MALTA

COURT OF APPEAL

THE HON. MADAM JUSTICE

EDWINA GRIMA

Sitting of the 9 th July, 2014

Civil Appeal Number. 200/2012/1

Mediterranean Wellbeing Co. Ltd.

Vs

Samuel Kruse

The Court,

Having seen the partial judgment of the Court of Magistrates (Malta) of the 24th April 2013, wherein the Court delivered its decision with regards to two prelimary pleas raised by defendant:

"The Court:-

Having seen the application presented by the plaintiff company Mediterranean Wellbeing Co. Ltd [C 40909] on the 8th July 2012 in which it requested the Court to condemn the defendant Samuel Kruse:

'ihallas is-somma ta' erbat elef, mitejn u wiehed u ghoxrin ewro u tmintax–il centezmu tal-ewro (€4,221.18), rapprezentanti bilanc minn somma akbar dovuta ghal xoghlijiet maghmula fuq l-opra tal-bahar M.V. Christa Marie, ghal hlas parzjali li sar lil terzi f'ismu, u kif ukoll ghall-hlas t'ammont dovut ghal diversi materjali fornuti in konnessjoni mal-istess xoghlijiet, [Vide l-anness Dok A], liema ammont baqa' qatt ma gie mhallas minnu lis-socjeta' rikorrenti, u minkejja li gie interpellat diversi drabi sabiex ihallas dan l-ammont lis-socjeta' rikorrenti, huwa baqa' inadempjenti.

Bl-ispejjez u bl-imghax legali mid-disgha w ghoxrin (29) ta' Ottubru 2009 sad-data tal-pagament effettiv kontra l-intimat li hu minn issa ingunt ghas-subizzjoni.'

Having seen the reply of defendant Samuel Kruse presented in Court on the 11th July 2012 where he pleaded:

1. "Illi preliminarjament, is-socjeta' rikorrenti ghandha tghid x'tip ta' azzjoni qed taghmel sabiex l-intimat ikun jista' jressaq l-eccezzjonijiet relattivi skond liema azzjoni qed tigi avvanzata fil-konfront tieghu;

2. Illi wkoll preliminarjament u bla ebda pregudizzju ghall-ewwel eccezzjoni, l-intimat m'ghandu l-ebda rabta guridika mas-socjeta' rikorrenti. Kwalsiasi xoghol li hu kien ikkummissjona, dan kien ghamlu direttament ma' persuni fizici li agixxew in personam u in nome proprio u fl-ebda waqt ma qalu lill-intimat li kienu qed jagixxu in rapprezentanza jew ghan-nom ta' persuna ohra, morali jew le. Ghalhekk, l-intimat ghandu jigi liberat mill-osservanza tal-gudizzju bl-ispejjez kontra s-socjeta' rikorrenti;

3. Illi preliminarjament ukoll u bla ebda pregudizzju ghas-sueccepit, it-talba tas-socjeta' rikorrenti hija, sa fejn applikabbli, preskritta ai termini ta' paragrafu (a) u anke paragrafu (b) ta' l-Artiklu 2148 tal-Kodici Civili (Kapitolu 16 tal-Ligijiet ta' Malta);

4. Illi subordinatament u minghajr pregudizzju ghas-sueccepit, is-socjeta' rikorrenti ghandha turi li ghandha locus standi u interess guridiku li toqghod fil-kawza u tavvanza l-prezenti pretensjoni.

5. Illi subordinatament u minghajr pregudizzju ghas-sueccepit, it-talba tas-socjeta' rikorrenti hija nfondata fil-fatt u fid-dritt u kwalsiasi allegazzjoni ghandha tigi debitament pruvata ai termini ta' l-Artikolu 562 tal-Kapitolu 12 tal-Ligijiet ta' Malta, flimkien ma' l-Artikoli 558 u 559 ta' l-istess imsemmi Kapitolu;

6. Salvi eccezzjonijiet ulterjuri permessi mil-Ligi.

Bl-ispejjez kollha kontra s-socjeta' rikorrenti."

Having seen the note of the plaintiff company that was presented on the 16th October 2012 in which it declared that the action of the plaintiff company is intended to recover the expenses incurred by the plaintiff company in the name of the defendant to recover the price of material provided to the defendant and to recover the rights which were not paid.

Having seen the note of the plaintiff company that was presented on the 24th October 2012 in which it declared that the action of the plaintiff company is based on the Article 1623 et seq of Chapter 16 of the Laws of Malta and Article 960 et seq of Chapter 16 of the Laws of Malta.

Having seen the affidavit of the defendant Samuel Kruse that was presented by means of a note on the 22nd November 2012 whereby he declared that he has known Mr Leif Goran Morgan Erikson for around five years. He needed someone to carry out works on his yacht, Christa Maria, which works consisted mainly in sandblasting and painting of the hull of the boat. However he was informed by Mr Leif Goran Morgan that further works were necessary. The works that were carried out are indicated in the attached Doc A though it must be pointed out that the works indicated in point 10 had been carried out by another person and not by Mr Leif Goran Morgan Erikson and the other workers who were assisting him. The works carried out require a person of a certain trade to be carried out.

