MALTA

Court of Appeal
(Inferior Jurisdiction)

HON. JUDGE
LAWRENCE MINTOFF

Sitting of the 11th March, 2020

Appeal Number: 32/2018/1LM

Simonds Farsons Cisk plc

vs.

1. Jan Pantzar
(I.D. Card number 110505(A))
2. Dolittle & Fishmore Limited (C79128)

The Court,

Preliminary

1. This is an appeal filed by appellant **Jan Erik Pantzar** (hereinafter referred to as "appellant") from the judgement (hereinafter referred to as "the judgment") delivered on the 28 March, 2019, by the Court of Magistates (Civil)

(hereinafter referred to as "the First Court"), whereby that Court upheld the demands of plaintiff company **Simonds Farsons Cisk p.l.c.** (hereinafter referred to as "plaintiff company") and thereby rejected the pleas of defendants.

Facts

2. The facts of the present proceedings are as follows. On 1st April, 2017, the appellant in his personal capacity as well as on behalf of defendant company **Dolittle & Fishmore Limited** (hereinafter referred to as "defendant company") signed a loan agreement[1] with plaintiff company whereby it was agreed that plaintiff company would grant a loan of €10,000 to appellant personally and in his abovementioned capacity. On the 4th April, 2017, Jan Pantzar in both the said capacities signed a Credit Application Form[2] with plaintiff company and another three companies, namely Farsons Beverage Imports Co. Limited, Quintano Foods Limited and Ecopure Company Limited, where the main obligation was to pay in full all invoices issued to him *pro et noe* for various products to be supplied by the named companies. Payments were eventually not honoured in full and plaintiff company filed proceedings before the First Court against appellant and defendant company.

[1] *Fol.* 20 of the court file.
[2] *Fol.* 15 of the court file.

Merits of the case

3. The said proceedings were filed on 16 February, 2018, demanding the payment of the sum of €14,229.43, together with interest as from the date of the relative invoice and judicial expenses. This sum included the amount of €10,556.51 allegedly due to plaintiff company for products sold and assigned to appellant and defendant company, as well the amount of €3,662.92 allegedly due as the outstanding balance on the loan advanced to the said appellant and defendant company.

4. Appellant together with defendant company filed their reply on the 24 April, 2018, whereby they pleaded that (a) by way of a preliminary plea appellant had no juridical relationship with plaintiff company and therefore he should be declared non-suited; (b) plaintiff company's demands against appellant were unfounded both in fact and in law and should be rejected with costs; (c) as to the merits and without prejudice to the above, plaintiff company must prove that it did sell and consign to defendant company the merchandise listed in Dok. A and in Dok. B attached to their claim and also that the amount claimed was actually due.

The Appealed Judgment

5. The First Court made the following considerations in its judgment of the 28th March, 2019:

"The Court will first consider the preliminary plea raised by defendant Jan Pantzar regarding his standing as proper defendant to the plaintiff's action. The issue of the proper defendant in litigation is a matter of public policy and is a plea peremtory of the action, so as such it maybe raised at any stage of the proceedings (even at an appellate stage) and could be raised by the Court *ex officio.*

It is imperative at this point to underline that defendant Pantzar maintains that he is not the proper defendant with respect to the plaintiff's action, because he claims that he never ordered or purchased any merchandise from said company and therefore he has no legal relationship with the plaintiff.

On its part, plaintiff company insists that both defendants, that is Dolittle & Fishmore Limited and its director Jan Pantzar, are properly suited and that its action can validly survive against both of them in view of the fact that both the credit application agreement (Dok. CSH) and the loan agreement (Dok. CSH1) were entered into and signed by Jan Pantzar both in his personal capacity and as representative on behalf of the company Dolittle & Fishmore Limited.

The Court would point out that in order for the defendant to be declared non-suited in plaintiff's action, it would be necessary for him to show that no juridical relationship whatsoever exists between him and plaintiff. The determination of this plea does not require any examination of the merits of the plaintiff's claim or any ascertainment of the legitimate subject of plaintiff's action. Indeed, it has been consistently held that in the determination of such a plea, the Court must avoid considering and making any pronouncement that touches the merits of the claim and the Court must therefore limit its considerations to establish whether or not the plaintiff could have legitimately directed its action against the defendant who pleads non-suit, that is, whether or not defendant could reasonably be considered as the legitimate subject of a judicial pronouncement of plaintiff's claim.

