did not sign on the last page of the agreement. However it appears undisputed that both parties initialed every page of the said document.

Another document (unmarked) is a maintenance agreement which although drafted to be signed between Schindler Limited and the Respondent, was actually only signed by Schindler Limited and NOT signed by Respondent.

Document B is a "Final Inspection Certificate" issued by TUV Austria Services Gmbh. It is signed by Engineer Ray Spiteri. This is the certificate of CE Compliance and dated Vienna the 1st December 2008, and refers to the lift provided by the Claimant and installed at 95 Spinola Road Saint Julians.

RESPONDENT

The Respondent filed the following documents with his statement of defense.

These are three legal letters. The first 2, marked JB1 and two are letters sent by Fenech & Fenech Advocates on behalf of Respondent to the Claimant. One letter is dated the 2nd March 2009 and the second one dated the 20th April 2009. JB3 is a letter from Aequitas Legal on behalf of the Claimant with reference and in response to JB2. In the letters sent on behalf of Respondent one can see that Respondent was seriously complaining about malfunctioning of the lift. The letters make reference to other correspondence from Aequitas, which is not exhibited but which one understands to have consisted of demands for payment of the balance due on the lift. The reply from Aequitas is in JB3. This letter dated 30th April 2009 states that there is no valid reason for payment of the balance to be withheld, and concludes "Kindly advise

your client that the sender will be happy to inspect the lift at hand (sic) and carry out the necessary repairs. If any, once payment is effected. On a side note please bear in mind that the malfunctioning complained of may be the result of improper/lack of lift maintenance, something which falls under your client's realm of responsibility and for which my client cannot answer."

The following are the documents filed with the Tribunal during hearings:

RS1 is a Lift Inspection Report issued by TUV Austria, signed by Eng Ray Spiteri, which declares that an inspection was held by Engineer A. Green on the 24th September 2008 on location at 95 Spinola Road, Saint Julians. This is a 38 page report which purports to cover all inspection aspects of the lift in question. The report shows almost everything to be in order, although it outlines a few items which are still to be installed. However the report gives a clean bill of health with regards to the operability of the lift.

The witness Pierre Brincat filed a hand written document marked as PB1 with a list of sixteen dates between the 8th November 2008 up to the 21st March 2009, where the lift experienced faults.

The witness Jesmond Brincat filed a series of e-mails marked JeBI between Charles Barbara and Roberto Palacin representing the manufacturer, with some technical details.

Part 2 - Oral Evidence

The Respondent Joseph Brincat was the first to testify, and although his evidence was not altogether coherent, the gist of what he said was that he is refusing to pay the balance due on the price of the lift because the lift does not work properly. The Claimant's technicians attended several times on site in order to restart the lift, but after a while, the Claimant began to insist on full payment and refused to send any more technicians to attend to the

faults. The witness mentioned several instances of stoppages and mentioned that the lift does not stop on two floors, and that it won't work if populated by a number of persons, even though their collective weight would be well within the lift's tolerance. He stated that at one point he resorted to getting help from another company namely Carmelo Farrugia Ltd.

*Witness **Joseph Farrugia**, a representative of Carmelo Farrugia Ltd., testified that he is a lift engineer, and that he was requested by the Respondent to attend to his lift as he was having problems with it and that he was having a dispute with the Claimant supplier. The witness stated that he personally ascertained the existence of a number of problems in the lift namely:*

The lift would not start due to a blown fuse - this was changed twice by the witness on two separate occasions;

The lift would not function on two floors - this was addressed by making some adjustments to the lift door mechanisms;

On another call they encountered a problem with one of the rail shoes. They removed it, and replaced it with the proper part. The witness stated that the part he removed was not the right one for the lift in question. The failed part was exhibited and held by the Technical arbitrator;

He also stated that weight load sensor was not properly calibrated, and explained how the lift would not run with four people inside the cabin, and how one person had to dismount before the cabin started. He attributed this to lack of proper calibration.

The witness also stated that he performed the minimal amount of work necessary to keep the lift running in the Respondent's interest. He also stated that as far as he is aware the lift now works properly as the Respondent did not call upon his assistance any more. In his general opinion the lift has been installed according to appropriate

standards, but still had a number of snags which ought to have been resolved earlier by the provider.