The defendant stated that he had commissioned these works in winter 2008 around November or December. He had stopped the works because he was not satisfied by the way in which they were carried out. He felt that he was being overcharged for these works. The works were finished in May 2009 and he paid soon after upon request of Mr Morgan Erikson. The defendant stated that he never received any request for payment from Mr Morgan Erikson or any other person or company until he received the judicial letter on the 20th October 2011, the judicial letter dated 10th December 2010.

He said that he had always dealt with Mr Leif Goran Morgan Erikson but he knew that he was working also with Mr Kenneth William Donaldson as regards the works which they were carrying out on his yacht. He never heard of Mediterranean Wellbeing Company Ltd before these judicial proceedings. However he had received from Mr Kenneth William

Donaldson a balance of payments due (Doc. B) by means of an email dated 31st August 2009 in the names of the company Advanced Yacht Systems Ltd, which was the first time he had heard of this company. He was led to believe that he had commissioned Mr Leif Goran Morgan Erikson and his partner Mr Kenneth William Donaldson to carry out the said works.

Kenneth Donaldson on behalf of Mediterranean Wellbeing Company Limited gave his evidence on the 23rd January 2013 and stated that he occupies the position of company director of the plaintiff company. He said that Samuel Kruse had asked for some repairs to be carried out on the vessel MV Christa Marie, and these works were carried out in the period February 2009 ending May-June 2009. These were painting, underwater works, and other similar works including engineering works as mentioned in the invoice Document A exhibited in the acts of the proceedings. This document relates to the materials which were used, for the execution of these works. Whilst the works were being carried out he remembers that he has sent a number of emails to the defendant. Mr Kruse had always informed him that the boat in question was being used for charter and that the boat was foreign flagged. He had told him that the boat in question belongs to a company, however he had never stated who the company was. He asked Donaldson to invoice him excluding VAT, because the boat was exempt from VAT payment. He had to present the VAT exemption and the documentation relative to such exemption necessary not to accept VAT. However by October of the same year, the witness had run out of time from this and he can confirm that the defendant never gave him such exemption and consequently he issued the invoice together with VAT of eighteen per cent. The witness had asked him various times to affect payment with great difficulty, however he never paid up. He had also sent him an official letter on 29th October 2009, and till today he received no payment.

Asked if he ever met Samuel Kruse, after the issue of such invoices and after the works have been carried out, he said yes, in fact they had

exchanged correspondence stating that they should meet in a bank in Naxxar. The witness exhibited a copy of this correspondence which the Court marked as document Z. He believes that they have met on 2 October 2009 in the Bank of Valletta in Naxxar. The defendant had wanted the witness to reimburse him the amount of money he had given on behalf of this bill, which money was given from his own personal account so that he could substitute such payment with payment from behalf of his company. He had asked Donaldson to refund him first, subsequently in the next few days he would reimburse him. Naturally the witness did not agree to that and so their meeting was held for nothing.

The witness exhibited another document which was marked as document X which indicates the tranfers which were done from Samuel Kruse's account and directed to the company. The supplies and works were not carried out in one go. He continued to seek approval from the defendant whilst the works were being done. He exhibited an email in this regard which the Court marked as document B4. He exhibited also an email which is dated 16 October 2009, whereby he had asked the defendant, why he was not replying to his communications and he also said in his reply that he was abroad and he was very busy and that he would get back to the witness, the moment he would get back to Malta. This email was marked as document A3. He also exhibited another email dated 9 February 2009, which was marked as document A1 which is an approval that the witness had when the works were being carried out. He confirmed that he had a very good relationship with the defendant, Samuel Kruse who is a web site designer. In fact together with his manager Susanne Schembri, the witness had asked him to design a web site for his company. Naturally the defendant knew that it was his company. He declared that here they cannot say that the relations were good.

Samuel Kruse in cross-examination gave his evidence on the 20th February 2013 where he declared that he owns in his personal capacity the vessel MV Maria Kristina which has a Maltese flag. He confirmed the evidence given in his affidavit in particular that exhibited on page 19 of

the acts of the proceedings in particular once again that he never received any request from payment from Mr Morgan Ericson or any other person until he received the judicial act on 20 October 2011. He confirmed once again that no one else asked for payment.

Asked what is Document B exhibited on page 22, he said that this is a statement indicating the expenses incured in relation with MV Krista Marie. Asked when this was sent to him, he said that he does not have the date. Asked who sent him this document he believes that it must have been Kenneth Donaldson. He confirmed that the works on this statement were actually carried out and he also confirmed that these payments were actually affected. The balance indicating €6,169.36 was paid by him last spring, and he made a cash paymment to Mr Morgan Ericson. The witness paid the balance when the works on the boat were finished, which was in May 2009 when the works were completed.

