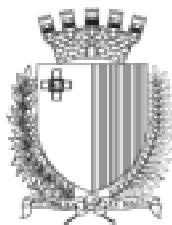

# Court of Appeal

## Judges

## THE HON. CHIEF JUSTICE MARK CHETCUTI
## THE HON. MR JUSTICE JOSEPH R. MICALLEF
## THE HON. MR JUSTICE TONIO MALLIA

**Sitting of Monday 23rd November 2020**

**Number 2**

**Application Number 319/09 JZM**

**Emil Otto Bachet**

**v.**

**Bank of Valletta plc**

**The Court:**

1. Having seen the sworn application brought forward by the plaintiff, Emil Otto Bachet, on the 27th March, 2009, whereby it was claimed that:

> "1. Illi huwa proprjetarju uniku tad-drittijiet kollha relatati ma` Safety Deposit Box no 49, li huwa kien fetah Palace Square, il-Belt Valletta; dan is-Safety Deposit Box sa fejn jaf huwa u sa fejn qalulu giet trasferita sussegwentement lill-fergha tal-Mqabba ; din il-kaxxaforti ta` depositu nfethet f`Gunju 2001 bi skrittura; din l-iskrittura kienet totalment danneggjata u meqruda peress illi d-dokument kienu fil-basement tad-dar tieghu f`Anversa u flooding ta` l-ilma f`dan il-basement iddestruggihom totalment;

“2. Illi d-dirigenza tal-Bank kienet tatu kodici f`konfidenza biex jigi identifikat ai fini ta` din il-kaxxaforti, liema kodici kienet maghrufa lilu biss f`kunfidenza u lill-Bank. Li kien mehtieg biex tinfetah il-kaxxaforti/safety deposit box, kien ghalhekk ic-cavetta moghtija lill-esponent mill-Bank u l-kodici; l-esponenti ghad ghandu fil-pussess tieghu c-cavetta u l-kodici. Il-procedura kienet illi l-esponenti kien jindika lill-Bank il-kodici tieghu ai fini ta` identifikazzjoni; sussegwentement, l-esponent kien jipprocedi ma` l-impjegat tal-Bank u kienet tinfetah is-safety deposit box permess ta` zewgt icwievet, wiehed f`idejn l-esponent u l-iehor f`idejn il-Bank. Flimkien ma` l-impjegat tal-Bank, kienet tinfetah il-kaxxaforti/safety deposit box; dan l-arrangament kien jahdem;

“3. Illi f`Marzu 2008, l-esponenti mar fil-fergha ta` Palace Square, il-Belt u meta talab biex jiftah is-safety deposit box, sar jaf ghaliex qalulu illi kienet giet trasferita fil-fergha ta` l-Imqabba. L-esponent mar sussegwentement il-fergha ta` l-Imqabba u hemm sab is-safety deposit box/kaxxaforti numru 49, identifika ruhu permezz tal-kodici, wera c-cavetta u talab ghal darba tnejn li jigi awtorizzat li jiftah is-safety deposit box. L-impjegati tal-Bank f`dik l-okkazjoni hallew lill-esponenti li jdahhal ic-cavetta li hadmet izda l-Bank ma uzax ic-cavetta tieghu. Il-Bank Manager kien qallu li ma setax jiftah the safety deposit box. Kellu anke nkontri mas-Sur T Depasquale u mas-Sur I Xuereb fejn gie verifikat illi c-cavetta kien wahda genwina; dan kollu inutilment; l-esponent qed jesebixxi Dokumenti A sa H;

“4. Illi c-cirkostanzi tal-esponenti huma dawn: huwa jista` juri ccavetta, keychain u label Dok. I, moghtija mill-Bank konvenut; dawn huma distintivi u normalment assocjata ma` safety deposit box. Ghandu fil-pussess tieghu kodici u c-cwievet; l-esponenti wera lill-impjegati tal-fergha tal-Bank of Valletta illi c-cavetta tieghu taqbel, qed tigi esebita kopja tal-keychain Dok (sic);

“5. Illi l-Bank konvenut ma gab ebda prova biex jikkontradici jew jirribatti l-prova u l-pozizzjoni tal-esponenti, izda qed jirrifjuta illi jippermetti access lill-esponenti ghal dan is-safety deposit box, minkejja laqghat u korrispondenza u ghalhekk kellha ssir din il-kawza;

“6. Illi l-esponenti minhabba n-nuqqas tal-Bank kien kostrett illi jidhol fi spejjez, isofri danni konsistenti f`perduratura f`Malta, u spejjez ancillari u ghal dan l-intimat Bank huwa responsabbli;

“GHALDAQSTANT L-ESPONENTI jitlob bil-qima lil din l-Onorabbli Qorti li joghgobha tiddikjara u tiddeciedi illi :

“1. l-esponenti attur huwa proprjetarju uniku u esklussiv tad-drittijiet kollha assocjati ma` safety deposit box number 49, kif originarjament koncessa lilu mill-konvenut Bank of Valletta plc;

> "2. taghti r-rimedju u direttivi kollha sabiex tippermettilu access esklussiv u uniku ghal tali safety deposit box numru 49 u ghall-kontenuti taghha, taht dawk il-provvedimenti tal-Ligi nkluzi dawk relatati mal-konfidenzjalita` u s-sigriet bankarju skont il-Ligi;
>
> "3. tiddikjara u tiddeciedi illi l-bank konvenut huwa responsabbli ghad-danni ghar-ragunijiet tas-suespost;
>
> "4. tillikwida d-danni hekk likwidati;
>
> "5. tikkundanna lill-konvenut ihallas id-danni hekk likwidati.
>
> "Bl-ispejjez u bir-riserva ta` kull dritt u azzjoni fil-Ligi.
>
> "Il-konvenut ingunt ghas-subizzjoni."