*Witness **Pierre Brincat**, who is one of the Respondent's sons, testified and gave some more detailed accounts of the same occurrences which were described by the other witnesses. He lives in the block. When asked whether the lift was now in working order he was rather vague on the point, but he kept mentioning cases where the lift would not run if it was mounted by a certain number of people. In substance however, he repeated and confirmed what was stated by the previous witnesses.*

*Witness **Darren Borg** testified that he owns a flat in the block but does not live in it. He does however attend fairly frequently. He reiterated some of the episodes already mentioned and stated that some three weeks prior to giving evidence the lift jammed on the fifth floor.*

*Witnesses **Mary Rose Brincat** and **Maurice Borg** each mentioned episodes where the lift fails to work, or gave a sudden jerk. Mrs. Brincat gave an example of the lift not stopping flush with the floor and this caused her to trip on one occasion.*

*The evidence of engineer **Ray Spiteri** who represents the notified body which issued the final certificate was of very limited relevance. In essence he merely confirmed the contents of his report. He explained that the original snags reported were mainly the responsibility of the developer and not of the lift supplier. He then confirmed what was stated in the final certificate, namely that the lift passed the inspection in full. He also added that the load calibration was carried out "in front of us", and that the calibration had been carried out in the proper manner.*

*Witness **Jesmond Brincat**, another of the Respondent's sons, testified that the lift had been installed in October 2008 and certified by Eng. Spiteri. Towards the end of November the lift started to give trouble. The first noticeable problem was that the lift would stop if directed toward two particular floors in the building. He recounted*

how his family would call out the Claimant's technicians who would come over, resolve the issue, and when asked what was wrong with the lift, would reply that nothing was wrong with it. He mentioned a specific case where one of the technicians actually asked for a strip of cardboard to use to get the lift going again.

He added that the lift must have stopped around thirty times, (although it is not clear within what time frame). He insisted that up to the time of his deposition before this Tribunal, there were two buttons to levels 2 and 5 that were masked with tape to prevent their use, as it is constantly feared that whenever these buttons are activated, the lift would break down. He also stated that three persons (including himself) together weighing 290 kilos would trigger the excess weight warning, when the lift was rated to take 375 kilos.

He also stated that a compromise offer of a further deposit of €5,000 to the Claimant had been made, with the intention of breaking the deadlock over payment, and inducing Claimant to attend to the lift's problems. His family then commissioned Melfar to correct some faults and get the lift serviceable. They also commissioned a technical report by an engineering partnership Camilleri and Cuschieri.

In cross examination, the witness stated that the lift began to malfunction between two to three weeks after its commissioning.

The Tribunal heard the evidence of Engineer Carmel Cuschieri who testified in his capacity as a consultant engineer engaged by the Respondent to prepare a report on the state of the lift. This report was exhibited and confirmed. Witness inspected the lift in his consulting capacity on the 19th November 2009, which is more or less a year after the lift started giving trouble and approximately a year and a month after the lift had been placed in service.

His report mentions ten points of which only the following were personally ascertained by him. The others were a mere listing of the complaints voiced to him by Respondent. When the witness was asked to specify which complaints were ascertained by him in person he indicated the following one:

- > Covers of trunking are missing in the lift shaft*
- > Cables are installed bare without containment in the shaft*
- > Shaft lighting consists only of three light points on six floors*

The witness confirmed that his inspection had been carried out on the 19th November 2009. However it should be noted that all other areas of complaint were not personally ascertained by the witness as the lift was not functioning at the time of the inspection. The machine was switched on, but the lift was still not functioning. Furthermore the witness stated that he found no evidence of misuse of the lift and that even if a new lift were to be left without maintenance for a whole year it ought not to manifest all these problems.

Evidence for the Claimant consisted in the testimony of Fabio Ruscio and Engineer Charles Barbara.

Fabio Ruscio testified that he is a technician employed by Claimant, and he supervised the installation and commissioning of the lift in question. He stated that the installation and commissioning were normal and nothing of note occurred. He stated he was present when an employee of Ray Spited had attended to carry out the certification, and all went well.

He then confirmed that after the commissioning, the Respondent had contacted him about four or five times within the space of three months. He said that the call outs were related mainly to the lift door contacts on the various floors, when asked if this was normal he replied that it was, especially as in this case the lift had been started prior to the finishing of all the apartments, and

there was still debris underfoot which tends to create these problems.

According to him the problems were minor adjustments which were brought about owing to the dust .and debris which was still around in the block. He denied any knowledge of the lift failing to open on two particular floors. He also denied being the person who asked for a strip of cardboard to effect a temporary repair although he said this might have happened just as a temporary fix.

Engineer Charles Barbara then testified for the Claimant. He was involved in selling the lift to the Respondent and in all stages thereafter, including the present dispute. He contended that the payment terms were 20% deposit and the balance upon certification. He stated that commissioning was ready by November 2008 whereas certification occurred in December. There were two issues which the certifying engineer had pointed out. One was to do with a switch which the engineer wished to be adjusted, whereas the other matter was the installation of a telephone line which depended on the Respondent not the Claimant.