The witness stated that he is absolutely certain that he had not heard of the name of the plaintiff company prior to receiving the judicial letter as he mentioned in his affidavit. However he subsequently saw this name in the emails. He also realised afterwards that in actual fact he had made bank transfers to this same plaintiff company at the time when he was not paying cash to Mr Morgan Ericson. In fact he was insisting on making bank transfer for the payment, and after some time he was given a bank account where to transfer the money. Asked why the witness did not pay the balance in bank transfer since he was not happy paying in cash, he said that everything went to Kenneth Donaldson and he insisted that the money should be paid cash.

The witness stated that he was asking for receipts for each payment which he made, he was promised to be given receipts by Mr Ericson but he was not given receipts. Asked if he saw Mr Donaldson he answered yes, they live in the same city, so the witness has come accross him. Basically they have met by chance. In fact he remembers meeting him in the bar last autumn when he coincidentaly went to this bar to meet Mr

Morgan Ericson and Kenneth Donaldson at that time came in too. Subsequently an argument developed between them. That was the only time that the witness met him although he has seen him on other occasions. He remembers on one ocassion that Mr Donaldson was insisting to meet him at the bank because he was very nervous, because he had some VAT audit on his company. The witness does not know which company as he did not specify and he wanted to refund the money that the witness placed in his bank account. The meeting was held though no refund was done. He wanted to pay the witness back these €6000 that he paid to his bank account because according to what he told him, he had VAT audit on his company, and thus it was important for him, to return this money to the witness and get paid in cash. The witness said that he was not very happy to do so. It was not in his interest to do this as he had nothing to do with his VAT issues.

Asked if Mr Donaldson asked for his approval before the works started, the witness cannot answer. However as the works were going on he did go on site to see what was going on, but he does not recollect that he had any approval in writing.

Considerations.

The Court heard the parties plead and discuss the second, third and fourth defence pleas raised by the defendant in his note of exceptions dated 11th July 2012 (fol. 9) together with the defendants plea of prescription based on Article 2148 (a) of Chapter 16 of the Laws of Malta raised in the sitting of the 23rd January 2013 (fol. 27).

The Court also heard the parties authorise her to proceed with a preliminary judgement on the points raised in the sitting of the 4th April 2013 regarding the exceptions here in just mentioned.

Legal Consideration.

The defendant submitted in his note of defence that he has no juridical representation with the plaintiff company and thus should not be held responsible for the plaintiff action since he claims to have acted with a physical person Kenneth Donaldson de proprio and not with the physical plaintiff company.

The Court feels it necessary at this early stage to make reference to jurisprudence with regards to such plea better known in the Maltese language as "*nuqqas ta' rabta guridika".*

According to the judgment delivered by the Appeal Court in its Inferior Jurisdiction in the names '**Korporazzjoni Ghas-Servizzi Ta' L-Ilma Pro Et Noe Vs Emmanuel Grixti'** a definition to what amounts to a guridical relationship was given. It held that:-

"*B'relazzjoni guridika wiehed necessarjament jifhem l-ezistenza ta' rapport bejn zewg partijiet in virtu ta' liema l-wiehed, kreditur, ghandu d-dritt jippretendi minghand l-iehor, id-debitur, li dan jissodisfa l-obbligazzjoni tieghu. Obbligazzjoni din li tista' tkun wahda kemm "di dare" jew "di fare" jew "di non fare". Tali rapport obbligatorju jista' jkun wiehed f' sens strett u jista' jkun jkollu wkoll dimensjoni aktar wiesgha;*

***Ftehim bejn id-debitur u terza persuna li biha t-terza persuna tassumi l-obbligu tad-debitur fil-konfront tal-kreditur liema ftehim jigi komunikat lill-kreditur*"**

In the case given in the names '**Frankie Refalo et vs Jason Azzopardi et'** delivered on the fifth (5) October 2001 by the Appeal Court, the

following was stated with regards to the institute of who is the right person to sue in a court case:

Biex jigi stabilit jekk parti in kawza kienetx jew le legittimu kontradittrici tal-parti l-ohra, l-Qorti trid bilfors tivverifika prima facie jekk il-persuna citata fil-gudizzju, kienetx materjalment parti fin-negozju li, skond l-attur, holoq ir-relazzjoni guridika li minnha twieldet l-azzjoni fit-termini proposti.

Jekk dan in-ness jigi stabbilit, il-persuna citata setghet titqies li kienet persuna idoneja biex tirrispondi ghat-talbiet attrici, inkwantu dawn ikunu jaddebitawlha obbligazzjoni li kienet mitluba tissodisfa dan inkwantu il-premessi ghaliha, jekk provati, setghu iwasslu ghall-kundanna mitluba f'kaz li jinstab li l-istess konvenut ma jkollux eccezzjonijiet validi fil-ligi x'jopponi ghaliha. Dan, naturalment ma jfissirx li jekk il-Qorti tiddeciedi li l-konvenut kien gie sewwa citat inkwantu jkun stabbilit li l-interess guridiku tieghu fil-mertu kif propost mill-attur illi hu kellu necessarjament ikun finalment tenut bhala l-persuna responsabbli biex tirrispondi ghat-talbiet attrici kif proposti, kif lanqas ifisser li l-istess konvenut ma jkollux eccezzjonijiet validi fil-mertu, fosthom dik li t-talbiet attrici kellhom fil-fatt ikunu diretti lejn haddiehor ukoll inkwantu dan ikun involut fl-istess negozju u li allura seta' jigi wkoll citat bhala legittimu kontradittur fil-kawza.