It has been held by the Court of Appeal that:-

"… għal fini tal-valutazzjoni tal-leġittimazzjoni tal-kontradittorju wieħed għandu neċessarjament u ġuridikament jieħu rigward għall-prospettazzjoni tal-attur bl-azzjoni minnu intentata u mhux għall-eżitu tal-kontroversja. Fi kliem ieħor, jekk il-konvenut huwiex ukoll il-leġittimu kontradittur jiddependi mill-aċċertament magħmul fuq il-bażi tad-domanda proposta, jigifieri, mir-riżultat persegwit mill-

attur fil-ġudizzju (fn 4 ***Karmenu Mifsud vs Mariano D'Amato –*** *deċiża mill-Qorti tal-Appell (Inf.) fil-15 ta' Novembru 2006)."*

The relevant facts of this case, as would result from the acts of the proceedings are as follows:

- Defendant Jan Pantzar requested and was granted, financial support from plaintiff company in the form of a loan and credit facilities, for a new project that was being undertaken by him, consisting in the opening of an outlet called Dolittle & Fishmore.

- A loan agreement was entered into on the 1st April 2017 (Dok. CSH1) (fn 5 Fol. 20 *et seq.*) between plaintiff company and *"Mr. Jan Pantzar … … in his personal capacity and on behalf of Dolittle & Fishmore Ltd, C-79128 … jointly and severally …",* whereby a loan in the sum of ten thousand Euro was granted by plaintiff in favour of the said persons. On the same date, Jan Panztar *"in personal capacity and obo Dolittle & Fishmore Ltd, C-79128"* signed a bill of exchange (fn 6 Fol.23) in favour of plaintiff company, in acceptance of the said sum of €10,000.

- According to plaintiff company, defendants owe an outstanding balance in the sum of €3,662.92 on this loan (fn 7 Vide Affidavit of Robert Galea, fol. 27). This amount is comprised of the entries shown in the statement of account Dok. B (fn 8 Fol.4).

- A further agreement was entered into between plaintiff company and Dolittle and Fishmore Limited (fn 9 Referred to, in the agreement, as the "Re-Seller") on the 4th April 2017 (Dok. CSH) where the company was granted a 30 day credit for payment of all invoices for products supplied by plaintiff company under the terms and conditions. This agreement was signed by defendant Jan Pantzar immediately under a printed declaration, forming part of the agreement, that reads as follows:

  "In conjunction with this application for credit, I verify that I have read and understood the above terms and conditions and agree to be bound by all the conditions above.

  Signed by the Director or Owner/Spouse, personally and on behalf of the Re-Seller." *(fn 10 Fol. 17)*

- The amount being claimed by plaintiff company from defendants in these proceedings representing the outstanding balance on invoices for the supply of

products, which were issued between 20th March 2017 and 30th October 2017 in the name of "Dolittle and Fishmore", is that of €10,556.51 as would result from the statement of account dated 15th February 2018 (Dok.A) (fn 11 Fol. 2 and 3.).

Having considered;

That it is a settled principle of the law of obligations that a person is deemed to have promised or stipulated for himself, unless the contrary is expressly established by law, or agreed upon between the parties, or appears from the nature of the agreement (fn 12 Art. 998 of Chapter 16). Furthermore, a person cannot by a contract entered into in his own name bind or stipulate for anyone (fn 13 Art. 999(1) of Chapter 16), and unless it transpires expressly from any covenant that it is being stipulated for the benefit of a third party (fn 14 Art 1000 of Chapter 16), an agreement carries its effects and shall be operative only between the contracting parties and shall be neither of any prejudice nor any advantage to third parties, unless in those cases established by law (fn 15 Art 1001 of Chapter 16). The presumption that a person contracts in his own name is a *juris tantum* presumption which can be rebutted by cogent proof brought forward but in case of doubt, the presumption prevails and one is deemed to contract in one's own name (fn 16 Civil Appeal decided on 31.10. 2008 in **Charles Thorne et vs John Mallia Borg et.**).

