MALTA

# QORTI CIVILI
# PRIM' AWLA

**ONOR. IMHALLEF**
**JOSEPH ZAMMIT MC KEON**

Seduta tal-31 ta' Ottubru, 2013

Citazzjoni Numru. 1154/2012

**Perit Martin Xuereb esercenti l-professjoni tieghu bl-isem "Martin Xuereb & Associates"**

***vs***

**Philippe Martinet**

**THE COURT :**

## I. The matter

Having seen the sworn application which plaintiff filed on the 21st November 2012 wherein he stated as follows -

*1. Illi l-intimat talab u ottjena s-servizzi professjonali tar-rikorrenti li gew lilu prestati, inkluz li jipprepara diversi disenji, esekuzzjoni ta` xoghol ta` alterazzjoni in konnessjoni mal-hanut li jgib in-numru 239B li jinsab fi Triq it-Torri Tas-Sliema, ghal-liema servizzi r-rikorrenti haqqu li jithallas u talab lill-intimat sabiex ihallsu s-somma ta` €15,445.71 li maghhom trid tinghad is-somma ta` €2,780.23 bhala taxxa fuq il-valur mizjud (VAT) – ghalhekk b`kollox is-somma ta` €18,225.94.*

*2. Illi l-intimat ghalkemm interpellat ghalihom baqa` ma hallasx, anzi ghall-ewwel qal li huwa haseb li r-rikorrenti ma kienx sejjer jitlob il-hlas, u wara qal li r-reklam tar-rikorrenti kien skada bid-dekors ta` sentejn minn mindu presta x-xogholijiet u ghalhekk ir-rikorrenti baghatlu ittra ufficjali fit-12 ta` Ottubru 2012 li giet lilu debitament notifikata fit-22 ta` Ottubru 2012 u ghaldaqstant beda jiddekorri l-imghax tal-8% mid-data tal-istess notifika tal-ittra ufficcjali sad-data tal-effettiv pagament.*

*3. Illi dan id-dejn huwa cert, likwidu u dovut u fl-opinjoni tal-esponenti ghalhekk il-kawza tista` tinqata` ai termini tal-artiklu 167 ta` Kodici tal-Procedura Civili billi l-intimat ma ghandux kontestazzjoni validi x`jaghmel.*

*4. Jghid ghalhekk l-intimat ghaliex din il-Qorti ma ghandhiex :*

*(1) Taqta` u tiddeciedi l-kaz ai termini tal-artiklu 167 tal-Kodici tal-Procedura Civili u cioe` bid-dispensa tas-smigh tal-kawza ;*

*(2) Tikkundanna lill-intimat ihallas lir-rikorrenti s-somma ta` tmintax-il elf mitejn u hamsa u ghoxrin euro u erbgha u disghin centezmu (€18,225.94) ghal servizzi*

*professjonali minnu resi lill-intimat fuq istruzzjonijiet tieghu – kollox skont kif intqal fuq u ghar-ragunijiet fuq premessi.*

*5. Bl-imghax mit-22 ta` Ottubru 2012 (data meta l-intimat gie notifikat bl-ittra ufficcjali hawn fuq riferita) sad-data tal-effettiv pagament u bl-ispejjez kontra l-intimat inkluz dawk tal-ittra ufficcjali tat-12 ta` Ottubru 2012 li minn issa jibqa` ngunta ghas-subizzjoni tieghu.*

Having seen the list of witnesses entered by plaintiff and the list of documents filed with the sworn application.

Having seen its decree given in the hearing of the 7th January 2013 whereby the Court ruled that the proceedings in this cause from then onwards be conducted in the English language.

Having seen its other decree given in the same hearing whereby, after having noted that defendant had a *prima facie* defence in fact and at law to contest plaintiff`s claim, the Court granted defendant a period of twenty days effective from the 7th January 2013 to enter a sworn reply.