Id-dikjarazzjoni tal-Qorti li parti 'n kawza tkun legittimu kontradittur lanqas ma kienet tfisser li l-Qorti ma setghetx, fil-konsiderazzjoni tal-eccezzjonijiet opposti ghat-talbiet, tasal ghall-konkluzzjoni li l-konvenut - dikjarat prima facie legittimu kontradittur- kien wara t-trattazzjoni tal-kawza jirrizulta ghal kollox estranju ghar-responsabilitajiet lilu addebitati mill-attur fl-azzjoni minnu tentata".

The court feels that it also has to make reference to the judgment correctly referred to by the defendant in the names '**Camel Brand Co Ltd Vs Debono Michael'** delivered on the 23rd March 2002 by the First Hall Civil Court wherein it was opined that:

"*Meta negozju jkun gestit minn socjeta` b'responsabilita` limitata, u ghaldaqstant minn persuna guridika indipendenti, huwa l-obbligu taghha li tindika dan fl-aktar mod car u inekwivoku lit-terzi li jkunu qeghdin jinnegozjaw maghha.*

Tali indikazzjoni ghandha ssir ukoll fuq l-invoices, statements, etc. relatati ma' akkwisti maghmula minnha. Fin-nuqqas ta' tali indikazzjoni espressa t-terz ghandu kull dritt jipprezumi li qieghed jinnegozja ma' individwu, u fil-fehma tal-Qorti ma jistax jippretendi mod iehor.

Normalment bniedem jikkontratta ghalih inniffsu, sakemm ma jindikax li qieghed jikkontratta f'isem haddiehor, jew jekk dan ma jindikahx espressament, il-kontraent l-iehor ikun ragonevolment jaf li jkun qieghed jikkontratta f'isem haddiehor. Il-piz tal-prova li min jikkontratta ghamel hekk f'isem haddiehor tinkombi fuq min jaghmel l-allegazzjoni"

A close look at the judgment in the names **'Legend Real Estate Limited vs Ron Chetcuti'** delivered on the 20th October 2003 by the Court of Appeal which stated the following:

"*F'kaz bhal dan l-konvenut ghandu definittivament u konvincevolment jipprova mhux biss li l-ftehim sar ghas-socjeta gestita minnu imma ukoll li fil-mument meta sar tali ftehim s-socjeta konvenuta kienet konsapevoli tal-fatt illi hu kien qed jagixxi in rappresentanza tas-socjeta tieghu. Dan hu abbandament pacifiku fil-gurisprudenza taghna*."

It made reference to other court judgments which held that:

'Hija haga minn lewn id-dinja li bniedem normalment jikkuntratta ghalih innifsu sakemm ma jindikax li qieghed jikkontratta f'isem haddiehor jew jekk dan ma jindikax espressament il-kontraent l-iehor ikun ragonevolment jaf li jkun qieghed jikkontratta f'isem haddiehor. (Frank Cilia nomine vs Charles Scicluna delivered by the Commercial Court on the 27th April 1992 and Anthony Caruana et vs John Magro et delivered by the Court of Appeal on the 6th October 1999.

In the case under examination it transpired that Kenneth Donaldson explains how in his capacity as Director of the plaintiff company he had carried out some works for the defendant on a boat named Christa Maria. He said that the defendant had informed him that the boat had a foreign flag and was owned by a company, however he stated that invoices were to be sent to him and without VAT since he alleged that the boat was VAT exempt. He explains that he had asked for documents highlighting such exemption though the defendant never passed them on to him so he issued the invoices with a VAT rate of 18%. However notwithstanding that he carried out the work and he sent the invoices he was never paid for the work he was entrusted to do.

Mr Donaldson explains that in fact the accused had already made a payment in his personal capacity as witnessed in the bank statement exhibited in the acts of these proceedings marked as Dok X. It results that on the 26th March 2009, the defendant de proprio had paid the sum of three thousand Euro to the plaintiff company.

The witness however explains that after this was done he was asked by the defendant to reimburse him with this money so that the same

amount of money could be paid by a company. He however disagreed since he did not trust him and thus kept such deposit on account. The witness also exhibited an exchange of correspondence which indicated the negotiations that were going on and under the name of the witness Kenneth Donaldson there appears the name of the plaintiff company Mediterranean Wellbeing Co ltd. It appears from an examination of this correspondence that the defendant always acknowledged the emails that were sent to him by the plaintiff company and he replied to them in a personal capacity. Even the e-mail dated 29th September 2009 marked as document B4 a fol. 41 indicated that the demand for payment was made on behalf of the plaintiff company and once again the defendant replied in his personal capacity.