2. Having seen the sworn reply brought forward by the defendant company, Bank of Valletta p.l.c., of the 20th May, 2009, whereby it was pleaded that:

> "1. Illi, preliminarjament l-attur irid igib il-prova illi huwa verament proprjetarju ta` xi dritt relatat ma` safe deposit box 49 imsemmija fir-rikors guramentat.
>
> "2. Illi, subordinatament u minghajr ebda pregudizzju, is-socjeta` konvenuta ma kkawzat l-ebda danni lill-attur.
>
> "3. Illi, subordinatament u minghajr ebda pregudizzju, l-eccipjenti m`ghandhiex tbati l-ispejjez ta` din il-kawza.
>
> "Illi, dwar il-fatti tal-kaz l-eccipjenti tikkontesta l-fatti kif elenkati fil-premessi wiehed (1) sa sitta (6) tar-rikors guramentat.
>
> "Illi l-eccipjenti taf bil-fatt indikati f'din ir-risposta guramentata *di scientia propria."*

3. By means of a judgement dated the 6th of October, 2015, the First Hall of the Civil Court delivered its decision, by means of which the case was determined in the sense that, whereas it accepted all the pleas raised

by the defendant, the plaintiff's claims were rejected, and ordered that all costs of the proceedings were to be borne by the plaintiff.

4. The First Court delivered its judgement after making the following considerations reproduced hereunder:

"IV. Considerations of the Court

"The Court is evidently faced with two opposing and conflicting versions of events. In such situations, our Courts have elicited principles to be applied for the proper evaluation of evidence.

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

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

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

*2) Fin-nuqqas, li tigi applikata l-massima "actore non probante reus absolvitur".*
*Ara a propozitu sentenza fl-ismijiet "Fogg Insurance Agencies Limited noe vs Maryanne Theuma", Appell, Sede Inferjuri, 22 ta' Novembru, 2001.*

*Fi kliem iehor il-Qorti ghandha tezamina jekk xi wahda miz-zewg verzjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita` u specjalment dawk tal-konsistenza u verosimiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilitajiet u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant (Kollez. Vol L pII p440).*"

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

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

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

*f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant".*

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

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

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

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

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

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

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

"In a judgement given on the 26th September 2013 in re 'Chef Choice Limited vs Raymond Galea et' this Court (PA/JRM) went into detail on the issue of burden of proof. The Court raised points of law, which this Court fully endorses, and which are indeed relevant when considering the merits of this lawsuit. The Court stated as follows:-

*"… Illi l-Qorti tqis li, għalkemm il-grad ta' prova fil-proċediment ċivili m'huwiex wieħed tassattiv daqs dak mistenni fil-proċediment kriminali, b'daqshekk ma jfissirx li l-provi mressqa jridu jkunu anqas b'saħħithom. Il-prova mistennija fil-qasam tal-proċediment ċivili ma tistax tkun sempliċi supposizzjoni, suspett jew konġettura, imma prova li tikkonvinċi lil min irid jagħmel ġudizzju. Iżda f'każijiet mibnija fuq id-delitt jew il-*

*kważi-delitt, l-aktar meta jkun hemm imdaħħal xi egħmil tal-qerq tal-parti mħarrka huwa ammess li "f'kawża ċivili d-dolo jista' jiġi stabbilit anke permezz ta' presunzjonijiet u ndizji, purke' s'intendi jkunu serji, preċiżi u konkordanti, b'tali mod li ma jħallu l-ebda dubju f'min hu msejjaħ biex jiġġudika" (ara - P.A. PS - Emanuel Ċiantar vs David Curmi et - konfermata mill-Qorti tal-Appell fid-19.6.2006).*

*Illi minbarra dan, il-parti attriċi għandha l-obbligu li tipprova kif imiss il-premessi għat-talbiet tagħha b'mod li, jekk tonqos li tagħmel dan, iwassal għall-ħelsien tal-parti mħarrka (ara - App. Inf. - JSP - 12.1.2001 - Hans J. Link et vs Raymond Merċieca). Il-fatt li l-parti mħarrka tkun ressqet verżjoni li ma taqbilx ma' dik imressqa mill-parti attriċi ma jfissirx li l-parti attriċi tkun naqset minn dan l-obbligu, għaliex jekk kemm-il darba l-provi ċirkostanzjali, materjali jew fattwali jagħtu piż lil dik il-verżjoni tal-parti attriċi, l-Qorti tista' tagħżel li toqgħod fuqha u twarrab il-verżjoni tal-parti mħarrka. Min-naħa l-oħra, il-fatt li l-parti mħarrka ma tressaqx provi tajba jew ma tressaq provi xejn kontra l-pretensjonijiet tal-parti attriċi, ma jeħlisx lil din milli tipprova kif imiss l-allegazzjonijiet u l-pretensjonijiet tagħha (ara - App. Inf. PS - 7.5.2010 - Emanuel Ellul et vs Anthony Busuttil)*