When the lift was certified he started receiving calls from the Respondent concerning problems with the lift doors. He stated that he sent technicians a number of times and he said that notwithstanding that there had been a number of call outs, they could not establish which doors were causing the problem. He confirmed that these complaints started a few days after the lift was certified. He stated that this was not abnormal in new installations, as the lift needs to settle, shoes need to bed down et cetera. He insisted however that conditions were bad as there was dust in the building and this can cause a number of malfunctions rendering a lift unreliable. He stated that no job sheets were kept in connection with these call outs, as they were not administratively required.

The witness explained that the company did not raise any charges for the call outs in question. Then at one point the Respondent informed him that he had sought legal advice

on the matter and was not going to pay the balance. At this point the witness stated that he withdrew his services and instructed his lawyers on the case. He clarified that he never denied that the Respondent was having problems. His position was that installation and after sales services, were distinct. The Respondent therefore, according to the witness should pay the balance due, and the company would then honor its guarantee obligations.

The witness recalled that there were around five call outs in the first two months after installation. He also challenged the fact that the technical expert had visited the site several months after installation and all the complaints logged at such visits would be expected from a lift that had been running without proper servicing for such a time.

In cross examination the witness agreed that the item on the TUV certificate showing that the upward control movement of the car was operational, was mistaken as a hydraulic lift does not possess such a feature. He also clarified, that the complaints and call outs were very close to the installation of the lift and it was about two months after the installation that he stopped the technicians from further attendances owing to the dispute above referred to.

FINDINGS OF FACT

The technical arbitrator conducted two on site inspections and has reported the following:

"Problems/ Defects reported on lift by various witnesses:

- a. Landing Door Lock Contacts*
- b. Lift stopping below or above level at times and on all floors*
- c. Lift remains stuck at Floor Landings 2 & 5*
- d. Lift stopped between Floors 1&2 whilst going down*
- e. Lift will not work when three persons, sometimes two, are inside car*

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- f. Lift travels beyond the Level at Ground Floor and gets stuck*
- g. Door Motor Fuse blown twice*
- h. Door Motor Mechanism not correctly aligned with door locks*
- i. Car Guide Shoe Liner came out of its holder twice, wrong type*
- j. Electronic PC Board Corroded*
- k. Inadequate Shaft Lighting*

- l. Uncovered/ unprotected bare control wires in lift shaft*
- m. Cable Trunking Covers missing*

The above reported problems/ defects with the lift are of varying nature and gravity and have to be considered in detail as regards the cause and their adverse effect on the safe use of the lift.

From on-site inspection carried out on the 24 September 2010, the lift condition remains as written in red (underlined) for the mentioned points raised above. The Claimant was present but no representative for the Respondent was present,

a. Landing Door Lock Contacts

** The landing door contacts and gear are installed with very tight clearances and may give problems on occasion. During the on-site inspection the locks were tested separately from the operation of the lift and found operational.*

b. Lift stopping below or above level at times and on all floors.

** The stopping levels require final 'adjustments and can vary in the first year of operation of the lift. These works are normally corrected during the guarantee period*

c. Lift remains stuck at Floor Landings 2 & 5

* Both levels tested several times with the car empty, it was noted that lift does not stop level with floor, remaining out of floor for more than 2cm at a time. The difference in stopping level might be the cause of complaint for lift not operating satisfactorily -on these floors. As already indicated the door locks have tight clearances and although the car did stop at level 2 &5 during the time of inspection, there remains a good possibility that lift stoppages will be recurrent.

d. Lift stopped between Floors 1&2 whilst going down

* Did not happen during the time of inspection

e. Lift will not work when three persons, sometimes two, are inside car

* Lift tried with three persons and stopped at level four. The overload of the car needs re-setting.

f. Lift travels beyond the Level at Ground Floor and gets stuck

* This did not happen at time of inspection. However as already indicated there is a setting problem which requires adjustment

g. Door Motor Fuse blown twice

* This could not be verified at time of inspection. However there was a fuse cover missing on close inspection of the electronic board which requires replacement.

h. Door Motor Mechanism not correctly aligned with door locks

* Alignment very tight on all doors. More clearance on door lock housing in jamb of door channel recommended.

i. Car Guide Shoe Liner came out of its holder twice, wrong type

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* This could not be verified on site as no representative of installer was present on site assist inspection.

j. *Electronic PC Board Corroded*

* Electronic panel looked new and no corrosion evidence sighted during the inquiry.

k. *Inadequate Shaft Lighting*

* Shaft lighting present but not operational. The distance between lamps is more than two meters. Another lamp is located on the lift car. When all lights are operational the lighting level in lift shaft should suffice

l. *Uncovered/ unprotected bare control wires in lift shaft*

* Bare wires form part of the lift shaft installation.

m. *Cable Trunking Covers missing*

* During inspection cable trunking was all covered. If any trunking had missing covers it must have been of a small nature.