Samuel Kruse in his evidence of the 20th February 2013 admits that he made bank transfers to the plaintiff company although he says that at the time he was not aware that the money he transferred was sent to a company. He also says that he had not heard of the name of the plaintiff company prior to receiving the judicial letter although later on, in his same evidence he states that in fact he saw the plaintiff company name on a number of emails that were exchanged on this matter.

Thus from the above, it appears clear and unequivocal that the defendant was dealing with the plaintiff company through its Director Kenneth Donaldson and that the defendant knew about all this all the way. It is the opinion of the Court that such exception is frivolous in the light of the evidence brought forward by the same plaintiff company thus such pleas is being rejected.

With regards to the second plea of exception regarding prescription the Court has the following to say.

It appears from the statement exhibited by the defendant dated August 2009 exhibited fol. 21 marked as document A that the plaintiff company

was given a contract of works to carry out a number of small jobs relating to repairs to be carried out on the vessel Christa Maria. However according to the evidence given by the defendant in his affidavit works started around November or December 2008. He also stated that the works were stopped in May 2009 and as far as he knew he had paid for the works carried out until he received a judicial letter demanding payment dated 10th December 2010 which letter he received on the 20th October 2011. The defendant believes that the action for payment is prescribed in the first place by article 2148 (a) of Chapter 16 of the Laws of Malta.

This Article 2148 (a) provides the following:-

2148. ***"The following actions are barred by the lapse of eighteen months:***

(a) actions of tailors, shoemakers, carpenters, masons, whitewashers, locksmiths, goldsmiths, watch-makers, and other persons exercising any trade or mechanical art, for the price of their work or labour or the materials supplied by them"

According to the judgment given in the names **'David Cilia f`isem u ghan-nom ta` Mario Cilia assenti minn dawn il-Gzejjer *vs* Hal Mann Limited',** delivered by the First Hall Civil Court:

"L-Art. 2148(a) jirreferi ghall-krediti ta' artefici li jipprestaw l-opera taghhom u mhux ghall-appaltatur ta' l-opra li ghaliha l-materjali jkunu servew (Kollezz. Vol XLI.I.347)."

This train of thought is in fact the reasoning given in an earlier judgment where it the Court held the following:

'Fid-decizjoni riportata fil-Kollezz. Vol. XXXVIII P III p 710 jinghad hekk:

Il-preskrizzjoni ta' tmintax-il xahar li tolqot l-azzjonijiet tal-hajjata, skrapan, mastrudaxxi, bennejja,bajjada, haddieda, argentiera, arluggara, u persuni ohra li jahdmu sengha jew arti mekkanika, ghall-prezz ta' l-opri taghhom jew tax-xoghlijiet taghhom, jew tal-materjal li jfornu, tirriferixxi ghal-lokazzjoni ta' opera li biha dawk il-persuni jkunu obbligaw ruhhom li jaghtu x-xoghol taghhom, u mhux ghal-locatio operis li biha l-imprenditur jobbliga ruhu li jaghti, mhux ix-xoghol, izda l-prodott tax-xoghol - meta l-lokazzjoni d' opera tkun konnessa ma' organizzazzjoni ta' mezzi teknici li timprimi lil-lokazzjoni l-karattru ta' att oggettivament kummercjali.'

Undoubtedly in the case under examination the work that had to be carried out by the plaintiff company was that resulting from a contract of works and thus this article of the law is not applicable.

In the defendant's note of exceptions the defendant also gives an alternative article claiming that the action of the plaintiff company is also prescribed according to Section 2149 (b) of Chapter 16 of the Laws of Malta. This provides the following:

2149. *The following actions are barred by the lapse of two years:*

(a) actions of builders of ships or other vessels, and of contractors in respect of constructions or other works made of wood, stone or other material, for the works carried out by them or for the materials supplied by them;

In the judgment delivered on the 1st July 2007 in the names **'Salvu Attard vs Mark u Georgeann Meilak'** it was stated that:

'L-artikolu 2149(a) jipprovdi li l-azzjonijiet tal-kuntratturi ta' bini jew ta' xogholijiet ohra ta' njam, jew materjal iehor ghall-opri mahdumin minnhom jew ghall-materjal li jfornu jaqghu bi preskrizzjoni ta' l-gheluq ta' sentejn. Jiddependi hafna mill-agir u l-intenzjoni tal-partijiet u jekk l-intenzjoni kienetx wahda di dare l-kuntratt ghandu jitqies bhala bejgh waqt li jekk l-intenzjoni kienet di fare japplikaw il-principji ta' l-appalt [Qorti Kummercjali, George Camilleri vs Joseph Mamo noe, 28/08/1951, Kollez. Vol. XXV.iii639), u George Vassallo vs Lawrence Fenech et noe, 26/04/1988, u Appell Inferjuri Civili, Frederick Micallef noe et vs May Sullivan, 22/11/2002]. Hu sufficjenti li wiehed ihares lejn in-natura tax-xogholijiet li gew esegwiti mill-attur fejn minbarra li sar xoghol tal-konkos', l-attur ipprovda wkoll il-materjal u l-armar;'