*Illi huwa għalhekk li l-liġi torbot lill-parti f'kawża li tipprova dak li tallega (ara l-Art. 562 tal-Kap 12) u li tagħmel dan billi tressaq l-aħjar prova (Art. 559 tal-Kap 12).*

*… Iżda dak li jgħodd f'kawża m'huwiex l-għadd tax-xhieda mressqa għaliex "il-fatt li xhieda jkunu ġew prodotti minn parti partikolari f'kawża ... ċertament ma jfissirx li l-Qorti hija marbuta li temmen b'għajnejha magħluqa, jew li temmen aktar, dak kollu li dawn ix-xhieda jgħidu 'favur' il-parti. Fuq kollox, ix-xhud ma jiġix prodott biex jixhed 'favur' parti jew 'kontra' oħra, imma jiġi prodott biex jgħid il-verita`, il-verita` kollha, u xejn anqas minn dik il-verita` kollha" (ara - App. Ċiv. 19.6.2006 - Emanuel Ċiantar vs David Curmi et)*

*Illi l-Qorti tqis li, iżda, bħal ma jiġri f'każijiet bħal dawn, il-verżjonijiet tal-partijiet u ta' dawk li setgħu nvoluti magħhom ikunu ta' bilfors miżgħuda b'doża qawwija ta' apprezzament suġġettiv ta' dak li jkun ġara. Il-Qorti tifhem li kull parti jkollha t-tendenza li tpinġi lilha nnifisha bħala l-vittma u l-parti l-oħra bħala l-ħatja, u dan jgħodd ukoll għall-verżjonijiet li jagħtu dawk il-persuni l-oħrajn li jkunu b'xi mod involuti fl-episodju. Huwa d-dmir tal-Qorti li tgħarbel minn fost dawn il-verżjonijiet kollha u minn provi indipendenti li jistgħu jirriżultaw il-fatti essenzjali li jistgħu jgħinuha tasal biex issib x'kien li tassew ġara u kif imxew l-affarijiet;*

*Illi l-Qorti tifhem li, fil-kamp ċivili, il-piż probatorju m'huwiex dak ta' provi lil hinn mid-dubju raġonevoli (ara App. Inf. PS - 7.5.2010 - Emanuel Ellul et vs Anthony Busuttil). Iżda fejn ikun hemm verżjonijiet li dijametrikament ma jaqblux, u li t-tnejn jistgħu jkunu plawsibbli, il-prinċipju għandu jkun li tkun favorita t-teżi tal-parti li kontra tagħha tkun saret l-allegazzjoni (ara - P.A. NC - 28.4.2004 - Frank Giordmaina Medici et vs William Rizzo et). Ladarba min kellu l-obbligu li jipprova dak li jallega ma jseħħlux iwettaq dan, il-parti l-oħra m'għandhiex tbati tali nuqqas u dan bi qbil mal-prinċipju li actore non probante reus absolvitur (ara P.A. LFS - 18.5.2009 - Col. Gustav Caruana noe et vs Air Supplies and Catering Co. Ltd.) Min-naħa l-oħra, mhux kull konflitt ta' prova jew*

*kontradizzjoni għandha twassal lil Qorti biex ma tasalx għal deċiżjoni jew li jkollha ddur fuq il-prinċipju li għadu kemm issemma. Dan għaliex, fil-qasam tal-azzjoni ċivili, l-kriterju li jwassal għall-konvinċiment tal-ġudikant għandu jkun li l-verżjoni tinstab li tkun waħda li l-Qorti tista' toqgħod fuqha u li tkun tirriżulta bis-saħħa ta' xi waħda mill-għodda proċedurali li l-liġi tippermetti fil-proċess probatorju (ara - App. Ċiv. 19.6.2006 - Emanuel Ċiantar vs David Curmi noe). Fit-twettiq ta' eżerċizzju bħal dak, il-Qorti hija marbuta biss li tagħti motivazzjoni kongruwa li tixhed ir-raġunijiet u l-kriterju tal-ħsieb li hija tkun ħaddmet biex tasal għall-fehmiet tagħha ta' ġudizzju fuq il-kwestjoni mressqa quddiemha (ara - App. Inf. 9.1.2008 - Anthony Mifsud et vs Victor Calleja et)"*

"In a judgement given by the Court of Appeal in its Inferior Jurisdiction on the 12th April 2007 in re "Joseph Tonna vs Philip Azzopardi" the following was stated :-

*"In materja ta` provi, gie diversi drabi ritenut illi r-regoli l-aktar prevalenti fl-ordinament guridiku taghna jidhru li huma dawn:-*

*(i) Ibda biex ir-regola tradizzjonali tal-piz tal-provi timponi a kariku tal-parti li tallega fatt l-oneru li ggib il-prova ta' l-ezistenza tieghu. Tali oneru hu ugwalment spartit bejn il-kontendenti, sija fuq l-attur li jsostni l-fatti favorevoli li jikkostitwixxu l-bazi tad-dritt azzjonat minnu (actori incumbit probatio), sija fuq il-konvenut ghas-sostenn tal-fatt migjub minnu biex jikkontrasta l-pretiza tal-attur (reus in excipiendo fit actor) – Ara Vol. XLVI/i/5;*

