



FIRST HALL OF CIVIL COURT

HON. JUDGE TONI ABELA LL.D.

Sitting of Monday, the 7th day of October, 2019

Case number 4

Application number 461/17TA

Nemea Bank p.l.c. (C-45026)

vs

**Liberi Oy of Torikatu 3 A 5 15110 Lahti, Finland with company
registration number ID 08613901**

and

**Pasi Tapani Tinnilä of Tenavankatu 27B, 15170 Lahti, Finland holder
of Finnish identity card number 507465465**

The Court:

Having seen the sworn application of plaintiff Bank of the 27th of May 2017 sworn by Fabio Axisa on the same day by which it premised the following:

1. “That the applicant Bank was licensed to provide banking services in Malta in terms of the provisions of the Banking Act (Chapter 371 of the Laws of Malta);
2. That on the seventh (7th) of August 2014 the applicant Bank entered with the respondent company Liberi Oy, a company registered in Finland with company registration number ID 08613901 and with its registered office situated at Torikatu 3 A 5 15110 Lahti, Finland and with the second respondent Mr Pasi Tapani Tinnilä, holder of identity card number 507465465 in his personal capacity as a guarantor of the respondent company Liberi Oy, into a Loan Agreement (document herewith attached and marked as DOK NB 1) after a Term Sheet dated seventh (7th) of August 2014 (document also attached and marked as DOK NB 2);
3. That by means of the said Loan Agreement dated seventh (7th) of August 2014 the applicant Bank granted a loan to the first respondent Liberi Oy of up to a maximum of two hundred thousand euro (EUR 200,000) according to the terms, conditions and detailed guarantees contained in the same Loan Agreement and the Term Sheet dated seventh (7th) of August 2014 which Term Sheet contractually forms part of the Loan Agreement. On this loan the second respondent Pasi Tapani Tinnilä appeared as a guarantor in solidum with the first respondent in terms of the applicable law of the contract;
4. That the respondents or any one of them withdrew the amount indicated in the Loan Agreement and this in accordance with the Drawdown Request dated eighth (8th) of August 2014 herewith attached and marked as Document NB 1A, which Drawdown Request was duly confirmed by the guarantor Pasi Tinnila;
5. That subsequently on the twenty-second (22nd) of September 2014, the applicant Bank entered into a second Loan Agreement (document herewith attached and marked as Document NB 3) after a Term Sheet dated twentieth (20th) of September 2014 (document also herewith attached and marked as DOK NB 4), with the same respondent company Liberi Oy and with Mr Pasi Tapani Tinnilä in his personal capacity as a guarantor of the respondent company Liberi Oy;
6. That by means of the said Loan Agreement dated twenty-second (22nd) of September 2014, the applicant bank granted a loan to the first respondent of up to a maximum of two million, two hundred and fifty thousand euro (EUR 2,250,000) according to the terms, conditions and detailed guarantees contained in the same Loan Agreement and the Term Sheet dated twentieth (20th) of September 2014 which Term Sheet contractually forms part of the Loan Agreement. On this loan the second respondent Pasi Tapani Tinnilä

appeared as a guarantor in solidum with the first respondent in terms of the applicable law of the contract;

7. That the respondents or any one of them withdrew the amount indicated in the Loan Agreement and this in accordance with the Drawdown Request dated twenty-second (22nd) September 2014 herewith attached and marked as Document NB 3A, which Drawdown Request was duly confirmed by the guarantor Pasi Tinnila;
8. That the respondents or any one of them failed to pay the amounts due by them and therefore defaulted on one or more of the terms and conditions of the loan above mentioned including clauses number 5.2 and 6 of the two Loan Agreements and the corresponding clauses in the two Term Sheets;
9. That the said default gave rise to an event of default in terms of Clause number 12 of the two Loan Agreements and it was for this reason that on the 21st of April 2017 the applicant Bank initiated the contractual mechanism contemplated therein and agreed to by the parties and sent both the respondents two notices: (1) 'Notice for Payment regarding Loan to Liberi Oy as per Loan Agreement dated 7 August 2014' and (2) 'Notice for Payment regarding Loan to Liberi Oy as per Loan Agreement dated 22 September 2014' (documents herewith attached and respectively marked as DOK NB 5 and DOK NB 6);
10. That through the 'Notice for Payment regarding Loan to Liberi Oy as per Loan Agreement dated 7 August 2014', the applicant Bank requested the respondents Liberi Oy and Mr Pasi Tapani Tinnilä as follows:

"Accordingly through this letter, the Bank is (i) declaring that the Loan, all interest accrued and all other sums payable by the Borrower under the Loan Agreement and/or the Term Sheet are immediately due and payable; (ii) terminating all or any obligations of the Bank under the Loan Agreement and/or the Term Sheet; and (iii) therefore calling upon you to pay forthwith to the Bank the sum of twenty-nine thousand nine hundred and seventy-eight euro and eight-nine cents (€29,978.89), as set out in the attached Schedule A, together with interest until date of effective payment."