Having seen the sworn reply that was filed by defendant on the 23rd January 2013 wherein he states the following –

*1) That this Honourable Court should reject the claims of plaintiff proprio et nomine in their entirety and the plaintiff proprio et nomine should be condemned to pay costs as better detailed hereunder, and this for the following reasons, that is to say:*

*i. That the claims of plaintiff proprio et nomine could not be brought in virtue of this herein afore-*

*mentioned lawsuit since the plaintiff proprio et nomine forfeited the right to commence the action initiated, and furthermore the said claims of plaintiff proprio et nomine are prescribed in terms of article 2149(c) of the Civil Code (Chapter 16 of the Laws of Malta) ;*

*ii. That without prejudice to the above, as will be better proven during the pendancy of this current lawsuit, the defendant is not the debtor of plaintiff proprio et nomine since the contending parties had agreed that any services to be rendered by plaintiff (or plaintiff proprio et nomine for any matter) in this regard would be free of charge, and in any case they had definitely not agreed on the amount being claimed by plaintiff.*

*Therefore for the reasons expounded above, and for the reasons which will be raised and dealt with in detail during the hearing of the cause, the claims of plaintiff proprio et nomine should be rejected in their entirety and the plaintiff proprio et nomine should be condemned to pay all costs of this current lawsuit together with the costs of the legal letter sent to plaintiff proprio et nomine on the 19th April 2012 (Document "A") and those of the judicial letter filed on the 1st November 2012 and duly notified to plaintiff proprio et nomine (Document "B").*

Having seen the list of witnesses entered by defendant and the list of documents filed with the sworn reply.

Having seen the *note verbal* of the hearing of the 12th February 2013.

Having heard the evidence of both parties at that same hearing, and seen the documents filed during that hearing.

Having heard the evidence of Nicholas Vassallo and that of defendant at the hearing of the 14th May 2013, and seen the document that was filed during that same hearing.

Having seen the *note verbal* of the hearing of the 11th June 2013, in particular its decree whereby the Court adjourned the cause for judgement for today with both parties being given specific time-limits to file written notes of submissions.

Having noted that the parties did file any notes of submissions.

Having seen all the acts of the proceedings.

**CONSIDERS :**

## II. The Evidence

**Defendant** testified that he signed the contract to take possession of the premises in question in April 2009. Subsequently he met plaintiff and a quotation for works was finalised in early July 2009. The tenement was taken in shell-form and therefore the works which were required involved the installation of water and electricity, and flooring. The tenement was intended for commercial purposes. Asked by the Court when he instructed the commencement of works, defendant stated that he had gone to Mr. Xuereb just after the signing of the contract, around April-May 2009. He had approached Mr. Xuereb because the latter had a family connection with the owner of the building so he had gone to him to obtain the plans of the premises. Mr. Xuereb then prepared a plan. Defendant had asked a young draughtsman to organise the quotes for plastering, painting and all that was

needed. The quotes were ready early July 2009. The quotation was prepared by Nicholas Vassallo (Doc PM1) who was delegated by Mr. Xuereb to do so. The works started practically immediately and they took a bit longer that projected till around November. He started his operations at the end of November 2009. Asked by the Court whether he was satisfied with the works, defendant replied that he was not and that he had to argue with some of the suppliers regarding the quality of their work. He handled the matter directly and did not involve Perit Xuereb in this matter, due to the fact that Perit Xuereb had not charged him fees.

Questioned by the Court when he was eventually requested by Perit Xuereb to settle his fees, defendant replied that the first time he received an invoice was in September 2012. When he received the invoice, he thought it must have been sent to him by mistake so he emailed Perit Xuereb's secretary and explained to her that he had agreed with Perit Xuereb that no fees were due. After that email, he received a judicial letter. That is when he made contact with his legal advisers.

Defendant was referred to the documents at fol. 31 to fol. 33 of the court file. He stated that the document i.e. the estimate of works was prepared by Nicholas Vassallo. With that document in hand, his bankers could process his request for loan facilities. Questioned on the reason why professional fees were left out, defendant replied that there was an agreement with Perit Xuereb that no professional fees would be charged. Defendant confirmed that he had received Dok A (dated 12 September 2011) in September 2012. Requested to state when the works were completed, defendant stated that there was no closing of works due to the fact that he was not paying any fees and therefore he was not being difficult.

Defendant affirms that he had told Vassallo Builders that he was not ready to pay for the job as performed. Eventually Vassallo Builders negotiated a settlement and he paid half the amount that they had originally requested. He opened the shop for business in December 2009. By that time works were complete.