*(ii) Fil-kors tal-kawza dan il-piz jista` joxxilla minn parti ghall-ohra, ghax, kif jinghad, 'jista jkun gie stabbilit fatt li juri prima facie li t-tezi ta' l-attur hija sostenuta' – Ara Vol. XXXVII/i/577;*

*(iii) Il-gudikant adit mill-meritu tal-kaz hu tenut jiddeciedi iuxta allegata et probata, u dan jimporta li d-decizjoni tieghu tigi estratta unikament mill-allegazzjoni tal-partijiet. Jigifieri, minn dawk ic-cirkustanzi tal-fatti dedotti ghab-bazi tad-domanda jew ta' l-eccezzjoni u l-provi offerti mill-partijiet. Jikkonsegwi illi d-dixxiplina tal-piz tal-provi ssir bazi tar-regola legali tal-gudizzju 'n kwantu timponi fuq il-gudikant l-konsiderazzjoni li l-fatt allegat mhuwiex veru ghax mhux ippruvat;*

*(iv) Il-valutazzjoni tal-provi hu fondat fuq il-principju tal-konvinciment liberu tal-gudikant. Lilu hu moghti l-poter diskrezzjonali tal-apprezzament tar-rizultanzi probatorji w allura hu liberu li jibbaza l-konvinciment tieghu minn dawk il-provi li hu jidhirlu li huma l-aktar attendibbli w idoneji ghall-formazzjoni tal-konvinciment tieghu.*"

"Plaintiff is requesting this Court to declare that he is the sole and exclusive holder of safe deposit box 49 held at Bank of Valletta; to grant him the remedies necessary to exercise access to the contents of the box; and to declare the Bank responsible for damages.

"On its part, defendant Bank has pleaded that plaintiff has to prove that he is the true holder of the safe deposit in question, and has rejected plaintiff`s claim that it caused any damages to his detriment.

"In brief, plaintiff's account of events relates as follows: He claims that in 2001, he had opened an anonymous safe deposit box at the Palace Square Branch of defendant Bank. He states that he was provided with a code and a key. He claims to have paid eight years` rent for the box. In 2008, he went to Palace Square Branch to accede to his safe deposit box. He was there informed that the boxes had been transferred to Mqabba Branch. He did go to Mqabba Branch. When he went the Manager of the Branch was not present. However he did see the box which had a yellow sand colour. He was asked to return the day after when the Manager was present. He went the following day and met the Manager. He was asked for the written agreement with the Bank. He advised that he had lost the document in his house in Antwerp. He was refused access to the box. Plaintiff also met the Chief Legal Officer of the Bank. He was offered to disclose to the Bank the contents of the box so that his account of the contents could be verified but plaintiff declined the offer.

"On its part, defendant Bank affirmed that it did not have any written agreement referring to plaintiff, that it was not bank practice to have safe deposit boxes in anonymity, nor was it bank practice to provide a code. The Bank rejected plaintiff`s claim that he had paid rent to cover a number of years because its practice was to accept only annual rental payments for its boxes. In their testimony, the bank employees confirmed that at the time of plaintiff`s claim and even after, the box in question was available for rent and the Bank was holding the keys to gain access.

"The Court held an on-site inquiry at BOV Mqabba Branch on the 21st February 2011 with a view to ascertain facts at first hand.

"The following was established:-

i) When plaintiff was requested to insert his key in the lock on the left hand side of the box, the key was not compatible with the lock. However when he inserted the key in the right lock, the key did go into the lock but failed to turn;

ii) When a Bank representative tried to insert plaintiff's key in the left lock, the key did not go in;

iii) When Court requested the Bank to operate the opening of a box which was available for rent, the Bank inserted its key in the left lock, the client in the right lock and the box opened;

iv) Plaintiff placed again his key in the right lock and although it entered the lock it did not turn. As that key could not turn, the Bank could not its master key in the left lock.

v) The Court compared the key held by plaintiff and other client keys in the possession of the Bank. It was evident that the formation of the keys was different.

“What is relevant from what transpired during the on-site inquiry is that the key held by plaintiff was not similar to other client keys held by the Bank.

“Apart from this fact, although plaintiff`s key entered the lock, it did not make a turn. Because of this, the Bank could not use its master key.

“On a point of law, the onus of proof is on plaintiff. Art 562 of Chap 12 is as clear as can be.