It further stated that:-

"Illi sabiex tigi determinata liema hija l-preskrizzjoni applikabbli ghall-azzjoni partikolari wiehed irid jezamina d-dispozizzjonijiet partikolari tal-kuntratt li minnu titwieled l-azzjoni, u fl-ewwel lok jistabilixxi s-sustanza tar-relazzjoni guridika ezistenti bejn il-partijiet. Id-dispozizzjoni taht l-artikolu 2149(a) ma tikkontemplax il-kaz ta' fornituri ta' materjal in genere, izda tal-fornituri li jsiru minn ….. appaltaturi ta' xogholijiet, li flimkien mal-opra taghhom ikunu in konnessjoni mal-istess opera fornew ukoll il-materjali mehtiega [(Ara A.M.C. Marketing Ltd. vs Pletz Holdings Ltd. deciza mill-Prim'Awla Qorti Civili fit-22 ta' Frar 2002). Hekk gie ribadit ukoll fis-sentenza deciza mill-Qorti ta' l-Appell fl-ismijiet Paul Formosa vs Salvu Debono deciza fil-5 ta' Ottubru 2001]."

In the case under examination that plaintiff company is asking the court to condemn the defendant to pay her a sum of money as indicated in its application which sum represents balance from a large sum representing works carried out on the vessel Christa Marie as well as for the purchase of materials bought to carry out the same work. Thus this is really the scenario that applies to that case in question.

Now as was stated earlier on by the same defendant, the plaintiff started carrying out his works in the months of November / December 2008 and stopped working in the month of May 2009. Thus it is from this same Month May 2009 that the two year prescription period applies.

It appears that the first judicial act which the plaintiff company presented against the defendant was filed on the 10th December 2010. The defendant however iterates that this act has no validity with regards to the prescription plea since it was notified to the defendant on the 20th October 2011 much later than the two years entertained by law for Court action to be taken.

As explained in the judgment given by the Court of Appeal in the names '**Emanuel Calleja vs Anthony Portelli'** delivered on the 29th November 1971:

"*Iz-zmien ta' preksrizzjoni jrid jitqies b'referenza ghall-azzjoni kif bazata."*

Reference is here being made to the judgment in the names '**Pasquale Bonello vs Matteo Grech'** delivered by the Commercial Court on the 9th January 1875 where it was held that the plea of prescription is the exception to the action "*la* ***prescrizione e una eccezione opposta alla azione, ed e regola invariabile che il convenuto in questo caso diventa attore, spettando a lui di provare cio che serve di***

fondamento alle sue eccezione – (Chardon Del Dolo e delle Frode Vol 1 Toullier Vol. 4 para 612)."

Thus the plea of prescription is the exception to the present plaintiff action so much so that the defendant becomes plaintiff to prove his plea and thus has to indicate that the action was taken too late after the two year period allowed by law (Vide **Mario Zammit vs Lawrence James Cappello et** decided on the 19th November 1962 by the Court of Appeal Sede Civili).

It results that the judicial act was presented within the two years permitted by law but notified after the two years.

Article 2128 of Chapter 16 of the laws of Malta provides the following:-

"*Prescription is also interrupted by any judicial act filed in by judicial act the name of the owner or of the creditor, served on the party against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right."*

In no circumstances does the law say that such judicial act has to be notified. It only speaks about the act being presented. In this respect there does not seem to be any contestation since it is the defendant himself to outline such dates and consequently such plea is also being rejected.

Consequently, the Court is hereby rejecting the pleas regarding to 'nuqqas ta' rappresentanza guridika' and prescription raised by the defendant and orders the continuation of the case on its merits.

The Court reserves the question of expenses for the final judgement when it pronounces itself on the merits".

Having seen the appeal filed by the appellant Samuel Kruse wherein the following grounds of appeal were put forward:-

1. that the claim filed by plaintiff company is time barred in terms of article 2149(a) of Chapter 16 of the Laws of Malta and this since the prescriptive period was never interrupted as laid out in terms of articles 2128 and 2130 of the Civil Code. Consequently the First Court erroneously decided that the said period had been interrupted by the filing of the judicial letter and not by its notification to defendant as laid out in the above-indicated articles of law. The said judicial letter was notified to appellant after the prescriptive period had elapsed since he was notified in October 2011, when the prescriptive period had expired in June 2011.