Defendant did not meet plaintiff or Nicholas Vassallo after December 2009.

He stated that the last service which he referred to Nicholas Vassallo related to some painting works in November 2009.

When questioned whether he had referred his complaints to a third party architect, defendant replied that he chose to negotiate directly with Vassallo Builders and reached a settlement.

Questioned whether he involved plaintiff when he found out that the works were defective, defendant replied that he had involved Perit Xuereb with regard to the floor. Plaintiff came to check the floor. He mentioned to Nicholas Vassallo that he was pleased with the quality of the plaster. At the end of the day, he did not bother much due to the fact that Perit Xuereb was not charginmg him fees.

In **cross-examination**, defendant was asked whether he realised that the document he had received (fol 31) was an estimate of the cost of works not the final costings. Defendant confirmed that that was the case as he required the estimate to forward to his bankers. He agreed that he had paid a final bill of €121,433. He further agreed that he received the email at fol 52. That document is dated 29th October 2010 but pointed out that the question of the umbrellas, had no relation whatsoever

with the merits of this lawsuit. Questioned by the Court whether that was a matter related to the estimate of works, defendant could not remember ; however for him it was something casual to ask an architect for a solution.

**Plaintiff** testified that he had provided his services to defendant in April- May 2009. Defendant had gone to his office to obtain a plan of the premises. Defendant had told him that he was going to instruct an interior designer to carry out the works which he required. The person concerned was Jean Marc Bianchi. He had advised defendant that the premises required structural alterations. The building was owned by Mark Gollcher who was plaintiff`s brother in law.

A builder was commissioned to carry out the necessary works. And so he did on two fronts : the alterations that defendant required, and the works that were necessary to reinforce the building. Mark Gollcher agreed to the works. Two bills were issued : one to defendant for the alterations he had requested ; and another bill to Mark Gollcher to reinforce the construction for the upper floors. Mark Gollcher settled the bill.

Plaintiff states that he was indeed surprised when he was advised that defendant expected that his services were for free. In actual fact, he never told defendant that his services to him would be for free.

Plaintiff states that he was first contacted by defendant in May 2009. Although defendant`s was a minor project, the latter kept changing what he wanted, altering the main doors to stainless steel ones. In fact the initial budget escalted in cost.

The last time he was contacted by defendant was on the 29th of October 2010 by email. Defendant had

asked for advice regarding the shading of the façade. Until that point, he had never sent a bill to defendant. But on one occasion he had asked a carpenter to do some work in the premises of defendant and the carpenter had refused to do so. When asked for an explanation, the carpenter stated that he had carried out work for defendant and after that sent t him a bill ; defendant did not settle the bill and therefore he refused to carry out further works in those premises.

Witness stated that he also had a site supervisor on the premises in order to check out the works. Asked by the court to state when he concluded his services to defendant, witness could not give an exact date but said that the last time there was contact between them was the email dated 29th October 2010. For plaintiff, that email implied that at that point in time his services had not yet been terminated.

Plaintiff stated that at the end of the project defendant did not want to continue spending money and wanted to continue the project gradually. Plaintiff had indicated a number of shops from where he could buy what he required – Doc MX1. After that there was no further contact. He met Joseph Abela, the carpenter to whom he made reference previously, and decided to send the bill.

On the 7th of September 2011, he had met the carpenter mentioned above, Joseph Abela, and had decided to send the bill.

Questioned by the Court as to who was in charge of the structural alterations, plaintiff stated that of the structural works were of two types. The first type consisted of a column on the façade which required extension. There were cracks at the back of the block, which defendant would have used for storage ; these

required reinforcement. The works were at the charge of Mark Gollcher. In fact defendant was not invoiced for them. The second type of work involved was work which defendant required for the use of his premises ; for instance, a spiral staircase to connect the basement to the lower floor, and other structural alterations that defendant required.

Plaintiff points out that he had obtained two or three quotations for the work, and that he had directed a builder to perform the works. The bill was then divided partly to defendant and partly to the owners of the block.

Asked by the Court whether defendant ever contested the quantum of the bill, witness replied that the estimate was changing all the time because they were trying to find better quantities. The bill was calculated on the cost of the project ; in this particular case there were a number of items for which they did not charge defendant.