11. That through the 'Notice for Payment regarding Loan to Liberi Oy as per Loan Agreement dated 22 September 2014', the applicant Bank

requested the respondents Liberi Oy and Mr Pasi Tapani Tinnilä as follows:

“Accordingly through this letter, the Bank is (i) declaring that the Loan, all interest accrued and all other sums payable by the Borrower under the Loan Agreement and/or the Term Sheet are immediately due and payable; (ii) terminating all or any obligations of the Bank under the Loan Agreement and/or the Term Sheet; and (iii) therefore calling upon you to pay forthwith to the Bank the sum of one million one hundred and eighty-eight thousand four hundred and thirty-seven euro and thirty-one cents (€1,188,437.31), as set out in the attached Schedule A, together with interest until date of effective payment.”

12. That despite the fact that the said notices were duly served on the two respondents in terms of clause 14.1 of the two Loan Agreements (see herewith attached and marked as DOK NB 7), the respondents or any one of them remained to date in default and it is for this reason that these legal proceedings in front of this Court had to be instituted and it is this Court which is competent to hear these legal proceedings in terms of clause number 16.2 of the same Loan Agreements.”

Consequently plaintiff Bank requested the following:

1. “Order and decide that one or more of the events/conditions mentioned in the two Loan Agreements and/or the Term Sheets which form part of the Loan Agreements occurred, particularly but not limitedly since the respondents Liberi Oy and Mr Pasi Tapani Tinnilä or any one of them failed to pay the amounts due by them to the applicant Bank as stipulated and contractually agreed to by the parties and/or since the respondents Liberi Oy and Mr Pasi Tapani Tinnilä or any one of them were in default of other obligations assumed by them in relation to the applicant Bank;
2. Order the respondents or any one of them, to jointly or in any other manner between them, pay the applicant Bank:
 - i. the sum of twenty-nine thousand, nine hundred and seventy eight euro and eighty nine cents (€29,978.89) in terms of the Loan Agreement and the Term Sheet dated seventh (7th) of August 2014, together with further interest from the 21st April 2017 till date of effective payment; and

- ii. the sum of one million one hundred and eighty-eight thousand, four hundred and thirty-seven euro and thirty-one euro cents (€1,188,437.31) in terms of the Loan Agreement and the Term Sheet dated twenty-second (22nd) of September 2014 and twentieth (20th) of September 2014 respectively, together with further interest from the 21st April 2017 till date of effective payment.

With costs against the respondent who is from now summoned on oath.”

Having seen that respondents notified according to law with the judicial acts, failed to present a sworn answer within the time prescribed by the law. This means that they remained in default and in a the state of contumacy;

Having seen all the evidence presented by plaintiff Bank during the course of these proceedings by way of witnesses viva voce or otherwise and as well all other documentary proof annexed with the sworn application and abundantly produced during the course of the proceeding by plaintiff Bank;

Having seen all the records of the case;

Having heard the final submissions of legal counsel to plaintiff Bank during the sitting of the 10th of June 2019;

Having seen that during that same sitting, in view that respondents are in default and in a state of contumacy, notwithstanding that they were given time to present written submissions in terms of article 158 (10) of Chapter 12 of the Laws of Malta, they failed to make any such submissions;

Having seen that the case has been adjourned for today for the delivery of judgement;

Now therefore:

Points of facts

1. The plaintiff Bank entered into two loan agreements with respondent Company *qua* the principal debtor and the other respondent in his personal capacity as a guarantor, which agreements are respectively dated 7th August 2014 and 22nd September 2014 (vide Dok NB 1 and Dok NB 3 a` fol 13 and 28). Each of the said contracts was respectively subject to a Term Sheet dated 7th August 2014 and another one dated 20th September 2014 (vide Dok NB 2 and Dok NB 4 a` fol 24 and 39).

2. By means of the first agreement, plaintiff Bank granted a loan to respondent Company up to a maximum of two hundred thousand Euros (€200,000) and by the second agreement granted another loan up to two million and two hundred and fifty thousand euros (€2,250,000). From the two documents respectively dated 8th August 2014 (a` fol 27) and 22nd September 2014, the amounts subject of both loans were drawn down by respondent Company. These loan withdrawals were both signed by respondent Pani Tinnila.

