CIVIL COURT – FIRST HALL

THE HON. MADAME JUSTICE MIRIAM HAYMAN

Sworn Application Number: 904/2018 MH

Today, 15th December 2021

John Whibley (British Passport Number 099235827)

vs

Gabriella Vella (ID Number 0044184M) and Jason Pace (ID Number 144571M)

The Court:

Having seen **the sworn application of plaintiff of the 11th September 2018** by virtue of which he stated:

Jesponi bir-rispett:

Illi l-partijiet kienu dahlu fi ftehim fejn gie ppublikat Kostituzzjoni ta' debitu datat 9 ta' Novembru 2009 maghmul minn Nutar Dr. Andre Farrugia, kopja hawn annessa u mmarkata Dok A fejn ir-rikorrenti sellef lill-intimati l-ammont kumplessiv ta' €45,000 (hamsa u erbghin elf Ewro).

Illi l-ammont misluf ried jigi mhallas lura b'pagamenti rateali skond is-segwenti pagamenti;

a. Hamest elef Ewro (€5,000) sa mhux aktar tard mill-15 ta' Dicembru 2009
b. Tmien telef Ewro (€8,000) sa mhux aktar tard mill-15 ta' Marzu 2010
c. Tmien telef Ewro (€8,000) sa mhux aktar tard mill-15 ta' Settembru 2010
d. Tmien telef Ewro (€8,000) sa mhux aktar tard mill-15 ta' Marzu 2011
e. Tmien telef Ewro (€8,000) sa mhux aktar tard mill-15 ta' Settembru 2011
f. Tmien telef Ewro (€8,000) sa mhux aktar tard mill-15 ta' Marzu 2012

Illi l-imghax jibda jiddekorri jekk l-intimati ma jhallsux is-somma indikata fiz-zmien miftiehem;

Illi l-intimati ma irrispettawx il-ftehim stabilit fil-Kostituzzjoni ta' debitu u bdew ihallsu lura is-somma mislufa lilhom fit- 28 ta' Mejju 2010 f'pagamenti mensili ta' €500 (hames mitt Ewro);

Illi l-intimati hallsu lura l-ammont ta' €44,500 u l-ahhar pagament sar fit-3 ta' Ottubru 2017. Meta wiehed jikkalkola l-imghax dovut skond ir-rata kummercjali sal-15 ta' Gunju 2018, l-ammont dovut favur ir-rikorrenti jammonta ghal circa €16,942.81;

Jghidu ghalhekk l-intimati, ghaliex din l-Onorabbli Qorti m'ghandhiex, prevja kull dikjarazjoni opportuna u ghar ragunijiet premessi, tiddeciedi billi:

1. Tiddikjara li l-intimati jew min minnhom ghandhom ihallsu lir-rikorrenti l-imghax skond il-Kostituzzjoni ta' Debitu datat 9 ta' Novembru 2009 maghmul minn Nutar Dr. Andre Farrugia;

2. Tillikwida, okkorrendo bil-hatra ta' perit nominand, l-ammont li l-intimati ghandhom ihllasu lir-rikorrenti skond il-Kostituzzjoni ta' Debitu datat 9 ta' Novembru 2009 maghmul minn Nutar Dr. Andre Farrugia;

3. Tikkundanna li l-intimati jew min minnhom ihallsu lir-rikorrenti;

Bl-ispejjez inkluz l-ittra ufficjali, kif ukoll l-imghax kontra l-intimat, li minn issa huwa ingunt ghas-subizzjoni.

Having seen the list of witnesses and the document annexed to the sworn application.

Having seen **the joint sworn reply of defendants Gabriella Vella and Jason Pace of the 29th October 2018**[1] by virtue of which the following pleas were raised -

Jesponu bir-rispett u bil-ġurament tagħhom jikkonfermaw:

1. *Illi fl-ewwel lok u mingħajr preġudizzju għas-suespost l-azzjoni kkontemplata hija illeċita billi bbażata fuq att kriminuż billi ai termini tal-att li jirregola l-Bank Ċentrali, Kapitolu 371 tal-Liġijiet ta' Malta u senjatament l-artikolu 5 tal-istess, persuna mingħajr il-liċenzja opportuna ma tistax tislef il-flus. Hawn ukoll l-azzjoni kkontemplata għandha mill-illeċitu billi tikser il-kundizzjonijiet tal-artikolu 966(d) tal-Kodiċi Ċivili;*
2. *Illi fit-tieni lok u mingħajr preġudizzju għas-suespost jiġi rilevat illi r-rikorrenti m'ottemporax ruħu mad-disposizzjoni tal-Kap 12 tal-Liġijiet ta' Malta senjatament l-artikolu 256(2) fejn ir-rikorrenti kellu jintima lill-esponenti għall-ħlas permezz t'att ġudizzjarju liema talba ma saritx u għalhekk din il-kawża hija intempestiva;*
3. *Illi fit-tielet lok u mingħajr preġudizzju għas-suespost jiġi rilevat illi t-talbiet attur huma preskritti stante d-dekadenza tal-ħames snin minn l-aħħar pagament illi kellu allegatament jiġi effettwat u ċioe' l-ħmistax (15) ta' Marzu tas-sena elfejn u tnax (2012) u dan ai termini tal-Kap 16 tal-Liġijiet ta' Malta;*
4. *Illi fil-mertu u mingħajr preġudizzju għas-suespost l-esponenti jirrilevaw illi t-talbiet hekk kif dedotti mir-rikorrenti fil-konfront tagħhom huma nfondati fil-fatt u fid-dritt u għandhom jiġu miċħuda bl-ispejjeż kontra tiegħu u dan peress illi l-esponenti dejjem effetwaw il-pagamenti tagħhom bil-kunsens tal-esponenti u mingħajr l-esponenti qatt ma qalilhom xejn nonstante illi l-fatt illi tali pagamenti saru wara ż-żmien dovut;*
5. *Illi huwa biss issa fejn kien għad fadal biss l-aħħar pagament ta' ħamest mitt ewro illi r-rikorrent qiegħed jallega dan kollu u dan bl-iskop ovvju sabiex l-istess rikorrenti jakkwista somma flus mill-interessi u dan bi ksur tal-ispirtu tal-istess kostituzzjoni ta' debitu;*

[1] Fol 9 et seq

6. *Illi għalhekk l-ebda ammont m'huwa dovut lir-rikorrenti u dan skont kif allegat mill-esponenti;*
7. *Salv eċċezzjonijiet ulterjuri;*

Having seen the list of witnesses annexed to the sworn reply.

Having seen its decree dated 9th June 2021 by virtue of which the Court ordered that the proceedings continue in the English language.

Having seen all the evidence brought forward by the parties.

Having heard the oral submissions made by the lawyers of the parties.

Having seen that the case was adjourned for judgement for today.

Having seen all the other acts of the case.

Considered:

Plaintiff filed this court case to request the Court to order defendants to pay him interests in accordance with a Constitution of Debt agreement signed between the parties on the 9th November 2009.

On the other hand defendants rejected plaintiff's claims as unfounded in fact and at law.

From the acts of the case it transpires that:

1. On the 9th November 2009 a Constitution of Debt agreement was signed between plaintiff John Whibley as "the Creditor" and defendants Jason Pace and Gabriella Vella as "the Debtors" by virtue of which the creditor granted on title of loan to the debtors who accepted together and in solidum between themselves the sum of €45,000 which was payable by them to the creditor by means of the following payments –

a. The sum of €5,000 by the 15th December 2009

b. The sum of €8,000 by the 15th March 2010
c. The sum of €8,000 by the 15th September 2010
d. The sum of €8,000 by the 15th March 2011
e. The sum of €8,000 by the 15th September 2011
f. The sum of €8,000 by the 15th March 2012

The parties further agreed that –

"The Debtors are not due to pay to the Creditor any interest on the sum granted on loan. However, without prejudice to the rights granted to the Creditor by law, in the event the Debtors fail to make any of the said payments on the date stipulated above, the Debtor shall incur the payment of interest at the rate stipulated by the Central Bank of Malta and/or in accordance with EU Directive Two thousand stroke thirty-five letters 'EU' (2000/35/EU) whichever is the higher."

Preliminary Pleas

Defendants raised preliminary pleas to challenge the validity of plaintiff's action.

1. According to **the first preliminary plea**, plaintiff's action is illicit because it is based on a criminal act since according to article 5 of the Banking Act (Chapter 371 of the Laws of Malta) a person without the appropriate licence cannot give out money on loan. This action is also illicit because it breaches article 966(d) of the Civil Code.

Article 5 (1) of the Banking Act states as follows –

"No business of banking shall be transacted in or from Malta except by a company which is in possession of a licence granted under this Act by the competent authority."

Article 966 (d) of the Civil Code states that -

"The following are the conditions essential to the validity of a contract:

(.....)

(d) a lawful consideration."

It is the opinion of the Court that the substance of the contract in question shows that this is simply a commercial transaction agreed to by parties, for which a commercial rate of interest was also agreed upon in accordance with the interest rates as set out according to the Late Payment EU Directive 2000/35 and/or those the Central Bank.