A juridical relationship, furthermore, may arise out of various situations, not only within a contractual context. These situations also give rise to legal effects tantamount to a reciprocally binding relationship and which would found a legal relationship (fn 17 **Joseph Tabone vs Capece Company Limited et**, decided by the First Hall of the Civil Court on the 6th May 2014).

As a matter of fact our Courts have held that:

"B''relazzjoni ġuridika' wieħed neċessarjament jifhem dak l-att jew pluralità ta' atti konnessi li jimmiraw għall-produzzjoni ta' effett ġuridiku fl-ambitu tad-drittijiet bejn żewġ soġġetti jew aktar. Tali att jew atti huma, mbagħad, ravviżabbli minn manifestazzjoni ta' volontà, ossija ta' dik l-imġiba li in bażi għaċ-ċirkostanzi li fih tavvera fit-traffiku ġuridiku tnissel fid-destinatarju t-tifsira li l-parti trid tipproduċi l-konsegwenzi ġuridiċi predetti." (fn 18 Civil Appeal decided on 27.11.2009 in **Perit Robert Musumeċi vs Nażżareno sive Reno Fenech**.)

Having considered;

That in order to establish whether juridically, there exists a juridical *nexus* between plaintiff company and Jan Pantzar in his personal capacity, the Court must begin by considering whether on a *prima facie* basis it would result that the said defendant had a material involvement in the transactions on which the present action is founded. In such a case, the defendant will be deemed to be answerable to the plaintiff's demand and the Court can proceed to examine defendant's pleas on the merits (fn 19 Ara fir-rigward: **Frankie Refalo nomine vs Jason Azzopardi et** – deċiża mill-Qorti tal-Appell fil- 5 ta' Ottubru 2001.).

In this case, as far as the **amount claimed for supplies sold and delivered to defendant company** is concerned, the Court is firmly of the belief that a very manifest legal and contractual relationship exists between plaintiff company and defendant Jan Pantzar in his personal capacity, arising from the fact that said defendant evidently undertook to be bound personally for by the credit terms and conditions granted to defendant company. While it is true that the products supplied by plaintiff company were purchased by and delivered to defendant company Dolittle & Fishmore Limited which is the company named in the Credit Application form as "*the Re-Seller",* and in no way does it result that the supplies were made to Jan Pantzar personally, the latter's involvement in the transactions relating to the supply and delivery of products to Dolittle & Fishmore Limited is evident from the capacity in which he expressly signed the agreement for the granting of credit terms.

In so far as the **loan agreement** is concerned, the Court is of the same considered opinion. Jan Panztar himself in his Affidavit confirms unequivocally that he *"opted to go forward"* with the loan agreement knowing that personally, he would be severally liable with the defendant company for the loan repayments. There is therefore no doubt that even in this context, a legal and contractual relationship exists between plaintiff company and defendant Pantzar which mutually binds the parties and which falls perfectly within the parameters of plaintiff's action as proposed.

All this, however, is not to say that the Court finds liability in defendant Pantzer for the payment of the debt claimed by plaintiff: this is an issue which will have to be definitely determined after enquiry into the merits.

However, the Court cannot agree that defendant Pantzer is non-suited and consequently, will not be upholding his plea that he is not the proper defendant or that he is not answerable to plaintiff's claims.

Having considered;

Dolittle & Fishmore Limited's Plea

That on the merits of the claim, defendant company Dolittle & Fishmore Limited does not contest that it is the proper defendant; its only defence (fn 20 Third plea in the Reply dated 24th April 2018.) is founded on the assertion that plaintiff would need to prove that it has effectively sold and delivered unto said company the products for which the invoices listed in statement of account Dok. A were issued, and that the amount indicated in Dok B is indeed due.

The Court considers that given the statement of account (Dok.A) which clearly lists the invoices that were issued for the supply of products to defendant company on an account entitled "Dolittle & Fishmore", and given also that defendant company in its evidence (fn 21 Affidavit of Jan Pantzar and cross-examinations of the witnesses produced by plaintiff company) never even alleged that the products were not purchased by or delivered to it, the onus of proving that the debt of €10,556.51 is due, has been duly discharged by plaintiff company according to Law. After all, plaintiff company also exhibited the agreement styled "Credit Application Form", in virtue of which credit terms for the payment of supplies were granted to defendant company which, in turn, undertook to pay for all invoices for products supplied by the plaintiff company.