3. By means of a notice for payment dated 21st April 2017 (a` fol 43) plaintiff Bank wrote to the respondents, informing them that the borrower was in breach of its obligations under the agreement of the 7th August 2014 and the relative Term Sheet, amongst others by failing to pay on due date, the amount of €29,266.73 payable in terms of clauses 5.2 and 6 of the loan agreement and the relative clauses of the Term Sheet. They were also informed that this was in breach of clause 12 of the said loan agreement. Therefore for reasons better explained in that letter, plaintiff Bank informed the respondents that all outstanding amounts under that loan agreement had immediately become due and payable. This meant that plaintiff Bank was terminating all it's obligations under the said loan agreement and was demanding that the mentioned amount be forthwith paid along with accrued interest.

4. By means of another notice for payment also dated 21st April 2017 (a` fol 43) plaintiff Bank wrote to the respondents, informing them that the borrower was in breach of its obligations under the agreement of the 22nd September 2014 and the relative clauses of the Term Sheet for having failed to pay on the agreed date, the semi annual interest of €39,970.66. They were accordingly informed that this was in breach of clause 12 of the said loan agreement. This meant that plaintiff Bank was terminating all it's obligations under the said loan agreement and was demanding that

the amount of €1,188,437.31 be paid immediately along with interest that had accrued up to that time.

5. Following the said notices the present suit was filed against the respondents, demanding amongst others the payment of all the above amounts along with the relative interest on the capital from respondent Company as the principal debtor and the respondent Pasi Tapani Tinnila as guarantor meaning surety according to law.

Points of Law

6. In its simplicity, the legal aspects of the present suit consists in a breach of contract regarding the above mentioned two loan agreements. The matter is regulated by article 1146 of the Civil Code which states that *“Payment means the performance of an obligation, whether the subject-matter of the obligation is to give or to do.”* In the present case the subject matter consists in a pecuniary obligation (Vide **Appeals Court Decision of the 7th July 2010 per Judge Philip Sciberras in the names of APS Bank Ltd -vs- Francis Xavier Micallef**). According to plaintiff Bank, respondent Company is in default of payments and therefore in contractual breach amongst others of clauses 5.2 , 6 and 12 of the respective loan agreements.

7. On the other hand, the other respondent, as per signed declarations respectively dated 7th August 2014 and 22nd September 2014 (a` fol 22 and 37) accepted to stand as guarantor in his personal capacity. This means that according to law he chose to guarantee the proper observance of all obligations undertaken by the principal debtor as per loan agreements above mentioned. Consequently he accepted to stand as a surety (*“garanti”* in the maltese legal language). In deed guarantor and surety are frequently used interchangeably.

8. In this regards the Court makes reference to article 115 of the Commercial Code where in the following is stated:

“(1) In commercial obligations, co-debtors are, saving any stipulation to the contrary, presumed to be jointly and severally liable.

(2) The same presumption shall extend to a surety, even if not a trader, who guarantees a commercial obligation.”

9. The Court has no hesitation to state that it considers the subject matter of this suit as being a commercial obligation par excellence in all it's legal aspects. Furthermore article 1941 of the Civil Code states that *“In commercial matters, the surety is always, in the absence of an agreement to the contrary, presumed to be bound jointly and severally with the debtor.”* Our Courts have always expressed themselves in the following manner on the matter:

“Skond l-artikolu 1941 tal-Kodici Civili: ***Il-garanti, fi hwejjeg tal-kummerc, meta ma jkunx hemm ftehim xort’ohra, jitqies dejjem li hu obbligat in solidum mad-debitur.*** Dan ifisser li jekk jirrizulta pruvat li l-garanzija favur id-debitur kienet saret fil-kontest ta’ negozju naxxenti minn operazzjoni kummercjali, il-ligi tippresumi li l-garanzija hija in solidum. Jispetta ghalhekk lill-intimati li jaghmlu l-prova li l-garanzija moghtija ma kienitx ghal hwejjeg li ma kienux tal-kummerc, u fin-nuqqas tirbah il-presunzjoni tal-ligi li tali garanzija kienet wahda solidali. Fil-kaz in ezami jirrizulta li l-garanziji inghataw ghal skop kummercjali ghalhekk ghandha tirbah il-presunzjoni tal-ligi li l-garanzija hija wahda solidali (Vide **Decision of First Hall Civil Court in the names of HSBC Bank Malta Plc -vs- Frank Dimech et of 3rd October, 2008 per Justice Geoffrey Valenzia.**)

Consideration of the subject matter

10. The Court examined the deposition of Fabio Axisa who is appearing on behalf of plaintiff Bank as authorised by the Competent person in terms of a legal notice of the 27th April 2017 issued by virtue of Chapter 371 of the Laws of Malta. The said witness explains clearly the facts that led the plaintiff Bank to initiate the present proceedings (vide depositions a` fol 394B to 394H). He explains that before taking this decision *“we were cautious in ensuring that the loans were indeed granted by the plaintiff Bank and withdrawn by respondents.”* This tallies with the signed documents of withdrawals signed by respondent Pasi

Tinnila (a` fol 27 and a` fol 42). This meaning that the amounts of monies subject matter of the loans above mentioned were materially taken by Respondent Company a principal debtor.

