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Fit-Tribunal tal-Konsumatur

Sam Safavi

Vs

Rado Limited (C 51559)

CCT 221/23/MM

Today, 4th February 2025

The Tribunal

Having seen the plaintiff's claim, filed on 29 November 2023, wherein he seeks the sum of ten thousand euro (€10,000).

Having seen that the respondent was duly served with the notice of claim, but did not file a reply.

Having seen all the acts and documents of the case.

Having duly considered the testimonies given under oath.

And having seen the notes of submission of the parties.

Considers

The Tribunal notes that the defendant company failed to file a reply on time but appeared for the sittings and filed a note of submission. That by means of an application filed on the

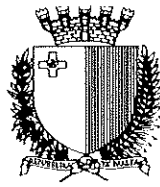


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20 February 2024, the defendant company requested this Tribunal to grant a time-frame for the submissions of its reply. The Tribunal determined that the defendant company did not present any valid reasons or detailed explanation to justify its state of contumacia and was therefore declared to be contumacious.

That from a legal aspect, the Court of Appeal in the matter of **Noel Calleja et v. Middle Sea Valletta Life Assurance**, decided on 29 January 2005 held “*L-istitut tal-kontumacja huwa msejjes fuq il-presuppost li l-imħarrek, bin-nuqqas tiegħu li jwieġeb għax-xilja u t-talba da parti tal-attriċi, ikun wera dispett lejn is-sejha għall-Qorti biex jidher quddiemha, liema dispett il-liġi thares lejha bħala għemil li jisthoqqlu piena – dik li ma jkunx jista’ jindahal fit-tressiq ta’ provi billi dan jammonta għal forma ta’ dizordni soċjali. Maż-żmien il-qradi Maltin iddeċidew li r-rigorozita` tal-proċedura għandha tiġi mitigata fis-sens li fejn il-Qorti tkun sodisfatta li ma kien hemm ebda nuqqas volut min naħa tal-persuna mħarrka li jista’ jammonta għall-ħtija, m’għandu jkun hemm l-ebda diffikulta` li l-kontumacja titqies bħala waħda ġustifikata. Di fatti l-ġurisprudenza interpretattiva stabbiliet ċertu fatturi li jirrendu l-kontumacja mhux ġustifikabbli. Dawn huma fil-każ li l-kontumacja: kienet volontarja jew kolpuża; jew priva minn kawża ġusta; jew mankanza ta’ impediment legittimu da parti tal-imħarrek li kien poġġa lill-istess fl-impossibilita` jew f’diffikulta` gravi li jippreżenta n-nota tal-eċċezzjonijiet tiegħu; jew ma kienx każ ta’ żball invinċibbli.”*

That in the matter of **Market Handle Limited (C-49546) vs. Fahrenheit Freight Forwarders Co. Limited (C – 17421); Elaine Sant Galea u Alfa Company Limited** decided by the Civil Court, First Hall on 12 January 2012, held that “*Illli l-prinċipji li jirregolaw jekk il-kontumacja hijiex bi ħtija jew le, ġew għadd ta’ drabi mfissra u elenkati. Il-prinċipji huma li: (a) il-kontumacja mhix ġustifikata jekk kienet volontarja; (b) jew jekk kienet kolpuża; (c) li jeħtieġ li biex tkun ġustifikata tiġi murija raġuni ġusta għas-sudisfazzjon tal-Qorti; (d) liema raġuni ġusta trid tissarraff’impediment legittimu; (e) li tali impediment irid ikun indipendenti mir-rieda tal-persuna kontumaci; minbarra dan, (f) sabiex żball ikun meqjus bħala impediment legittimu, irid ikun żball invinċibbli b’mod li (g)*



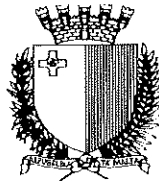
*l-impediment legittimu li jzomm lill-parti milli tressaq id-difiża tagħha jrid ikun dak li bnadi oħra ssejjaħ bħala una necessita' impellente di chiamata ad altri doveri imprescindibili; u (h) li l-impossibilita' li l-imħarrek jikkontesta t-talba jew li jidher għas-subizzjoni trid tkun gravi u fiżika jew, f'ċirkostanzi eċċezzjonali biss, waħda morali". (Ara wkoll App. Ċiv: 12.12.1975 fil-kawża fl-imsijiet **Paul Grixti vs Direttur tax-Xoghlijiet Pubbliċi**; u l-kawża fl-ismijiet **Joseph Naudi Montaldo noe vs Emmanuel Xuereb** deċiża mill-Prim Awla tal-Qorti Ċivili fis-27 ta' Frar 1995).*