From its part appellate company, together with its reply to the appeal filed by defendant, availed itself of the faculty granted to it by article 240 of Chapter 12 of the Laws of Malta and filed a cross-appeal to the partial judgment of the First Court. The ground of appeal put forward by plaintiff company is directed solely towards the operative part of the judgment wherein the Court decided to apply the prescriptive period laid down in article 2149(a) of the Civil Code to the present action. It argues that the nature of the action filed by plaintiff

company was one of *locatio operis* and consequently the applicable prescriptive period should have been the longer one of five years without indicating the article of law to be applied instead, and subordinately were the Court to apply article 2149(a) or 2148, these articles of law have to be read in conjunction with article 2151(2) of Chapter 16, and consequently the shorter prescriptive period is to be extended to a period of five years.

It results from the acts, that an appeal is being lodged by both parties regarding only the decision delivered by the First Court with regard to the plea of prescription, appellant alledging that the First Court erroneously decided that the prescriptive period of two years was interrupted since the interruption could only take place by a valid notification of the judicial letter filed by plaintiff company against defendant, whilst plaintiff company complains that the First Court applied the wrong prescriptive period to the circumstances of this case.

The Court will first deal with the grouds of appeal filed by appellant in order to establish whether in the first place the filing of the judicial letter by plaintiff company on the 10th December 2010 interrupted the running of prescription according to law. The Court points out at the outset that it finds it amiss that neither of the parties deemed it fit to exhibit the judicial letter under examination by the Court and evidence regarding proof of notification of the same. The First Court in its decision relied solely on that stated by the parties in their testimony, wherefrom the following crucial dates result:

1. The works were carried out by Plaintiff Company between February 2009 and May/June 2009.

2. Part payment was effected by defendant, however a balance remained pending.

3. A bill was sent to defendant by plaintiff company on the 31 August 2009 indicating the balance due.

4. E-mail correspondence takes place between the parties regarding payment in September/October 2009.

5. On the 2nd October 2009 parties agree to meet at a bank in Naxxar.

6. Kenneth Donaldson , for plaintiff company, in his testimony states that an official letter was sent to defendant on the 29th October 2009, but no reply was ever received. Said letter, however, was never exhibited.
7. Defendant states in his affidavit that he received a judicial letter on the 20th October 2011 which letter was dated 10th December 2010.

Appellant correctly points out in his appeal to the judgment of the First Court that the law clearly indicates that prescription is interrupted either by the filing of a judicial letter duly notified or by the filing of a judicial demand. In this case it results, only from what is stated in the testimony of Kruse, which, however, is not contested by plaintiff company, that he received notification of the

judicial letter on the 20th October 2011, consequently more than two years after the works had been carried out.

Article 2128 of the Civil Code clearly states:

"**Prescription is also interrupted by any judicial act filed in the name of the owner or of the creditor, served on the party, against whom it is sought to prevent the running of prescription, showing clearly that the owner or creditor intends to preserve his right.**"

Article 2130 continues:

"**No interruption takes place if the act is not served before the expiration of one month to be reckoned from the last day of the period of prescription. Cap. 12.**

(2) Nevertheless, if the party to be served is absent from Malta, service shall be deemed to be effected by the publication of a notice in the Government Gazette, within a month to be reckoned from the last day of the aforesaid period, on the demand of the party filing the act, as provided in the Code of Organization and Civil Procedure.

(3) The said notice shall contain a summary of the act of interruption, and shall be signed by the registrar of the court before which the act has been filed."

Article 890 and 891(1) of Capter 12 of the Laws of Malta further provides:

"**The protest or judicial letter shall take effect from the day of the service thereof.**

Nevertheless, where the protest or judicial letter is intended to interrupt the course of prescription, such protest or judicial letter shall take effect from the day on which it is filed, provided, if service is not effected within the eight days following, the party filing the protest or judicial letter makes a demand by an application for the publication in the Government Gazette of a notice, signed by the registrar, containing the substance of the act itself, and such notice is published in the Government Gazette within a month to be reckoned from the day on which the act is filed."

As already pointed out a copy of the judicial letter is not found in the acts. Plaintiff company neither brings forward evidence, as it was incumbent on it to do, to proof that interruption of the prescription alledged by defendant has taken place. The only evidence of notification lies in the affidavit of Kruse who states that he was notified in October 2011. It is not clear either how notification actually took place, under which procedure established by law.

Consequently the Court is of the opinion that the First Court erroneously decided that the prescriptive period had been interrupted upon the filing of the judicial letter of the 10th December 2010 and its reasoning that the law does not indicate that the same has to be duly notified, since in actual fact the law clearly states otherwise and explains in detail the manner in which the interruption is to take place in the sections of law above cited. Consequently the rejection of the plea of prescription by the First Court based on this interpretation of the law is erroneous and therefore this Court cannot but uphold this ground of appeal filed by appellant.