Consequently, the Court has no reservations in rejecting defendant company's plea in so far as the claim for payment of invoices for supplies made to said company, is concerned, and maintains that the sum of €10,566.51 claimed by plaintiff company, which sum is comprised of those entries listed in the relative statement of account (fn 22 Vide Dok. A), apart from having been duly proven is owed by defendant company. After all, it is evident from the statement of account exhibited as Dok. A that the invoices for products supplied to defendant company were not honoured within the 30-day credit period that, according to the Sales Manager of plaintiff company (fn 23 Robert Galea), was granted to the company in virtue of the Credit Application agreement.

Having considered;

That as far as the loan agreement is concerned (Dok. CSH1), the Court considers that no serious contestation of the balance claimed by plaintiff, was tendered by defendant company. The sum of €10,000 that, according to the said agreement, was loaned to defendant company, results also from the statement of the loan account Dok. B as having been paid into defendant company's account on the 24th April 2017. The entries of various repayments and postings result from the said statement and were not disputed by defendant company.

Although it does not result that as such, the company had defaulted on the repayment of the loan in the six-monthly instalments agreed to in clause 5 of Dok. CSH1, the Court observes that according to Clause 10 of the agreement, it was agreed that plaintiff company reserved the right to cancel in its discretion the benefit of time granted for payment of the loan in terms of clause 5.

In any event, the Court is satisfied that there is sufficient evidence in the acts of the proceedings to show that this benefit was cancelled after the credit terms and conditions granted to the defendant company for payment of invoices for supplies, were not adhered to. Although Jan Pantzar asserts that in December 2017 Dolittle & Fishmore Limited was served with a garnishee order filed by plaintiff which prevented further payments from being made, no evidence brought in support of this claim and moreover, the payments he claims to have effected during the month of November 2017, evidently by means of two cheques, were already not honoured in the same month of November, that is, prior to December 2017. This would result amply from the statement Dok. A (fn 24 Entries of 28th November 2017, fol. 3.). Consequently, the Court after weighing all these factors, has no doubt that defendant company is liable for the payment of the entire balance of the loan.

It is therefore the Court's decision that defendant company is the debtor of plaintiff company in the sum of €3,662.92, due by way of the outstanding balance on the amount loaned as per agreement dated 1st April 2017, as would result from the statement of account Dok. B.

Jan Pantzar's Plea

Defendant Jan Pantzer pleads that plaintiff's claims in his regards are unfounded and cannot be acceded to (fn 25 Second plea in the Reply dated 24th April, 2018.).

With reference to the sum claimed for products supplied to Dolittle & Fishmore Limited (Dok. A), as already pointed out, the Credit Application Form (Dok. CSH) is duly signed by defendant Jan Pantzar, who expressly accepted (fn 26 Fol. 17.) to be bound by all conditions of the said agreement, *"personally and on behalf of the Re-Seller"* who, in the agreement Dok. CSH, is defined as Dolittle & Fishmore Limited. Although in his testimony, Jan Pantzar claims that the agreement reached with plaintiff company was in the sense that the responsibility for the payments due for the supply and delivery of products to defendant company, would be solely of the said company, this statement is manifestly contradicted by the express terms of the agreement dated 4th April 2017 and by the personal capacity in which Jan Panztar undertook to accept these terms. After all, clause 10 (fn 27 Fol. 15) of the said agreement signed by Jan Pantzar clearly stipulates that the directors of the company signing the agreement:

"… bind themselves personally to the Company, which accepts, in solidum together with the private company, the the performance of all the obligations under these Terms and Conditions of Credit. In particular, and without prejudice to the generality of the above, they shall be personally liable, in solidum with the private company, for the repayment of all overdue payments and interest due to the Company under this agreement.".