There is nothing illicit about that.

Moreover the agreement was duly signed before a Notary and all the legal formalities are deemed to have been observed.

It is clear that article 5 of the Banking Act applies in the context of the banking business which in article 2 of the said Act is defined as follows -

"business of banking" means the business of a person who as setout in article 2A accepts deposits of money from the public withdrawable or repayable on demand or after a fixed period orafter notice or who borrows or raises money from the public(including the borrowing or raising of money by the issue of debentures or debenture stock or other instruments creating oracknowledging indebtedness), in either case for the purpose of employing such money in whole or in part by lending to others or otherwise investing for the account and at the risk of the personaccepting such money."

The above definition clearly denotes a business that is regular, constant and habitual.

On the other hand, the fact that a person gives out money and loan does not automatically qualify him as a person involved in the banking business. From the records of the case it does not transpire that plaintiff was conducting banking business in a regular, constant and habitual manner.

As a result it cannot be deemed that plaintiff is subject to the requirements of article 5 of the Banking Act.

Neither has it been shown that the contract is based on an unlawful consideration.

Moreover, as stated by the Court in the case **Paul Gauci et vs Dominic Farrugia et decided on the 30th March 2012** in a similar context in relation to a plea raised in terms of the Financial Institutions Act (Chapter 376 of the Laws of Malta) –

"Illi l-Kap. 376 Artikolu 3 (1) jgħid hekk :

"Ebda kummerċ ta' istituzzjoni finanzjarja ma għandu jsir f'Malta jew minn Malta ħlief minn kumpanija li jkollha liċenzja mogħtija taħt dan l-Att mill-awtorita kompetenti."

Illi l-Kapitolu 376 jgħid illi istituzzjoni finanzjarja tfisser kull persuna li b'mod regolari jew abbitwali tikseb holdings, jew tidħol biex twettaq xi attivita' elenkata fl-ewwel skeda akkont u għar-riskju tal-persuna li tkun qegħda twettaq dik l-attivita'.

Ikkunsidrat:

Illi l-Qorti rat sentenza tal-Qorti tal-Maġistrati Għawdex fil-Ġurisdizzjoni Superjuri, mogħtija fil-kawża fl-ismijiet ***Ronald Azzopardi vs Francis Bonello et*** *fit-3 ta' Marzu 2009, fejn il-Qorti qalet hekk:*

"Sabiex persuna tikkwalifika bħala istituzzjoni finanzjarja trid tagħmel l-atti elenkati fl-iskeda b'mod regolari jew abitwali. Il-Qorti hi tal-fehma li dawn iż-żewg kelmiet huma sinonimi ta' xulxin u jindikaw attivita persistenti u kostanti, attivita' li tista tgħid tkun drawwa. Li persuna ssellef flus ma jfissirx b'daqshekk li awtomatikament taqa' fid-definizzjoni ta' istituzzjoni finanzjarja."

Illi f'sentenza oħra mogħtija mill-Qorti tal-Appell fil-kawża fl-ismijiet ***David Bonett vs Carmelo Borg et****, il-Qorti qalet hekk:*
"Fl-artikolu 3(1) ta' l-att numru XII tal-1994 li jipprovdi illi 'no business of a financial institution shall be transacted in or from Malta except by a company

which is in possession of a licence granted under this Act by the competent Authority."

Il-Qorti qalet illi l-appellanti jidhru li qegħdin jikkonfondu l-bżonn ta' liċenzja biex wieħed jeżerċita tip ta' negozju ma' l-eżerċizzju tan-negozju nnifsu u mal-validita' tal-kuntratti u r-rabta kontrattwali li joħolqu. Għandu jkun ċar illi l-Att numru XII tal-1994 bl-ebda mod ma jimmodifika l-kapaċita' ta' persuni li skond il-liġi setgħu jikkontrattaw illi jinvolvu ruħhom f'negozju ta' self. Tali negozju, fin-nuqqas ta' disposizzjoni espressa tal-liġi li tikkommina n-nullita' tiegħu, jibqa validu u jorbot lill-kontraenti. Dana irrispettivament minn sanzjonijiet li l-attur jista jinkorri jekk jirrizulta li kien qed jikkonduċi negozju li għalih ma kellux liċenzja. Biżżejjed jingħad illi kellu qabel xejn jiġi stabbilit x'ifissru t-termini 'regular occupation or business' fl-artikolu 2 ta' l-istess Att u dan apparti konsiderazzjonijiet oħra.