That in the matter of **Beacom vs Spiteri Staines** decided by the First Hall, Civil Court, on the 9 December 1993 (Kollez. Vol: LXXVII.iii.195) held "*Illi sa minn dejjem, il-Qrati tagħna qiesu li jagħmlu differenza bejn il-kontumaċja b'tort u dik ġustifikabbli. Huma ssoktaw b'din il-linja wkoll sa dawn l-aħħar żminijiet u għarfu u fissru bejn dik il-parti mħarrka li turi disinterest assolut u l-oħra li turi kull fehma li tikkontesta l-kawża u li ma lahqitx għamlet dan jew ma lahqitx użat il-mezzi li tagħtiha l-ligi għal raġuni li ma kinitx tahti għaliha. (Ara wkoll il-kawża fl-ismijiet **Francis Cutajar et vs Mariano Farrugia et** deċiża mill-Prim Awla tal-Qorti Ċivili tal-5 ta' Mejju 2011).*

Considers

That the claimant confirmed under oath the contents of the document entitled '*Comprehensive Letter Detailing the Dispute with Rado Ltd*' attached to the initial notice of claim, and confirmed that the financial damage suffered in actual fact exceeded the sum being claimed, as the financial damage allegedly incurred consists of:

- €9,041.75 to Rado Systems, who failed to deliver the project even after 67 calendar days.
- €9,1-55 to Kibitec for redoing Rado Systems' work (23 calendar days)



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- Between €2,500 to €3,000 for additional repainting of the living area and drainage work by Blue Star Project.
- €250 for rescheduling the tickets of my 16 year-old nieces
- Additional costs for rescheduling the delivery of the kitchen and other materials.

Considers

The Tribunal further notes that the claimant has failed to explain or prove to the satisfaction of the Tribunal his juridical interest in these proceedings. It was Marketa Rusenkova who commissioned the work and it is not clear to the Tribunal whether Marketa Rusenkova and the claimant are related, whether they co-own the property in question in Swieqi, or whether Marketa Rusenkova is employed by the claimant or the other way round. The Tribunal is not even sure who paid the payments to the defendant company; that is whether it was Marketa Rusenkova or the claimant. The Tribunal notes that on 14 July 2023, the claimant corresponded with the defendant company and said *“Please note that all payments are made once a week every Friday. Your invoice is included in the batch of today”*. The signature block of the claimant is ‘Sam Safavi – Portfolio Manager – Director’. This adds more uncertainty and it would have been opportune for the claimant to call upon Marketa Rusenkova to testify and explain her involvement in these proceedings.

Considers

This Tribunal agrees with the defendant company’s submission that it is a well-founded principle at law that the mere fact that a defendant is declared as contumacious does not



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mean, nor should it be construed, as an admission on its part of the claim. Moreover, the contumacious state of a defendant does not in any manner reduce or limit the burden of proof on the part of the claimant to bring forward the best available evidence, as required by law, for its claims to be upheld.

This Tribunal notes that Article 562 of Cap. 12 of the Laws of Malta provides that "*Saving any other provision of the law, the burden of proving a fact shall, in all cases, rest on the party alleging it*" and Article 559 states "*in all cases the court shall require the best evidence that the party may be able to produce*".

The Tribunal notes that it is an established principle that the parties to a contract of works may terminate their contractual obligations unilaterally without any obligation to give reasons, much less valid reasons for this: the effects of termination of a contract of works are regulated by Article 1640 of the Civil Code which provides that the owner may terminate the contract at any time, even if the work has already begun. The Tribunal observes that this legal provision constitutes a derogation from the fundamental principle of contract law that in a bilateral or synallagmatic contract, neither party may unilaterally decide to terminate a contractual relationship entered into with another party. In the particular contract of works, the law requires that the person who awarded the work, in this case the claimant, may choose to terminate the contract at any time, so much so that the law expressly allows that termination may be made even if the work has already begun. In addition, the law also provides that the contract is terminated immediately as soon as the person who awarded the work informs the contractor, by any means, of his decision to terminate the contract, and this without the need for any authority or confirmation from the court. This option will take effect immediately upon notice being given to the contractor, be it even verbally.