The lift was commissioned by Panto and the Notified Body was called to come and carry out the Final Examination and Tests of the lift, for the purpose of issuing the Final Examination Certificate before putting lift into service, and for the purpose of issuing the Declaration of Conformity Certificate.

Locking Devices

It is to be noted that the locking devices, according to good practice, are designed to have protection against the risk of an accumulation of dust, which would hinder their proper functioning. If it did not have such protection, therefore, the problems would manifest themselves on other doors which are of similar built.

Load Control:

According to the Regulations and Standards, the lift shall be fitted with a device to prevent normal starting, excluding re-leveling, in the event of overload in the car (14.2.5.1 EN81-2E).

Moreover, the load sensing device should be of adequate strength and good construction so that it does not lose its setting during the normal use of the lift.

Installer states that the PC Board was removed and replaced it with a new one, under Guarantee terms and conditions, when finding the PC Board 'with signs of corrosion. The question of the PC Board found to be corroded as stated by Supplier, has to be for other reason than sea air/spray, since the PC Board is enclosed inside the Control Panel which is made of steel and the enclosure has to be minimum to IP2X (pg 29 report about examinations and tests on an installed hydraulic lift doc, Ing R Spiteri)."

The arbitrators are reasonably satisfied that problems which are still apparent in the lift, which do not seem to be major in nature, are not the result of dust, or corrosion or lack of service or maintenance. On the contrary these issues appear to date back to the time of installation. It is patently obvious that when the lift was commissioned and "certified" the said lift still needed attention. It does not appear that the issues involved require major or radical intervention or repair, or that this was ever required.

Sadly it appears that the supplier insisted upon payment from a customer who was quite justifiably dissatisfied with the product. The attempts by the Claimant to address the issues in question appear to have been quite cursory, as the attitude was that until such time as the Respondent paid the balance due, the Claimant was doing him a favor by attending to the call outs. The problems which have surfaced appear to be matters of setting and calibration, more than anything else.

These are matters which should surely have been seen to by the Claimant prior to claiming that installation was complete. They are also matters which could have been resolved without undue fuss, had the supplier acted with good will and in good faith, which it appears was not always manifest in the case. This case really should never have gone this far.

The arbitrators will decline to comment on the usefulness, the propriety and the accuracy of the so called certification report, and the manner in which it was drawn up, and the whole system whereby the supplier engages the notified body and pays its fees. It will suffice to say for our purposes that the arbitrators will not place any reliance at all on this report.

FINDINGS IN LAW

The Respondent's case rests on the principle "Inadimplenti non est adimplendum". Respondent does not deny having purchased the lift, nor the balance due on the contract. Respondent is merely contending that the contracted object of the sale was not properly delivered and that as a result, the seller is in default of his obligations. This exempts the buyer from proceeding to conform to his obligation to pay the price of the sale.

A recent erudite judgement delivered by The Court of Magistrates for Gozo (Superior Jurisdiction) explained the origin, significance and extent of the exceptio inadimpleti contractus (Easysell Caterers (Gozo) Limited vs Benjamin u Concetta konjugi Bonello, Twan u Sharlene konjugi Vella. 6th May 2010)

"Kif jindikaw fin-nota tal-Osservazzjonijiet taghhom il-konvenuti qed jibbazaw id-difiza taghthom fuq l-exceptio inadimpleti contractus. Gie spjegat f'dan ir-rigward illi:

Per exceptio inadimpleti contractus si intende, come dice il termine stesso, un'eccezione che il debitore (in base a contratto bilaterale) che venga convenuto dalla contraparte per l'esecuzione della sua propria

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obbligazione, puo'opporre, se'la contraparte che agisce contra di lui, non abbia, essa stessa, adempiuto, o non sia pronto ad adempiere."

Il-Kodici Civili taghna jaghmel accenn ghal din l-eccezzjoni fir-rigward biss tal-bejgh, fejn jinghad illi:

"Il-bejgiegh mhux obligat jikkunsinna l-haga jekk ix-xerrej ma jhallasx il-prezz taghha, hlief meta l-bejgiegh ikun ta lix-xerrej zmien ghall-hlas."