Witness states that when defendant received the bill on the 12th of September 2011, his reaction was that he could not believe it because he thought that everything was going to be free.

**Nicholas Vassallo** stated that he was employed as project manager with plaintiff for five years. He had been in plaintiff`s emplyment for eleven years. He was the project manager where defendant was concerned. He used to meet defendant frequently and also correpond with him frequently. He had spent some four hundred (400) hours on defendant`s project. His first meeting was at the premises to find suppliers and materials for the project. Asked whether there were any discussions with defendant regarding remuneration, witness replied that they never spoke about figures, however it was clear that a job was being done and that therefore the job would have to be remunerated. Asked what was defendant's

reaction at the end of the project, witness replied that defendant was pleased with the job. Witness exhibited Doc NV : that was the final costing of the project. It was sent to defendant by their accounts department.

When **cross-examined**, witness stated that he was involved in the preparation of the document at fol 31 et seq of the court file. With regard to that document, when questioned why the item *professional fees* was left blank, witness replied that where professional fees were involved, it was not his job to fill in that part of the invoice. Normally what takes place is that the invoice shows the cost of the works, basically the contractors and the third party works. This is then forwarded to the accounts secretary who draws up the fees. The understanding with defendant was that professional fees had to be charged. The document in question was not a bill but a works cost estimate ; it was not a final budget estimate. Doc A was the final costing, which was based on his workings ; it was the invoice referring to the fees.

**CONSIDERS :**

## III. The plea of prescription

Before going into the merits of plaintiff`s demand, the Court will consider first the plea. If defendant succeeds in his plea, there will be no purpose at all foir this Court to enter into the merits.

Defendant has pleaded prescription by virtue of **Art 2149(c) of Chap 16** which states as follows –

*"The following actions are barred by the lapse of two years :*

*…*

*(c) actions of advocates, legal procurators, notaries, architects and civil engineers, and other persons exercising any other profession or liberal art, for their fees and disbursements".*

This Court in its judgement of the 30 October 2003 in re "**Stencil Pave (Malta) Ltd vs Dr. Maria Deguara noe**" (**PA/JRM**) held that –

*"hija regola ewlenija fil-procedura li l-prova li l-azzjoni hija preskritta trid issir minn min iqanqal l-eccezzjoni, u ghalkemm il-parti attrici tista` tressaq provi biex tittanta xxejjen dawk tal-parti mharrka billi tmeri li ghadda z-zmien jew billi ggib `il quddiem provi li juru li l-preskrizzjoni kienet sospiza jew interrotta, il-piz jaqa` principalment fuq min jallega l-preskrizzjoni. Hi l-parti mharrka li trid tipprova li l-parti attrici ghaddhielha z-zmien utli biex tressaq il-kawza, u dan minn zmien minn meta dik il-kawza setghet titressaq".*

(see also "**Holland noe vs Chetcuti**" – Court of Appeal – 25 ta` Frar 2000 ; "**Vella vs Cefai**" – Court of Appeal - 5 ta` Ottubru 2001 ; "**Portelli vs Psaila**" - First Hall Civil Court - 29 ta` Mejju 2003 ; "**Causon noe vs Sheibani**" – Commercial Court – 4 ta` Dicembru 1987 ; "**Camilleri vs Frendo**" (Kollezz. Vol. XII.144) ; "**Borg vs Testaferrata Bonici**" – Court of Appeal – 24 ta` Marzu 1958).

In particular in the judgement "**Causon vs Sheibani noe**" the Court stated as follows –

*"Illi min jeccepixxi l-preskrizzjoni hu obbligat li jaghmel prova sodisfacenti tad-data meta l-perijodu tal-preskrizzjoni jibda jiddekorri ghaliex diversament il-Qorti qatt ma tkun f'posizzjoni li tikkonstata jekk il-perijodu applikabbli tal-preskrizzjoni jkunx iddekorra jew le".*

It is a point of law that prescription should be interpreted restrictively, and therefore where doubt prevails on its application, that should militate against the

party that raises the plea. ( see "**Alf Mizzi & Sons (Marketing) Limited vs Dismar Company Limited**" – First Hall Civil Court – 12 October 2004 and "**Ellul noe vs Vella noe**" – Court of Appeal – 8 May 2001). Prescription is to be applied within the strict limits established by law not to upset the quest for justice on the merits.