11. The witness continues to explain that after having diligently established that the respondents were in default as per loan agreements in question, two Notices of Payment were sent to inform them as per paragraphs 23 and 24 of the deposition of the said Fabio Axisa. Each of the said withdrawals states that it was being made in terms of the respective loan agreements. He further explains that “In our capacity as Competent Person, we diligently ensured that the said Notices were duly served on and received by both respondents in accordance with clause 14.1 of the two loan agreements agreements even though the respondents received our notices ordering to pay the plaintiff Bank, all amounts remained due. To date no further payments were made and therefore the respondents remain in default.”

12. Byron Dalli, being a senior Associate with the audit firm Pwc, the Competent Person representing plaintiff Company in these proceedings, after explaining under oath in detail the transactions in question and confirming much of what Fabio Axisa stated, continued as follows:

“Following the last repayment that was made as per above , the Respondents stopped making the necessary re-payments for reasons unknown to us. As Competent Person and therefore , in view of the

respondent's breach of the Loan Agreements and Term Sheets, in particular clauses 5.2 and 6 of both the Agreements corresponding Term Sheets , we triggered the event of default clause (clause 12) of the two Loan Agreements and called in the loans.” (a` fol 232)

13. The Court refers to the fact that respondents were notified according to law with the present proceedings, yet they remained in default. This, in itself, does not amount to an admission of the claims. The plaintiff Company still has the burden of proving its case as if they were contested (vide **Decision of the First Hall Civil Court of the 3rd April 2003 in the names of Waldonet Limited vs David Thake**).

14. As regards the substantive claims of the plaintiff Company, besides hearing the witnesses produced during the course of these proceedings, the Court had the occasion to examine the voluminous amount of documents exhibited by plaintiff Company. It has amply transpired to the Court, that the respondents indeed took loans by virtue of the two Loan Agreements and relative Term Sheets as mentioned above. It also transpired, that for unknown reasons to plaintiff Bank, respondents at one time stopped to effect repayments that fell due according to the said agreements and Term Sheets and this in breach of their contractual obligations. Plaintiff Company managed to prove that notwithstanding the relevant Notice of payments sent to the respondents in the light of clauses 5.2 , 6 and 12 of the above mentioned agreement,

respondents failed to effect the payments requested therein and therefore remained in clear breach of their contractual obligations. The Court therefore finds, that the claims of plaintiff Company are founded in fact and law vis-a-vis both respondents, as to the respondent Company qua principal debtor and the other respondent as guarantor and surety.

Decision

Now therefore, in view of the above reasons and considerations the Court hereby:

Acceeds to the first demand of plaintiff Company by ordering and deciding that one or more of the events/conditions mentioned in the two Loan Agreements and/or the Term Sheets which form part of the Loan Agreements occurred, particularly but not limitedly since the respondents Liberi Oy and Pasi Tapani Tinnilä or any one of them failed to pay the amounts due by them to the plaintiff Company as stipulated and contractually agreed to by the parties and/or since the respondents Liberi Oy and Pasi Tapani Tinnilä or any one of them were in default of other obligations assumed by them in relation to the plaintiff Company.

Consequently **acceeds to the second demand** of plaintiff Company and orders and condemns the respondents, jointly and severally between them, to pay to plaintiff Bank:

- (1) the sum of twenty nine thousand, nine hundred and seventy eight Euro and eighty nine cents (€29,978.89) along with interest that has accrued to date of eight thousand, three hundred and eleven Euro and seventy four cents (€8,311.74) amounting in all to thirty seven Euro five hundredes and seventy eight Euro and forty seven cents (€37,578.47) in terms of the Loan Agreement and Term Sheet dated 7th August 2014 with further interest according to law from today up to the time of effective payment.

- (2) the sum of one million one hundred and eighty eight thousand, four hundred and thirty seven Euro and thirty one cents (€1,188,437.31) along with interest that has accrued to date of one hundred thirty five thousand, eight hundred and fourty one Euro and eighty two cents (€135,841.82) amounting in all to one million two hundred eight three thousand, eight hundred Euro and eighty two cents (€1,283,800.82) in terms of Loan Agreement and Term Sheet dated 22nd September 2014 and 20th September 2014 respectively along with further interest according to law from today until effective payment is made.

Expenses of these procedures are to be borne by respondents.

Judge Toni Abela

Deputy Registrar