Madankollu huwa accettat fid-dottrina illi din l-eccezzjoni tista' tapplika anke fir-rigward ta' kwalunkwe kuntratt bilaterali iehor. "Ma a nostro parere, e secondo l'opinione prevalente sia in dottrina che in giurisprudenza, l'exceptio inadimpleti contractus puo' venir opposta in ogni altro caso di contratto sinallagmatico. Ne'varrebbe obiettare, in senso contrario, che il codice civile nostro non menziona in alcun suo articolo l'exceptio non adimpleti contractus, mentre ha, d'altra parte, sufficientemente provveduto a tutelare le parti contraenti coll' an. 1165 cod. civ., (simili ghall-artiklu 1068 kap. 16 taghna) relative alia cos/ detta condizione risolutiva tacita.

Al silenzio del codice non puo' attribuirsi il significato di esdusione delta exceptio non adimpleti contractus. perche', con- molti altri esempi, puo' fadlmente dimostrarsi che non tutto il diritto civile vigente e' contenuto e regolato espressamente nel codice civile. Il codice non contiene che lo scheletro del nostro sistema giuridico private, mentre i tessuti sono, in gran parte, contenuti nel complesso delle teorie e del principii tramandati che si vengono diuturnamente plasmando e riplasmando intorno al codice."

Inghad mill-qrati taghna dwar din l-eccezzjoni illi:

"F'materja ta' kuntratti min jonqos li jwettaq l-obbligazzjoni li jkun intrabat biha, jkun responsabbli ghad-danni u l-kreditur jista' jigi awtorizzat iwettaq hu stess l-obbligazzjoni bi spejjez tad-debitur. Madankollu meta tinghata l-eccezzjoni inadimpleti non est adimplendum

jista' jkun hemm rabta bejn iz-zewg obbligazzjonijiet imnissla mill-istess rapport sinillagmatiku. Jehtieg li jkun hemm proporzjon bejn l-inadempjenza li biha l-kreditur ikun mixli u dik rifjutata mid-debitur. Fuq kollox in-nuqqas ta' twettiq tal-obbligazzjoni irid ikun ta' certa gravita'. Meta n-nuqqasijiet fit-twettiq ta' hatra ma jkunx sostanzjali. L-appaltatur ma jistax jitqies inadempjenti imma jibqa' obligat li iagħmel tajjeb qhan-nuqqas jew jaccetta t-tnaqqis f'dak li jisthoqlu li jithallas. F'kaz ta' nuqqas ta' twettia ta' obbligazzjoni, il-kreditur jista' jagħzel jew li jitlob li l-obbligazzjoni titwettaq ukoll kontra r-rieda tad-debitur jew inkella jitlob li jithallas qhad-danni li ikun qarrab minhabba n-nuqqas ta' twettiq." (underlining by the Tribunal)

Hekk ukoll gie ribadit illi:

"Ir-rekwiziti tal-eccezzjoni 'inadimpleti non est adimplendum' huma tlieta: (i) l-inadempjenza tal-attur li tolqot xi obbligazzjoni tieghu trid tkun parti ntegrali mill-ftehim; (ii) l-inadempjenza trid tkun verament imputabbli lill-attur; u (iii) irid ikun hemm proporzjonalita' bejn l-inadempjenza tal-partijiet u cioe' li n-nuqqas tal-attur relattivament għall-prestazzjonijiet li huwa jesigi mill-konvenut tkun ta' certa gravita'."

The arbitrators are of the opinion that the above doctrinal exposition (especially the part underlined by the tribunal) applies to this case. Clearly it cannot be said that the Claimant has carried out his duties perfectly, but on the other hand neither can it be said that his non performance is crucial. The lift has been delivered, it works for the most part, but its inherent unsolved problems have led to breakdowns and if unresolved will lead to more in the future. This situation is of course unacceptable to the Respondent. Therefore in view of all the above the arbitrators, have come to the following conclusion:

CONCLUSION

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Respondent's complaints about the functionality of the lift are founded and are upheld by the tribunal. In view of this, the tribunal orders that:

Claimant must address all the complaints mentioned hereunder namely:

Lift stopping below or above level at times and on all floors. The stopping levels require final adjustments

Lift remains stuck at Floor Landings 2&5

Both levels tested several times with the car empty. It was noted that lift does not stop level with floor, remaining out of floor for more than 2cm at a time. The difference in stopping level might be the cause of complaint for lift not operating satisfactorily on these floors. As already indicated the door locks have tight clearances and although the car did stop at level 2 & 5 during the time of inspection, there remains a good possibility that lift stoppages will be recurrent.

Lift will not work when three persons, sometimes two, are inside car

Lift tried with three persons and stopped at level four. The overload of the car needs resetting.

Lift travels beyond the Level at Ground Floor and gets stuck

There is a setting problem which requires adjustment.