On the basis of evidence submitted to the Court, both parties agree that works commenced around April-May 2009. The disagreement between the parties is when such services were concluded. Defendant states that plaintiff`s services were concluded in November-December 2009. On his part plaintiff states that the last time he contacted defendant was on the 29th of October 2010 (Doc MX1 at fol 52). For plaintiff that fact is evidence that up to that date, he was still rendering his services to defendant.

On the basis of documents filed by way of proof, it results that plaintiff prepared a cost estimate for defendant on the 6th of July 2009 (Doc PM1). In that document, the column referring to professional fees was left blank. A final costing (Doc NV1) was issued on the 6th July 2009. Even in that case, the column that refers to professional fees is blank.

The first occasion when defendant received an invoice relating to plaintiff's professional fees is Doc A dated 12th September 2011 whereby plaintiff requested from defendant settelement of €18,225.94 for his services. The document does not refer to any period when such services were provided.

The central issue therefore is at what point in time did plaintiff conclude the provision of services to defendant.

Plaintiff does not recall at what point in time this happened. He only refers to the email dated 29th October

2010. Plaintiff states that until that date he was still servicing defendant.

On his part, defendant insists that works, and therefore the services provided by plaintiff, were concluded in November-December 2009, noteably because he opened the shop for business in December 2009.

This Court is evidently faced with conflicting versions on matters of essence and substance to the dispute between the parties. In these circumstances, the Court has to consider in detail the evidence in order to determine which version is more credible and reliable on a basis of probabilities.

In its judgement of the 24th March 2004 in re '**Maria Xuereb et vs Clement Gauci et'** the Court of Appeal stated as follows –

*"Huwa pacifiku f'materja ta' konflitt ta' versjonijiet illi l-Qorti kellha tkun gwidata minn zewg principji fl-evalwazzjoni tal-provi quddiemha :*

*1. Li taghraf tislet minn dawn il-provi korroborazzjoni li tista' tikkonforta xi wahda miz-zewg verzjonijiet bhala li tkun aktar kredibbli u attendibbli minn ohra ;*

*2) Fin-nuqqas, li tigi applikata l-massima "actore non probante reus absolvitur".*

*Ara a propozitu sentenza fl-ismijiet "**Fogg Insurance Agencies Limited noe vs Maryanne Theuma**", Appell, Sede Inferjuri, 22 ta' Novembru, 2001.*

*Fi kliem iehor il-Qorti ghandha tezamina jekk xi wahda miz-zewg verzjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita` u specjalment dawk tal-konsistenza u*

*verosimiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilitajiet u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant (**Kollez. Vol L pII p440**)."*

Likewise in the judgement by this Court (**PA/TM**) of the 30 October 2003 in re "**George Bugeja vs Joseph Meilak"** it was stated that :

*"Jinsab ravvisat fid-decizjoni fl-ismijiet **"Farrugia vs Farrugia",** deciza minn din il-Qorti fl-24 ta' Novembru, 1966, li –*

*"il-konflitt fil-provi huwa haga li l-Qrati jridu minn dejjem ikunu lesti ghaliha. Il-Qorti ghandha tezamina jekk xi wahda miz-zewg versjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita' u specjalment dawk tal-konsistenza u verosimiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilitajiet, u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant".*

*Fil-kamp civili ghal dak li hu apprezzament tal-provi, il-kriterju ma huwiex dak jekk il-gudikant assolutament jemminx l-ispjegazzjonijet forniti lilu, imma jekk dawn l-istess spjegazzjonijiet humiex, fic-cirkostanzi zvarjati tal-hajja, verosimili. Dan fuq il-bilanc tal-probabilitajiet, sostrat baziku ta' azzjoni civili, in kwantu huma dawn, flimkien mal-proponderanza tal-provi, generalment bastanti ghallkonvinciment. Ghax kif inhu pacifikament akkolt, ic-certezza morali hi ndotta mill-preponderanza tal-probabilitajiet. Dan ghad-differenza ta' dak li japplika fil-kamp kriminali fejn il-htija trid tirrizulta minghajr ma thalli dubju ragjonevoi. Kif kompla jinghad fl-imsemmija kawza "**Farrugia vs Farrugia**", "mhux kwalunkwe tip ta' konflitt ghandu jhalli lill-Qorti f'dak l-istat ta' perplessita' li minhabba fih ma tkunx tista' tiddeciedi b'kuxjenza kwieta u jkollha taqa' fuq ir-regola ta' in dubio pro reo".*