“In his Trattato di Trattato di Diritto Giudiziario Civile Italiano (Vol. III 5ta ed. para. 465, 467, 468, 471 pag. 380 – 382) Mattirolo has stated :-

> “*Una regola di dottrina e di gurisprudenza generale reca che 'semper onus probandi ei incumbit qui dicit', ossia che 'semper necessitas probandi incumbit illi qui agit’. In verita`, il principio di egualianza civile, che nella pratica dei giudizi si traduce nel principio della parita` di trattamento assicurata alle parti, non permette che si presti fede piuttosto all'allegazione dell'uno che a quella dell'altro dei litiganti. Quindi ciascuna delle parti deve provare i fatti, che essa allega a sostegno del proprio assunto ; e l'autorita' giudicante deve pronunizare juxta allegata et probata …. Applichiamo questa regola all'una e all'altra parte.*
>
> *(a) Il primo ad agire nella causa e ad allegare un fatto, da cui egli pretende sia per risultare un cambiamento nello stato attuale del diritto, e' l'attore ; e percio` actori onus probandi incumbit. Quindi nelle cause in cui si propone un'azione reale l'attore dovra` provare il fatto dal quale deriva il dominio, … ; se egli invece promuove un'azione personale, dovra` pure provare quel fatto, quell'avvenimento da cui nacque il suo diritto e la conseguente obbligazione del convenuto . L'attore, che non provi, deve soccombere : actor non probante, reus est absolvendus. Conseguentemente, in presenza di una domanda non provata, il convenuto puo` limitarsi a negare il fatto allegato, ma non provato dall'attore ; e il giudice debbe senz'altro assolverlo.*
>
> *(b) Se l'attore abbia fornito la prova dei fatti che stanno a base della sua domanda, il convenuto, il quale voglia con qualsiasi eccezione o difesa modificare o distruggere lo stato attuale risultante dalle prove dell'attore, dovra`, dal suo conto, dare la prova di quei nuovi fatti, che egli allega e su di cui e' fondata la sua eccezione : onde la massima 'onus probandi incumbit actori', vuol essere completata con quest'altra 'reus in excipiendo fit actor'.*”

“Although plaintiff testified on oath that he had lost the written agreement with the Bank for reasons which he described, he failed to produce any other evidence of substance to corroborate his version that the basement of his house in Holland had been flooded and

because of that flooding the document was destroyed. Nothing whatsoever!

"In default of a written agreement, the strongest ground for plaintiff to sustain his claim for holding box no 49 and its contents was the key to the box which he claimed was in his possession.

"On the basis of facts in hand, it was evident for the Court that the key held by plaintiff differed in nature to the keys held by defendant Bank.

"The Court has *de visu* established that although the key did enter the lock as afore-detailed, it did not turn.

"Another fact which did not comfort plaintiff`s version was the keychain. In fact the keychain did read: "B.V.L". In no manner whatsoever did plaintiff establish by way of evidence that B.V.L. is an acronym used by defendant Bank; more so in this case where the Bank rejected those initials as its own.

"Faced by strong evidence to the contrary, plaintiff could have opted to disclose in open court the contents of the deposit box placing the Court in an adequate position to verify in real terms any objection by the Bank. Nonetheless plaintiff refrained from such a move.

"Contrary to what plaintiff did state in his submissions, defendant Bank fulfilled its obligation vis-à-vis the burden of proof.

> "In a judgement given on the 28th April 2003 in re "Ciantar vs Curmi noe" this Court (PA/PS) stated that –
>
> "*Fil-kamp civili ghal dak li hu apprezzament tal-provi, il-kriterju ma huwiex dak jekk il-gudikant assolutament jemminx l-ispjegazzjonijiet forniti lilu imma jekk dawn l-istess spjegazzjonijiet humiex, fic-cirkostanzi zvarjati tal-hajja, verosimili. Dan fuq il-bilanc tal-probabilitajiet, sostrat baziku ta` azzjoni civili, in kwantu huma dawn, flimkien mal-proponderanza tal-provi, generalment bastanti ghall-konvinciment. Ghax kif inhu pacifikament akkolt, ic-certezza morali hi ndotta mill-preponderanza tal-probabilitajiet. Dan ghad-differenza ta` dak li japplika fil-kamp kriminali fejn il-htija trid tirrizulta minghajr ma thalli dubju ragjonevoli.* (Vol. XXXVI P I p 319)"

"Taking even the above into account, apart from all established facts, this Court is of the view that plaintiff`s demands against defendant Bank are ill founded at law and in fact."

5. Having seen the application of appeal filed by the plaintiff, Emil Otto Bachet, whereby while making reference to the records of the case and reserving the right make those submissions which he considers

appropriate, he is requesting that, for the reasons contained therein, this Court cancels, revokes and reverses the judgement delivered by the First Hall Civil Court, Sworn Application 319/09JZM, in the names **Emil Otto Bachet v. Bank of Valletta plc**, decided on the 6th October, 2015. Appellant thus requests that this Court dismisses all the defendant bank's pleas and consequently accede to plaintiff's requests and demands, with costs in both instances, against the defendant bank.

6. Having seen the reply by the defendant company Bank of Valletta p.l.c., by means of which and for the reasons contained therein and for those which will be further submitted during oral pleadings, requested this Court to reject in its entirety the appeal of the appellant, with the costs of both the first and second instance to be paid solely by the plaintiff appellant.

7. Having seen that during the sitting of the 20th October, 2020, counsel, made their respective oral submissions, thus the case was adjourned for the purpose of this Court to deliver its judgement.

8. Having seen all the acts of the case and the documents exhibited thereat;

Considers:

9. That basically in this case, plaintiff instituted current proceedings with the purpose of having the Court (i) declare that he is the sole and exclusive holder of all the rights associated with safe deposit box number 49, as had originally been conceded to him by defendant bank; (ii) grant him all remedies necessary to enable him to have the exclusive access to the said safe deposit box; (iii) declare the bank to be exclusively responsible for the damages; (iv) liquidate the damages, (v) condemn the defendant to pay the damages thus liquidated.