Door Motor Fuse blown twice

This could not be verified at time of inspection. However there was a fuse cover missing on close inspection of the electronic board which requires replacement.

Door Motor Mechanism not correctly aligned with door locks

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Alignment very tight on all doors. More clearance on door lock housing in jamb of door channel recommended.

Car Guide Shoe Liner came out of its holder twice, wrong type

This could not be verified on site as no representative of installer was present on site to assist inspection. This needs to be verified and corrected if required.

Inadequate Shaft Lighting

Shaft lighting present but not operational. The distance between lamps is more than two meters. Another lamp is located on the lift car. When all lights are operational the lighting level in lift shaft should suffice.

Uncovered/unprotected bare control wires in lift shaft ' Bare wires form part of the lift shaft installation.

*within **ten weeks** from today, under the supervision of the Technical Arbitrator Engineer Emmanuel Scerri, whose costs and fees for such supervision shall be borne by the Claimant. The amount claimed by Claimant in this arbitration shall fall due without interest up to the date of certification hereunder mentioned, and with legal interest as from the date of such certification until final payment in full, upon the issue of a certificate by the said Engineer Scerri, notified to both parties and to the other members of the tribunal, as well as to the Registrar of the Malta Arbitration Centre, stating that the works herein above mentioned have all been carried out in accordance with the proper applicable standards.*

Failing appropriate repair and adjustment in the time period herein above mentioned, the said Engineer Scerri shall reconvene this tribunal in order to award a sum equivalent to the cost of repair of all or any pending faults, and the Tribunal shall then proceed to award to the Claimant such sum as shall be due after having regard to the balance claimed in the Notice of Arbitration and

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Statement of Claim, and any sum to be deducted in accordance with this part of the award.

The cost of this arbitration are to be borne by the Claimant.

Rat ir-rikors tal-appell tas-socjeta` Panta Marketing and Services Limited (C 11244) datat 19 ta' Ottubru 2010 fejn talab lill-Qorti thassar u tirrevoka d-decizjoni moghtija mic-Centru dwar l-Arbitragg ta' Malta hawn imsemmija u konsegwentement tilqa' t-talbiet taghha, bl-ispejjez taz-zewg istanzi kontra l-appellati.

Rat li dan l-appell kien appuntat ghas-smigh ghas-seduta tas-15 ta' Frar 2011.

Rat ir-risposta tal-appell ta' Joseph Brincat (ID 550934M) datata 8 ta' Novembru 2010 fejn talab lill-Qorti sabiex jichad l-appell tas-socjeta` appellanti waqt li tikkonferma s-sentenza msemmija bl-ispejjez taz-zewg istanzi kontra l-istess socjeta` appellanti.

Rat il-verbal tas-seduta mizmuma fil-15 ta' Frar 2011 fejn meta ssejjah l-appell deher Dr. Vincent Galea ghas-socjeta` appellanti, Diego Attard ghall-istess socjeta` appellanti, u Dr. Chris Grima ghall-appellat prezenti. Id-difensuri trattaw il-kaz. L-appell gie differit ghas-sentenza ghat-28 ta' Gunju 2011.

Rat id-dokumenti esebiti.

Rat l-atti kollha l-ohra tal-kawza.

II. KONSIDERAZZJONIJIET.

Illi l-appellant qed isostni li l-lodo ghandu jigi revokat ghaliex (1) It-Tribunal ma kellux japplika l-principju ta' *inadempenti non est adimplendum*, ghaliex la darba fil-kuntratt ghall-bejgh u installazzjoni u kommissjoni tal-lift hemm li l-appellat ghandu jhallas l-ammont bilanc dovut fuq l-istess xoghol mela l-lift jigi certifikat, u la darba t-talba

kienet għall-hlas tal-prezz dovut ta' €18,568, mela allura la darba gie accettat l-istess lift da parte tal-appellat, kellha tintlaqa' t-talba tas-socjeta' appellanti; (2) illi t-Tribunal ma setax jordna li jsiru tali xogholijiet u dan għaliex m'hemm l-ebda talba u kontro-talba f'dan is-sens.