In another judgement of the 28 April 2003 in re "**Emanuel Ciantar vs David Curmi noe"** this Court (**PA/PS**) stated as follows –

*"Huwa ben maghruf f'materja konsimili illi mhux kwalunkwe konflitt, kontradizzjonijiet jew inezattezzi fil-provi ghandhom ihallu lill-Qorti f'dak l-istat ta' perplessita` li minhabba fihom ma tkunx tista' tiddeciedi b'kuxjenza kwieta jew jkollha b'konsegwenza taqa' fuq ir-regola ta' in dubio pro reo."*

In its judgement of the 17 March 2003 in re "**Enrico Camilleri vs Martin Borg** the Court of Appeal in its Inferior Jurisdiction had this to state :

*" … kif pacifikament akkolt fil-gurisprudenza taghna "l-gudikant, fil-kamp civili, ghandu jiddeciedi fuq il-provi li jkollu quddiemu, meta dawn jinducu fih dik ic-certezza morali li kull tribunal ghandu jfittex, u mhux fuq semplici possibilitajiet ; imma dik ic-certezza morali hija bizzejjed, bhala li hija bazata fuq il-preponderanza tal-probabilitajiet".*

*("**Eucaristico Zammit –vs- Eustrachio Petrococchino**", Appell Kummerc, 25 ta' Frar 1952; "**Paul Vassallo –vs- Carmelo Pace**", Appell Civili, 5 ta' Marzu 1986).*

*Il-Qorti allura jehtiegilha tara jekk il-versjoni l-wahda ghandhiex teskludi lill-ohra fuq il-bilanc tal-probabilitajiet …"*

Regarding the plea of prescription as per Art 2149(c) of Chap 16, defendant testified when asked when where the works were completed (fol 77) *there was no closing of the works. It ended up with one person finishing painting, and being very slow and it was more or less there … but no, no there was no closing of the works.* At fol 79, defendant confirmed that the works were completed in December 2009. Asked **again** by the Court whether as far as he was concerned, the job was completed in December 2009, defendant replied (fol. 79)

– *"Yes yes like, I opened we were opened actually early December."*

On the other hand, plaintiff states that he continued to provide his services till the email sent on the 29th of October 2010. However the final costing presented in Court and marked Doc NV 1 is dated 6th July 2009.

**This Court does not agree with the statement made by plaintiff that the email of the 29th October 2010 is evidence that his services were still on-going at that date. When one refers to that email it is clearly a reply to an email sent by defendant in which he was asking for the <u>opinion</u> of plaintiff whether he could place canopies/shades on the façade. This certainly does not constitute proof that plaintiff was still rendering services to defendant, especially due to the fact that if that were so, the final costing of the services given to plaintiff would not have been dated 6th July 2009 but would have been dated subsequent to the 29th of October 2010.**

Taking all evidence into account, the Court accepts defendant's account of events namely that works were concluded in November-December 2009. There is ample proof to exclude that defendant acknowledged in any manner whatseover plaintiff`s pretention for payment of services. And therefore plaintiff`s judicial letter that was filed on the 12th October 2012 was ineffectual as plaintiff`s action was time-barred in accordance with Art 2149(c) of Chap 16.

## <u>Decision</u>

**For the reasons above, the Court is hereby deciding the cause between the parties as follows –**

**Accepts and considers admissible defendant`s plea numbered (1) (i) in the sworn reply.**

**Declares prescription of plaintiff`s action by virtue of Art 2149(c) of Chap 16 of the Laws of Malta.**

**Plaintiff`s demand is therefore dismissed with all costs to be borne by plaintiff.**

**< Sentenza Finali >**

----------TMIEM----------