Having, consequently, established that the judicial letter filed by plaintiff company has interrupted the prescriptive period only on the 20th October

2011[1], the Court will now pass on to determine the cross-appeal filed by plaintiff company since this attacks the operative part of the judgment of the First Court which established which prescriptive period is to apply to the case. In fact although plaintiff company was the "winning party" to the case, however it has lodged its appeal on the premise that the First Court erroneously applied the two year prescriptive period in its judgment, when the applicable prescriptive period is that for contract of works or *locatio operis* for repairs to a vessel, but nowhere does it indicate the article of law relative to the prescriptive period applicable to this transaction. It contends that article 2149(a) targets individuals who build and construct works from their inception to their completion and therefore does not apply to this case, but does not indicate the article of law which instead should apply.

That is has been established by jurisprudence over the years that:

"Il-Qorti ma ghandhiex toqghod tfittex biex tara jekk ghall-kaz hix applikabbli xi preskrizzjoni partikolari li ma tkunx giet indikata b' mod car u esplicitu minn min jinvokaha. Ara ***Kollez. Vol. XXXIII P I p 481*** *u "****Francis Bugeja nomine-vs- Indria Mercieca****" Appell, 29 ta' Mejju 2000"*

In another judgment **Joseph Gauci vs Saviour Farrugia** it was decided:

"Kif deciz, peress li din hi preskrizzjoni invokata mill-appellant il-Qorti ma tistax tezamina jekk hijiex applikabbli xi disposizzjoni ohra f' materja ta' preskrizzjoni ghaliex gie dejjem stabbilit fil-gurisprudenza u del resto huwa konsentaneu ghar-raguni u ghall-ispirtu fundamentali fil-materja ta' preskrizzjoni, illi dik ghandi tigi nvokata mill-parti, u ma tistax il-Qorti tara u tezamina jekk hemmx xi preskizzjoni li tista' tkun opponibbli peress illi hija materja kollha ta' kuxjenza" – ***Kollez. Vol. XXXIII P I p 481****;*

[1] Plaintiff company does not contest this fact as being the date when notification took place

Irid jinghad ukoll illi l-proposizzjoni generika ta' l-eccezzjoni tal-preskrizzjoni mill-parti nteressata ma tawtorizzax lill-gudikant biex jindividwa hu t-tip tal-preskrizzjoni li tghodd ghall-kaz. Dan ghaliex huwa l-parti li ghandu l-oneru jaghzel liema wahda mill-varji ipotesijiet prezunti mil-ligi hi applikabbli. Fin-nuqqas ta' indikazzjoni specifika l-eccezzjoni nnifisha ma tistax hlief tigi dikjarata inammissibbli.

Minn dan kollu jitnissel illi fl-assenza ta' indikazzjoni cara u specifika tal-preskrizzjoni, il-gudikant ma jistax jiehu inizzjattiva biex jissupplixxi hu ghan-nuqqas tal-parti."

Consequently since plaintiff company in his cross-appeal has failed to indicate which prescriptive period should be applicable other than that found in the judgment of the First Court, this Court is precluded from assuming which article of the law is to be applied upon a mere presumption from the terms used by appellant in his cross-appeal.

That subordinately, plaintiff company states in its cross-appeal that even if this Court were to uphold the decision of the First Court that the applicable prescriptive period is the two-year period envisioned in article 2149(a) of the Civil Code this article of law has to be read in conjunction with article 2151 which provides:

(1) In the cases referred to in the last four preceding articles, prescription takes place, even though there may have been a continuation of supplies, deliveries on credit, labour, services or other work.

(2) Nevertheless, in such case, where the claim in respect of such supplies, deliveries, labour, services, or other work is evidenced by an approved account or other written declaration of

the debtor, the action shall not be barred except by the lapse of five years to be reckoned from the date of such account or declaration.

Plaintiff company alledges that through the various e-mails exhibited before the First Court it amply results that Kruse had acknowledged the debt and had always approved the works to be carried out. This Court cannot agree with this line of defence since it results from the testimony of Samuel Kruse that he had asked plaintiff company to stop the execution of the works as he was not happy with the results. He states in his affidavit:

"*The works were stopped by me because I was not satisfied by the way in which they were being carried out and I felt that I was being overcharged for the same works*."

Furthermore the e-mails in question indicate that a meeting was to be held at a bank in Naxxar and this in October 2009 but do not indicate if the meeting actually took place and what happened. Also the bank statements exhibited or rather a copy of the same indicate that payments were made in February and March 2009 by Samuel Kruse to plaintiff company but does not indicate what these payments represent. It is evident from the acts that the evidence presented is minimal and although plaintiff company now at appellate stage deems it fit to raise various legal issues, however consideration of the same cannot be carried out since in the acts there is not sufficient evidence to substantiate the same.

For the above reasons, therefore, the cross appeal put forward by plaintiff company cannot be upheld.

Consequently the Court revokes the judgment delivered by the First Court, rejects the cross-appeal filed by plaintiff company, however upholds the appeal filed by defendant Samuel Kruse and declares that the action is time-barred in terms of article 2149(a) of Chapter 16 of the Laws of Malta.

Costs for this instance and for proceedings before the First Court are to borne by plaintiff company.

< Final Judgement >

----------END----------