Illi din il-Qorti tinnota li l-kuntratt relattiv kien jirreferi għall-bejgh u installar u kommissjonar tal-istess lift, liema kuntratt kien jinkludi għalhekk il-konsenja tal-istess lift, u wkoll l-installazzjoni tal-istess, u fl-ahharnett il-kommissjonar tiegħu (Dok. "A") tant li l-istess kuntratt jirreferi għall-*supply and installation of equipment* – f'dan il-kaz *Feles Hydraulic lift of 375 kg – 5 Passengers capacity, servicing Six floors in line, to be installed in an apartment at St. Julians.*

Illi l-appellat laqa' għal tali talba billi sostna li s-socjeta' attrici ma esegwietx l-inkarigu tagħha skond l-arti u s-sengħa u dan għaliex ma kienx qed jiffunzjona sew u għalhekk is-socjeta' appellanti kellha tirrimedja għall-istess anke fil-kuntest tal-garanzija mogħtija skond paragrafu 3 tal-Annex II TERMS AND CONDITIONS – fejn il-kumpanija obligat ruhha li għal zmien sena issewwi u tbiddel dawk il-partijiet li jirrizultaw difettuzi u li jirrangaw difetti li jirrizultaw minn xogħol hazin u dan *"to ensure the proper functioning of the equipment within the parameters of the Specifications of the said equipment which the Client declares to be aware of..."*.

Illi kien fid-dawl ta' dan li ingħata l-istess lodo u jidher li kien hemm difetti fl-installazzjoni tal-istess lift, b'mod li hemm diversi xogħolijiet li għad iridu jsiru sabiex jigu rrangati difetti dovuti għal xogħol hazin da parte tas-socjeta' appellanti, u dawn huma fil-parti disposittiva tal-istess lodo, l-aspett tekniku ta' liema ma gie bl-ebda mod kontrastat mill-appellant.

Illi taht din l-optika din il-Qorti thoss li ma hemm ebda dubju li l-istess Tribunal tal-Arbitragg accetta t-tezi tal-appellat fis-sens li xogħol esegwit mis-socjeta' appellanti ma kienx skond l-arti u s-sengħa u ma kienx tal-kwalita' pattwita u għalhekk kien japplika taht dawn ic-cirkostanzi

I-principju *“inadempenti non est adimplendum”* u fuq l-iskorta tas-sentenza fl-ismijiet **“Easysell Caterers (Gozo) Limited vs Benjamin u Concetta konjugi Bonello, Twan u Sharlene konjugi Vella”** (Q.Gh.Superjuri (PC) – 6 ta' Mejju 2010) irriteriet li:-

“F'materja ta' kuntratti min jonqos li jwettaq l-obbligazzjoni li jkun intrabat biha, jkun responsabbli ghad-danni u l-kreditur jista' jigi awtorizzat iwettaq hu stess l-obbligazzjoni bi spejjez tad-debitur. Madankollu meta tinghata l-eccezzjoni inadempti non est adimplendum jista' jkun hemm rabta bejn iz-zewg obbligazzjonijiet imnissla mill-istess rapport sinillagmatiku. Jehtieg li jkun hemm proporzjon bejn l-inadempjenza li biha l-kreditur ikun mixli u dik rifjutata mid-debitur. Fuq kollox in-nuqqas ta' twettiq tal-obbligazzjoni irid ikun ta' certa gravita'. Meta n-nuqqasijiet fit-twettiq ta' hatra ma jkunx sostanzjali. L-appaltatur ma jistax jitqies inadempjenti imma jibqa' obligat li iaghamel tajjeb qhan-nuqqas jew jaccetta t-tnaqqis f'dak li jisthoqlu li jithallas. F'kaz ta' nuqqas ta' twettia ta' obbligazzjoni, il-kreditur jista' jaghzel jew li jitlob li l-obbligazzjoni titwettaq ukoll kontra r-rieda tad-debitur jew inkella jitlob li jithallas qhad-danni li ikun qarrab minhabba n-nuqqas ta' twettiq.”

Illi fil-fatt ir-rekwiziti tal-eccezzjoni 'inadempti non est adimplendum' huma tlieta: (i) l-inadempjenza tal-attur li tolqot xi obbligazzjoni tieghu trid tkun parti ntegrali mill-ftehim; (ii) l-inadempjenza trid tkun verament imputabbli lill-attur; u (iii) irid ikun hemm proporzjonalita' bejn l-inadempjenza tal-partijiet u cioe' li n-nuqqas tal-attur relattivament ghall-prestazzjonijiet li huwa jesigi mill-konvenut tkun ta' certa gravita'.

Illi dan huwa konsistenti mal-principji enuncjati fis-sentenza **“Amal Aluminium Works vs Carmel Ebejer”** (P.A. (RCP) – 26 ta' Marzu 2009) fejn inghad li *“meta l-appaltatur ma jotteprax ruhu mal-ftehim, jigifieri illi x-xoghol jigi mwettaq mhux skond l-arti u s-sengha mhuwiex intitolat ghall-hlas. (“Vella vs Bugeja” A.I.C. (PS) - 3 ta' Frar, 2003; “Borg vs Buttigieg de Piro” P.A. - 13 ta' Jannar, 1995; “Mark Spiteri noe vs David*

Connaughway noe” P.A - 6 ta’ Marzu, 1998; u “John Bonnici noe et vs Anthony Sammut” A. C. - 22 ta’ Gunju, 1994)”.