10. The defendant bank rejected plaintiff's demands on the basis of the following pleas: (I) that the plaintiff has to prove that he is the true holder of the safe deposit box in question; (II) it rejected having caused plaintiff any damages and (III) that it should not be made to bear any costs relative to these proceedings.

11. The First Court upheld the defendant bank's pleas in that it was held that the plaintiff had not proved his case according to law and therefore rejected his claims, with the costs of the proceedings to be borne by the said plaintiff.

12. The plaintiff felt aggrieved by the decision of the First Court and filed the appeal under examination, having put forward as his main

grievance the fact that the First Court made a wrong or incomplete assessment of the evidence produced before it. While making reference to his note of submissions and to his rejoinder, the plaintiff sustains his grievance by referring to the following:

(I) With respect to the site visit held at the BOV Mqabba Branch on the 21st February, 2011, when the key provided by Bachet fitted but did not turn, whereas the key provided by the Bank did not function. The Bank further stated that it did not find records or evidence of his agreement and relationship with the Bank. Therefore, the plaintiff makes the following submissions: (a) the fact that he had a valid secret code to identify himself was never denied by the bank;
(b) the fact that the key fitted, even though it doesn't turn, creates a *prima facie* presumption that access was granted; (c) the bank was unclear as to denying whether in fact he had a safety deposit box, in fact it stopped short of denial, but asked plaintiff to establish entitlement; (d) appellant immediately identified box 49 with a yellow-sand colour.

(II) Referring to the points raised in his submissions, appellant repeats the following points which remain unanswered: (a) what is the reason that there are scanty records about the safe deposit boxes at Mqabba?; (b) why did the bank representatives testify that there are agreements traced

in respect of all other customers except box 49?; (c) why did the master key held by the bank of the boxes at Mqabba not function?

(III) There is also important circumstantial evidence, namely the access to a key, the fact that appellant was clearly familiar with bank procedure and was clear that initially the safe deposit box was at Palace Square, a fact not denied by the Bank. Whereas the Bank was reticent on challenging certain facts and it would have been expected from the Bank to be more forthcoming in its exclusionary evidence.

(IV) The appellant complains that the First Court adopted *ad litteram* the rule that the party alleging has to prove. While this cardinal principle cannot be denied, the fact is, as had been observed in one of the judgements quoted by the First Court, that the burden of proof may oscillate and shift from one party to the other. Now when taking the evidence into account, the Bank did not merely fail to give satisfactory answers, but it also did not display the required degree of organization and documentation, such as in the case of the key not working and the failure to trace the agreement.

(V) The Bank later made robust its procedures on safe deposit boxes. In this case, the rule that he who alleges has to prove, may lead to very unfair results. The truth is that the literal application of the rule does not

solve the unanswered questions, keeping in mind that the plaintiff was procedurally limited as the Bank also raised the issue of Bank secrecy, which fact should also be given due weight, namely that the bank was not forthcoming in producing evidence relative to the current status of the box. This fact together with the lack of records and procedures evidenced, raises very serious doubts. Thus, the appellant submits that on a balance of probabilities, he has managed to establish his argument and deserves at least the remedy of access to the safe deposit box.

13. It should be stated right from the outset that, in so far as the main grievance of the appellant is based on the alleged wrong or incomplete assessment of the facts by the First Court, this Court, being one of review, does not disturb the assessment carried out by the First Court lightly, especially if it is deemed that such Court could legally and reasonably come to the conclusion reached. It has constantly been reiterated by this Court, that it will only intervene, if it is convinced that the assessment carried out by the First Court is manifestly wrong, or if there exist reasons serious enough so that the conclusion reached constitutes an injustice with respect to one of the parties. (Vide for example judgement of this Court of the 28th April, 2017, in the names **Terres Co. Limited v. L-Ghajn Construction Company Limited**) However, this Court is still duty bound to go through the evidence, to see whether a proper evaluation has been

carried out and whether the conclusion reached is in accordance with the law.

14. This Court, first of all observes that, whereas it is normal for judges to be confronted with contrasting views and contradictory evidence, this does not mean that such a scenario leaves them perplexed when it is time for them to deliver their judgement, in that they rely on a number of principles which help them determine the way forward. Although the level of proof required in civil cases is of a lesser kind, than that required in criminal procedures, this does not mean that a plaintiff is exonerated from bringing forward the best possible evidence. The evidence brought forward should not be conjectural or speculative in nature, but should be convincing enough to help the judge decide on the claims being made. It is in fact provided for in our law of procedure (Chapter 12 of the Laws of Malta), that the burden of proving a fact, shall, in all cases, rest with the party alleging it (Article 562) and that in all cases, the court shall require the best evidence that the party may be able to produce (Article 559). These principles are also embodied in the legal maxim *actore non probante reus absolvitur,* meaning, when the plaintiff does not prove his case, the defendant is absolved, which has often featured in a number of judgements, including those extensively quoted by the First Court.