This stipulation leaves no doubt in the Court's mind that Jan Pantzar is personally bound for the payment of any balance due on invoices for supplies sold and delivered to Dolittle & Fishmore Limited, that is in breach of the terms and conditions of the agreement Dok. CSH. Apart from the fact that at no point did Jan Panztar ever dispute the fact that he is a director of and that he was authorized, at least when the two agreements were concluded, to represent and bind Dolittle & Fishmore Limited, Robert Galea testified (fn 28 Affidavit at fol.27) that the plaintiff company had agreed to grant a 30-day credit period to defendant company for the repayment of the invoices for products supplied. Defendants never challenged that the credit period approved by plaintiff was of 30 days. Moreover, it is evident from the statement of account exhibited as Dok. A that the invoices for products supplied to defendant company were <u>not</u> honoured within the 30-day credit period granted in virtue of the Credit Application Form and consequently, the joint and several liability of the director of the Re-Seller in terms of the aforementioned clause 10, came into effect.

It is moreover observed that although Jan Panztar alleged in his testimony that he did not agree that he would be personally liable for the amounts due for products supplied to Dolittle & Fishmore Limited, and asserted that the content of the agreements and the fact that he was binding himself in his personal capacity, was never explained to him, the Court cannot take this allegation seriously. The personal responsibility of the director of the debtor company (the Re-Seller) is not only illustrated in unequivocal terms in clause 10 of the agreement, but is also expressly stated **in bold print immediately above the signature** of director of debtor company on the said agreement. It is also evident that the Credit Application Form (Dok. CSH) is concise and to the point without entering into excessive detail and small-print that would require specific elucidation for its substantial validity. After all, the entire terms and conditions of credit are specified in one single page which leaves no room for doubt about the requirements and consequences of the concession of credit terms.

In view of the above considerations, the Court has no doubt that Jan Pantzar must be deemed as having jointly contracted together with Dolittle & Fishmore Limited for the obligation of payment of the invoices issued to defendant company for products supplied to it, in the event that defendant company breached the credit terms granted in its favour in terms of Dok. CSH. As already established, these credit terms were indeed not honoured by defendant company.

The Court is also of the considered opinion that in this case, the obligation of payment of the overdue invoices has been jointly contracted by the defendants, and is also an indivisible debt in terms of Article 1111 of the Civil Code (fn 29 An obligation is indivisible if, although the thing or fact forming the subject-matter thereof is of its nature divisible, the manner in which such thing or fact has been considered in the obligation does not admit of a performance in part.), such that each of the debtors is liable for the whole of the debt, even though the obligation might not have been contracted jointly and severally in terms of the credit agreement.

Above all however, it must be pointed out that the obligation for the payment of invoices for products supplied to debtor company is undoubtedly a commercial obligation (fn 30 Vide Article 5 of the Commercial Code which defines an *"an act of trade"* as including *"… (c) any transaction relating to bills of exchange; … (e) any transaction relating to commercial partnerships or to shares in such partnerships; …*

(i) any transaction ancillary to orconnected with any of the above acts." Also Article 7, which provides that "*Every act of a trader shall be deemed to be an act of trade, unless from the act itselt if appears that it is extraneous to trade."*)and consequently, in terms of Article 115 of Chapter 13 of the Laws of Malta, the co-debtors are, saving any stipulation to the contrary, presumed to be jointly and severally liable and thus, each of them may be compelled to discharge the whole debt.

Having considered;

That the position of Jan Panztar in relation to the loan agreement contracted with the plaintiff company, is somewhat less complex given that, as already pointed out, the said defendant appeared on the agreement and expressly and unequivocally bound himself in his personal capacity and on behalf of Dolittle & Fishmore Limited jointly and severally. Notwithstanding his testimony under cross-examination, Jan Pantzar testified in his Affidavit that although he did not agree with the stipulation in the loan agreement that he would be jointly and severally liable with Dolittle & Fishmore Limited for the repayment of the loan granted to the said company, *"he opted to go forward".* Defendant therefore, does not effectively dispute his personal and joint and several responsibility to pay the loan.

In view of these considerations, the Court cannot uphold Jan Panztar's plea that he is not responsible for the payment of the outstanding amount due by the defendant company on the loan agreement. As already established, the balance in the sum of €3,662.51 has been not only duly proven to be due from the documents exhibited by plaintiff in support of the debt, but has also been ineffectively contested by defendant.

For the above reasons, the Court cannot but conclude that both defendants jointly contracted in favour of plaintiffs for a loan to be granted to Dolittle & Fishmore limited in the sum of €10,000, and for the payment of outstanding invoices for products supplied to said company. Consequently both amounts claimed by plaintiff, which have been duly proven to the Court's satisfaction, are also due by the defendants *in solidum*.