In this regard it was stated as follows in the case **Cutajar Construction Limited vs Gregoire**, Court of Appeal, decided 29 March 2019:- "*That the essence of such a right is its*



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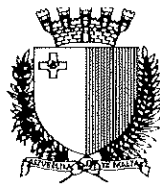
unilateral aspect and it appears that such a right is built on what is provided for in article 1671 of the Italian Civil Code. As explained in this context, tale diritto puo` essere fatto valere senza darne giustificazione alcuna e senza necessita` di accettazione dell'altro contraente, trattandosi di recess ad nutum, che si perfeziona con la notizia datane all'appaltatore e al prestatore d'opera, e che puo` essere esercitato in qualsiasi momento successivo alla conclusione del contratto, e, quindi, sia quando le opere non abbiano avuto ancora inizio, sia nel corso della loro esecuzione sia in epoca prossima al loro compimento.”¹

However, in such a case, the reason why the client makes such a choice is very relevant, and this is because if he has good reason to terminate the contract, he will only be obliged to pay the contractor a sum representing the contractor's costs and the value of the work after taking into account their utility, as well as the damages suffered by the client himself. If, moreover, the client does not have a good reason for terminating the contract, he must pay the contractor a sum not exceeding all the costs incurred and the value of the work awarded, together with any other sum as provided for in subsection (2) of Article 1640 of the Civil Code.

1640. (2) If the employer has no valid reason for the dissolution, he is to compensate the contractor for all his expenses and work and to pay him a sum to be fixed by the court, according to circumstances, but not exceeding the profits which the contractor could have made by the contract.”

Therefore, it is necessary to establish whether the unilateral termination of the contract on the part of the claimant was for good reason because, as we have seen, the existence or otherwise of a valid reason for termination is decisive for establishing the respective rights and obligations of the parties in connection with the payment of the contract costs.

Translated to: “such right may be exercised without any justification and without the need for acceptance by the other party, being a withdrawal ad nutum, which is perfected with the notification given to the contractor and the service provider, and which may be exercised at any time subsequent to the conclusion of the contract, and, therefore, whether the works have not yet begun, during their execution, or in a period close to their completion.”



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Having seen the evidence produced, the Tribunal does not agree that it was sufficiently proven that the parties agreed that the contract had to be completed by a particular date. Therefore, from this perspective, the Tribunal does not agree that the claimant had a valid reason to terminate the contract because the works were not completed within his expected timeframe. The Tribunal does not agree that there was any excessive and culpable delay on the part of the defendant company in completing the contract, much less any delay that constitutes a valid reason for terminating the contract.

With respect to the claimant's reliance on incidents involving the police, the Tribunal finds that such references are inadmissible as evidence in these proceedings. The claimant did not summon any police officers to testify under oath, nor were any official police reports formally exhibited as evidence in the acts of the case. In the absence of such corroborating testimony or documentary proof, the Tribunal cannot take these allegations into consideration.

Furthermore, the claimant failed to discharge the burden of proof in relation to the alleged deficiencies in the works carried out. No independent court-appointed expert was requested, nor was any privately engaged expert report submitted to establish, with the required degree of certainty:

- i) the precise scope of the works that were left incomplete;
- ii) the value of the works that were executed but were allegedly defective; and
- iii) the costs reasonably required to complete, rectify, or redo the works to bring them into conformity with contractual obligations or industry standards.

In the absence of such technical and evidentiary support, the Tribunal is not in a position to make a determination on these matters based on mere allegations or the claimant's subjective assessment.



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All this means that in these circumstances the claimant has failed to meet the burden of proof, on a balance of probabilities by a preponderance of the evidence, and thus the claimant is not entitled for any refund or compensation.

Decide

For the reasons set out above, the Tribunal decides the case and rejects the claimant's request.

Costs to be supported by the claimant.

Dr Martha Mifsud LL.D.

Arbiter