15. The traditional principles in civil law relative to the *onus probandi,* burden the plaintiff with the primary responsibility to prove that which is being alleged by him. The defendant has no obligation to provide proof to deny that being stated by the plaintiff, before the same plaintiff satisfies his duty to prove that being alleged by him. Such proof brought forward by the plaintiff must be adequate so as to sustain with certainty the existence of the fact being alleged. Unless plaintiff discharges his obligation to prove adequately his claims, he cannot then accuse defendant of failing to prove the plaintiff's case as being unfounded. Furthermore, in the case of conflicting or contradictory evidence, brought forward by the parties, in such a situation, it is the defendant's position which is favoured, as it rests with the plaintiff to prove his claims according to law.

16. While the Court endorses the principles mentioned above, in applying them to the situation at hand, it finds that the appellant's case cannot succeed. With respect to the first point raised by the appellant, regarding the site visit, whereby the appellant alleges that it is the key provided by the Bank that did not function, it is held that this is blatantly an incorrect statement. From the records of the sitting held by the First Court on-site, it transpires that although the plaintiff's key did go into the right lock of Box 49, it however did not turn. It is due to the fact that plaintiff's key did not turn in the relative lock, that the Bank could not put

its own key into the left lock and thus the safe deposit box remained closed. On the other hand, when the Court ordered the Bank official to open another random box, which is not rented out to a third party, the client's key was put into the right lock and only once it turns, the Bank puts its key into the left lock and after it turns, the box opens (vide fol. 146).

17. The plaintiff criticizes the Bank for not finding records or evidence of his agreement with the Bank. It is rather ironic for the plaintiff to raise this issue, being the one who failed to produce the alleged agreement with the Bank, under the pretext that it had been destroyed/damaged or defaced during a flooding in his home in Antwerp, a statement which as the First Court rightly observed, was not sustained by any other form of evidence. However, the fact that the Bank did not find records or evidence of the alleged agreement, if anything puts plaintiff's allegation of the existence of such an agreement into further doubt, considering also the fact that from the Bank's records, it seems that the box in question was indicated as "For Staff Use". Furthermore, plaintiff alleges he had paid for the rental of this safe deposit box in 2001, for eight years in advance. Now apart from the fact that plaintiff fails to produce this receipt, as it allegedly got destroyed together with the agreement, Bank official Martin Vella who at the time of the plaintiff's complaint, was posted with the Bank's Internal Audit Department, gave evidence to the effect that, it

is not the norm for someone to pay such rental for a number of years. Vella explains that normally, when a person rents out a safe deposit box, one would set in place a standing order, so that one's account would be charged annually. This notwithstanding, the bank official also checked the Bank's general ledger and then again, no trace was found of such payment.

18. Plaintiff states that the fact that he had a valid secret code to identify himself was never denied by the Bank. Yet again such a statement is incorrect, as this was contradicted both by Mr. Martin Vella, as well as by Dr. Michael Borg Costanzi, Chief Legal Officer and Compliance within the Bank who categorically states that: "*We have no practice of opening safe deposit lockers anonymously and we have no practice and we had no practice of using codes*". This was also confirmed during the plaintiff's cross-examination of the 8th October, 2009:

> "Dr. D. Cassar: *But the other question is you did not tell Dr. Borg Costanzi look here besides the key I have a code which I can reveal to you, am I correct that you did not tell him?*
>
> "Witness: *I told him and he said to me it's not possible, we don't do that in our bank.*
>
> "The Court: *He told you we don't have a code here, he did tell you that?*
>
> "Witness: *Yeah*
>
> "Dr. D. Cassar: *So the bank did tell you that there is no procedure of codes?*
>
> "Witness: *He told me*".

It is thus evident that, not only was the Bank clear from the outset, in stating that it had no system of codes relative to safe deposit boxes, but also that the plaintiff was duly informed of such practice.

19. With respect to plaintiff's assertion that the fact that the key fitted into the lock creates a *prima facie* presumption that access was granted, here again the fact that plaintiff was given the benefit of the doubt and given the opportunity to try out his key, or the fact that the key fitted into the lock, cannot be taken as tangible proof of any right to access the safe deposit box. First and foremost because although the key fitted, it did not turn, which is ultimately the test for a valid key and secondly, there was another important observation made by the Court when holding the sitting on site:

> "*The Court is viewing ictu oculi the two keys, that is the one that plaintiff alleges that opens box number 49, and another key of the bank which opens box number 20. The Court is also viewing another key which opens client box number 25, and the Court is noting a very evident difference in the formation of the key between the one held by the plaintiff and the ones held by the bank".*

This is yet another matter which puts the plaintiff's claims into doubt.

20. Although plaintiff states that the bank never denied that he had a safe deposit box and stopped short of denying it, but rather asked plaintiff to establish entitlement, it is reiterated that the defendant bank has no obligation to provide proof to deny what is being stated by the plaintiff.

Ultimately, it rests with the plaintiff to prove his allegations as to being entitled to access such safe deposit box. Then again, the fact that appellant identified box 49, as being of a yellow sand colour is not a determining factor, given plaintiff had already been to the Mqabba branch before instituting court proceedings and had been given the opportunity to try out his key in the lock of box 49, which box is marked "49" (vide fol. 145).