The Court cannot, therefore, uphold defendants' second and third plea and shall be rejecting them."

The Appeal

6. Appellant filed an appeal on the 16th April, 2019, whereby he requested this Court to *"… uphold his appeal by varying the judgment delivered by the Court of Magistrates on the 28th March 2019, if necessary by upholding his pleas, with costs of both instances against plaintiff company being appealed.".*

7. Appellant declares that he feels aggrieved by the decision of the First Court because it was wrong when it rejected his first and second pleas and thereby the First Court concluded that he is the proper defendant to plaintiff company's action.

The Reply

8. In its reply of the 13th May, 2019, for reasons stated therein, plaintiff company insists that the appeal must be rejected *in toto,* with costs against appellant.

Deliberations of this Court

9. Appellant insists that the First Court was mistaken when it rejected his first and second pleas and concluded that he is the right defendant to the action brought forward by plaintiff company. He submits that he is not personally responsible for the sum claimed as due by plaintiff company

because he always acted on behalf of the defendant company. Without prejudice to this first submission, appellant also submits that the First Court should not have decided that he was to pay *in solidum* with defendant company the entire sum claimed by plaintiff company. After referring to the facts of the case as they result from the evidence presented before the First Court, he points out that the statements exhibited by the plaintiff company marked as Dok. A and Dok. B, are not in his name or in the name of the defendant company. He explains that the sum is divided in two parts. The sum of €10,556.51 represents the price for the merchandise supplied and delivered to defendant company based upon the Credit Application Form, whilst the sum of €3,662.92 is the balance due in accordance with the Loan Agreement entered into by plaintiff company and the appellant in his personal capacity as well as on behalf of defendant company. Appellant insists that he signed both documents in his capacity as director of defendant company. Whilst referring to subarticle 4(4) of Chapter 386 of the Laws of Malta which gives a commercial partnership its legal personality distinct from that of its members, he submits that the evidence itself indicates that he had only appeared on the Credit Application Form on behalf of defendant company and was therefore not responsible for the amount claimed. He says that he had made it clear to plaintiff company that he was acting on behalf of defendant company. In order to support his argument appellant makes reference to the judgment **Anthony Caruana *vs.* John Magro et**[3] decided by the Court of Appeal. He further submits that on the Credit Application Form, it is defendant company which is

[3] 06.10.1999.

indicated as *"the Re-seller"* but not appellant himself. Appellant explains that the merchandise was necessary for a project undertaken by defendant company and delivery of the said merchandise was after all also made to that company. The First Court incorrectly interpreted the terms of the Credit Application Form which state that it was being *"Signed by the Director or Owner/Spouse, personally and on behalf of the Re-Seller"* and it did not consider that he was not a party to that agreement. He insists that his signature appeared on that agreement merely because defendant company is a legal entity and can only act by means of the actions of its representatives. He further submits that from the Credit Application form it is evident that no third parties were involved as guarantors of defendant company's debt and it was therefore only defendant company which is responsible for such debt. If appellant was to be considered as debtor jointly and severally with defendant company, then this part of the Credit Application Form would have been duly filled in.

10. Plaintiff company filed its appeal reply on the 13th May, 2019. It notes that the appellant's plea as to no personal juridical relationship with plaintiff company refers only to the sum of €10,556.51 which represents the price for the merchandise and which is covered by the terms of the Credit Application Form. However that which is stated in this document, namely *"signed by the Director/s or Owner/Spouse, personally and on behalf of the Re-seller"*, leaves no doubt that appellant signed both in his personal capacity as well as on behalf of the defendant company. Article 10 of the said Credit Application