“E` dovere dell'appaltatore di resistere ad ordini che egli vedesse pregiudizievoli alla solidita` e contrarii alle buone regole dell'arte” (Kollez Vol XXV pl p727). L-appaltatur hu obligat u hu dejjem responsabbli li jaghti lill-appaltant opra sodisfacenti, u ma jistax jallega li x-xoghol sar mhux sewwa ghax hu ghamlu kif ried il-kommittent, billi l-appaltatur hu obligat jirrezisti ghal kwalunkwe intromissjoni tal-kommittent” (Kollez. Vol XLII pll p1003).

Illi kollox impoggi f'dan il-kuntest ta' esekuzzjoni ta' xoghol hazin u ta' appalt da parte tas-socjeta' appellanti, ma hemmx dubju li legalment ghall-kaz in ezami l-principji legali applikati mit-Tribunal tal-Arbitragg huma korretti, u allura din il-Qorti ma tistax u ma hijiex qed tilqa' l-ewwel aggravju tas-socjeta' appellanti, u dan peress li ma hemm l-ebda dubju li l-appellat kellu dritt li jesigi li x-xoghol hazin jigi rimedjat la darba rrizulta li huwa mhux skond il-kwalita' pattwita u mhux skond is-sengha u l-arti, u dan seta` jaghmlu kemm minhabba l-principji fuq enuncjati li japplikaw f'kuntratt ta' appalt, u wkoll in forza tal-garanzija specifikatament moghtija fil-ftehim in kwistjoni bejn il-partijiet li gie citat mill-appellat bhala difiza quddiem l-istess Tribunal.

Illi l-argument li la darba hareg il-*complainte certificate*, mela allura t-Tribunal ghall-Arbitragg kellu neccessarjament jilqa' t-talba tas-socjeta' appellanti ma huwiex korrett, ghaliex irrizulta li minkejja li hareg tali certifikat, l-installazzjoni tal-lift ma saritx sew, b'mod li dan qatt ma ffunzjona kif mitlub, u jinghad ukoll li s-socjeta' appellanti lanqas osservat l-obbligi taghha skond il-ligi u skond il-garanzija minnha moghtija li tirrimedja ghax-xoghol hazin li sar minnha. Ghalhekk l-ewwel aggravju anke ghal din ir-raguni qed jigi michud.

Illi dwar it-tieni aggravju, jinghad li la darba l-kontestazzjonijiet kienu dwar difett fix-xogholijiet ta' installazzjoni ta' l-istess lift, u la darba dawn irrizultaw,

jirrizulta d-dritt tal-appellat li jitlob u jesigi r-rimedju tal-istess, u dan seta` jsir, fl-optika tat-talba kif saret, u kif giet moghtija d-difiza mill-appellat, bil-mod kif indikat mill-istess Tribunal, u dan huwa konformi wkoll ghall-gurisprudenza nostrali nkluzo dak li nghad u gie ritenut fis-sentenzi “**Serena Holdings Limited vs Power Projects Ltd**” (P.A. (RCP) - 29 ta' April 2009). B'hekk ma jirrizultax li l-istess Tribunal iddecieda l-kaz lil hinn mill-parametri lulu dedotti fl-avviz promotorju u ghalhekk anke dan l-aggravju qed jigi respint.

III. KONKLUZJONI.

Illi ghalhekk ghal dawn il-motivi, din il-Qorti, **taqta' u tiddeciedi**, billi filwaqt li tilqa' r-risposta tal-appellat datata 8 ta' Novembru 2010 biss in kwantu l-istess konsistenti ma' dak hawn deciz, **tichad l-appell interpost mis-socjeta' appellanti fir-rikors taghha datat 19 ta' Ottubru 2010** ghaliex huwa nfondat fil-fatt u fid-dritt ghar-ragunijiet hawn decizi, b'dan li tikkonferma l-lodo moghti mit-Tribunal tal-Arbitragg fl-ismijiet “**Panta Marketing and Services Limited (C11244) vs Joseph Brincat – ID 550934 (M) (Arbitragg Numru 2082/2009)**” datata l-1 ta' Ottubru 2010 ghall-finijiet u effetti kollha tal-ligi.

Bl-ispejjez kontra s-socjeta' appellanti Panta Marketing and Services Limited.

Moqrija.

< Sentenza Finali >

-----TMIEM-----