21. In his second complaint, the plaintiff raises a number of questions which he states remain unanswered. With respect to the alleged scanty records about safe deposit boxes in Mqabba, as pointed out in the evidence given by Joseph Caruana, Branch Manager, it is only with respect to box 49 that they did not trace an agreement, as they do have records of agreements of the other boxes (vide fol. 126 and 181). As to the second question, a plausible answer would be that bank officials could not find an agreement regarding the safe deposit box in question, as according to their records the said box is available for rental purposes, this being confirmed by the fact that the Bank has in its possession both the master key and the key which would be given to the client, should it eventually be rented out. Finally, it is pretty obvious that, the master key of the Bank did not function in the case of box number 49, as once the client's key could not turn, then the Bank could not even insert its master key, as from the test carried out on another box, it was evident that the

client's key has to be inserted and turned, before the Bank can make use of its master key.

22. The third point raised by the appellant is repetitive in nature, in that the access to a key in itself cannot be considered as proof of the right to access the contents of the safe deposit box in question, as the ultimate test for a valid key, is its actual ability to serve its purpose to open the lock in question. The fact that plaintiff had knowledge that the safe deposit box in question was originally situated at Palace Square, is again circumstantial in nature and does not serve the purpose of proving any rights over the said box. With respect to the Bank being more forthcoming in its exclusionary evidence, this Court cannot ignore the fact that the Bank's Chief Legal Officer had offered a practical solution to the matter, that the plaintiff discloses the contents of the safe deposit box for him to consider opening said box together, but then again plaintiff refused! This was also an observation made by the First Court in its considerations.

23. In so far as the appellant complains that, the First Court adopted the rule that the party alleging has to prove in a literal sense, it is to be observed that although it is true that the burden of proof may shift from one party to the other, the starting point is that the plaintiff is to bring forward convincing evidence to sustain his claims. In the absence of such proof, the burden of proof does not even shift onto the defendant and thus

the appellant's case cannot succeed. As aptly stated by this Court in its Inferior Jurisdiction, in the case **Anthony Camilleri v. Maurice Cauchi et**, decided on the 22nd December, 2002:

> *"Fi kwistjoni ta' kredibilita' u apprezzament ta' provi l-kriterju l-izjed sostanzjali hu jekk il-Qorti ghandhiex temmen lill-appellant fl-allegazzjoni centrali u bazika tieghu …jew taccettax dik il-verzjoni tieghu bhala wahda possibbli jew verosimili. Meta l-ewwel Qorti ghamlet dan u ezaminat il-kwistjoni fuq il-bilanc tal-probabilitajiet u tal-preponderanza tal-provi, sabet, u f'dan kienet ghal kollox korretta, illi l-prova fornuta mill-attur ma kenitx titqies sufficjenti ghall-konvinciment taghha.*
>
> *"Irid jigi osservat ukoll illi anke kieku, gratia argomenti, z-zewg verzjonijiet kienu plawsibbli jew possibbli huwa principju gurisprudenzjali ben affermat illi f'kaz ta' zewg verzjonijiet dijammetrikalment konfliggenti dan jiffavorixxi lill-konvenuti in kwantu kien dejjem obbligu tal-attur li jipprova l-allegazzjonijiet tieghu. Dan fuq l-istregwa tal-massima: "incumbit probatio ei qui dicat non ei qui negat" – "Gemma Cassar Saetta –vs- Imco Distributors Limited", Appell, Sede Inferjuri, 13 ta' Jannar 1999".*

While this Court embraces the above principle, it is deemed that plaintiff's grievance is unfounded.

24. Finally, the last complaint raised by the plaintiff, relates to the action taken by the Bank to make its procedures relating to safe deposit boxes, more robust. It is the understanding of this Court, that time and again, Banks review their procedures to make them stronger and consequently less susceptible to potential abuse. It is not clear in what context the plaintiff raises the issue of bank secrecy, but it should be reiterated that *in primis* it was up to the plaintiff to disclose all information available to him, including contents of the safe deposit box to the Court, for the

purposes of resolving his problem. As to the current status of the box, numerous Bank officials testified that according to their records, the safe deposit box is currently available for rental.

25. This Court begs to differ with plaintiff's assertion that on a balance of probabilities he managed to establish his argument or that he deserves to be given access to the safe deposit box. As rightly observed by the First Court, plaintiff's case fails on a number of counts: (I) his lack of producing the original agreement and receipt to the safe deposit box, or at least evidence to corroborate his allegation that the original documents were damaged in a flooding incident; (II) although he was in possession of a key that entered one of the locks of the safe deposit box, it failed to effectively turn in the lock, apart from being different from the other keys to safe deposit boxes in bank's possession; (III) his assertion to have opened the safe deposit box anonymously and having a secret code to enable his access to it, a procedure denied by all Bank officials and (IV) his failure to disclose the contents of the safe deposit box.

**Decide**

Therefore, for the reasons explained above, the Court disposes of the appeal filed by the plaintiff, in that it rejects the appellant's requests and

confirms the appealed judgement of the First Hall Civil Court of the 6th October, 2015, in the abovementioned names, in its entirety.

All costs for the proceedings, in both instances, are to be borne by the plaintiff.

| Mark Chetcuti | Joseph R. Micallef | Tonio Mallia |
|---|---|---|
| Chief Justice | Judge | Judge |

Deputy Registrar
mb