Form, which appellant overlooks or conveniently ignores, provides that *"The Director/s and/or Shareholders of the private company signing this agreement, bind themselves personally to the Company, which accepts,* in solidum *together with the company, to the performance of all obligations under these Terms and Conditions of Credit".* This document represents the *pacta sunt servanda* between the parties and appellant cannot now ignore it. Plaintiff company refers to article 1002 and article 1008 of the Civil Code which refer to the interpretation or otherwise of the terms of an agreement to further re-affirm its argument that Article 10 and that part of the Agreement where appellant signed were not subject to interpretation. It contends that it is a usage of trade that credit terms are only granted to a company or partnership where the director/s bind themselves personally with the said company or partnership. The Loan Agreement was a re-affirmation of the same concept of solidarity between the appellant and defendant company and appellant's argument as to whom the statement was issued and to whom the merchandise was supplied, was completely irrelevant. Irrelevant too is what was discussed and agreed verbally between the parties, and the legal maxim *contra sciptum testimonium, non scriptum testimonium non fertur*, as enunciated in local gurisprudence, was applicable in the present case. Finally, appellant's submission that the part in the Credit Application Form referring to Guarantor had been left blank, was also irrelevant because plaintiff company was suing him as co-debtor *in solidum* with the defendant company in terms of article 1094 *et seq.* of the Civil Code.

11. The Court cannot but confirm the appealed judgment because it finds that all of appellant's submissions are completely unfounded. However prior to presenting its considerations regarding the said submissions, it must be observed, as plaintiff company correctly noted, that appellant's grievance refers solely to the condemnation *in solidum* with defendant company to settle the sum of €10,556.51 for merchandise supplied to said defendant company in terms of the Credit Application Form. Therefore a careful examination of this document is necessary prior to making any legal consideration.

12. The First Court rightly points out that appellant duly signed the Credit Application Form personally and on behalf of defendant company, thereby also expressly accepting to be personally bound by all conditions listed in that document. The relevant part of that document reads as follows:

> "*In conjunction with this application for credit, I verify that I have read and understood the above terms and conditions and agree to be bound by all the conditions above.*
>
> *Signed by the Director/s or Owner/Spouse, personally and on behalf of the Re-Seller*"

13. The above must be read together with Article 10 of the document which stipulates:

> "**10. Private Limited Liability Companies**
>
> The Director/s and/or Shareholders of the private company signing this agreement, bind themselves personally to the Company, which accepts, *in solidum* together

> with the private company, to the performance of all the obligations under these Terms and Conditions of Credit. In particular, and without prejudice to the generality of the above, they shall be personally liable, *in solidum* with the private company, for the repayment of all overdue payments and interest due to the company under this agreement. In the absence of any other agreement, this personal liability will subsist even if the private company is liquidated, wound-up, amalgamated with another company or converted, and notwithstanding any change in the names of the Directors and/or shareholders after the signing of this agreement and/or in the running of the business".

14. The terminology used leaves no doubt as to the personal liability of appellant who signed the document personally and in his capacity as director of defendant company, and in this regard his argument regarding the non-existence of a guarantor on the Credit Application Form cannot be accepted. He does not appear, as he strongly and persistently insists, merely as signatory for and on behalf of defendant company. Contrary to what appellant contends, his liability towards plaintiff company is no different to that of defendant company because he is a jointly and severally bound and this is more than evident from the wording used in the latter part of the document which contains his signature. This is in accordance with article 1089 of the Civil Code which provides for joint and several liability to be expressly stipulated. Thus any verbal agreement to which appellant refers in this context, was eventually overriden by the specific clause in writing to which appellant put his signature. Again, in view of the written agreement, appellant's reference to the judgment delivered by the Court of Appeal in the names **Anthony Caruana *vs.* John Magro et** is also superfluous.

15. In terms of Article 10 of the Credit Application Form, appellant by signing the said document specifically agreed to settle any payments due by defendant company, such as are the facts of the present case. Appellant contends that this cannot be applicable in his regard because he had made it amply clear during the negotiation stage that defendant company was the customer such that all statements were issued in the latter's name and the merchandise was delivered to same. However this Court reiterates that the document eventually superseded any verbal agreement and appellant's liability towards plaintiff company is clear notwithstanding that the statements were issued in the name of defendant company or that he received no benefit from the agreement. It is also pertinent to note that appellant's obligation will persist in the eventuality that defendant company is liquidated, wound-up, amalgamated with another company or converted or if appellant is no longer director.

Decision

For the reasons explained above, this Court rejects appellant's appeal and confirms the appealed judgment in its entirety.

The costs of the proceedings before the First Court shall be as already decided by that Court and those of the present appeal shall be borne by appellant.

Onor. Dr Lawrence Mintoff LL.D.
Judge

Rosemarie Calleja
Deputy Registrar