Ikkunsidrat:

Illi fil-każ odjern, irriżulta mill-provi kollha li ġew prodotti illi l-attur silef flus lill-konvenuti permezz ta' tlett skritturi. L-attur xehed u dan ġie ukoll ikkonfermat mill-konvenut, illi huma kienu ħbieb. Effettivament l-ewwel darba illi l-attur silef lill-konvenut, l-attur kien silfu is-somma ta' tlett elef lira Maltin (LM3,000) in kontanti mingħajr skrittura u mingħajr ma kien hemm l-ebda xhieda preżenti u dana kollu ġie ikkonfermat mill-istess konvenut.

Illi l-attur xehed illi huwa lanqas jaf jikteb, li huwa bidwi u li la hu u lanqas martu ma jagħmlu xi xogħol fl-affarijiet finanzjarji. L-attur xehed illi qatt ma silef flus lil ħadd aktar ħlief lill-konvenuti u li kien silef lill-konvenut sempliċement għaliex il-konvenut kien insista miegħu li kellu bżonn dawn il-flus b'mod urġenti u peress illi kienu ħbieb.

Illi bl-ebda mod ma ġie ippruvat illi l-atturi kien jisilfu il-flus b'mod regolari jew abitwali, qishom kienu saru xi bank u għalhekk bl-ebda mod ma jikkwalifikaw bħala istituzzjoni finanzjarja."

In the light of the above considerations, **the first plea is going to be rejected.**

2. The **second preliminary plea** states that the case is untimely because plaintiff did not comply with the requirements of article 256(2) of Chapter 12 and did not notify defendants with a judicial letter before filing the court case.

Article 256(2) of the Chapter 12 states as follows -

"The enforcement of any other executive title may only take place after the lapse of at least two days from the service of an intimation for payment made by means of a judicial act."

In his sworn application plaintiff refers to an undated judicial letter sent to defendants and for which he is also claiming costs. This letter has not filed in the acts of the case, something which this Court cannot but disapprove of considering that a specific plea was raised about it.

In any case, from verifications made by the Court itself through the online court system, it transpires that a judicial letter was filed by John Whibley against defendants a few months before the intitiation of the court case, that is, on the 18th April 2018. It also transpires that both defendants were notified on the 21st April 2018.

So it turns out that plaintiff did comply with the requirement of the law prior to opening the court case. Although a copy of this letter is not filed in the records of the case the Court does not deem that defendants have been prejudiced because they have actually been served personally with the letter itself so they knew about plaintiff's claims. Moreover, and in any case the law does not envisage any particular sanction for shortcomings similar to this case where plaintiff did not produce the judicial letter in the records of the case.

This is what the Court stated in the case **Annemarie Zammit vs Donald Zammit decided on the 15th July 2002** -

"Illi, għalhekk, mill-premess jidher li:

a) l-intimata għamlet sejħa għall-ħlas tas-somma involuta permezz ta' att ġudizzjarju sabiex tirrendi esekuttiv l-att pubbliku in kwistjoni.

b) li hi, sussegwentement u wara li skada ż-żmien stipulat mill-liġi ippresentat ir-rikors għall-ħruġ tal-istess mandat.

Illi, pero hu minnu, ukoll, li mal-istess rikors ma ppresentatx kopja tal-istess ittra uffiċjali.

Illi, dwar dan il-Qorti, trid tara jekk tali mankanza hiex ta' tali gravita' li, filfatt u oġġettivament, avvertat xi preġudizzju għad-drittijiet legali tal-istess rikorrenti.

Wara li rat li:

a) kull ma huwa rikjest 'ad validitatem' sabiex att publiku jiġi res esekuttiv jitkompla fil-presentata u notifika ta' att ġudizzjarju ossija sejjaħ għall-hlas permezz ta' ittra uffiċjali kif ukoll il-presentata ta' rikors wara li jiddekorru għall-anqas, jumejn. L-intimata, filfatt, osservat dawn ir-rekwisiti. Għalhekk l-istess Qorti ma tistax tara kif, a basi ta' tali mankanza, tista tiddikjara null il-mandat in esami, wara li rat ukoll li r-rikorrenti ma sofra ebda preġudizzju bħala konsegwenza tal-istess nuqqas formali da parti tagħha.

b) F'każ ta' tali mankaza, 'in-nullita 'ma hiex' iddikjarata mill-liġi espressament' ....."

Hence this preliminary plea is going to be rejected.

3. According to the third preliminary plea raised by defendants the action is time-barred because more than five years passed from the time when the last payment was due according to the contract, that is, the the 15th March 2012.

Article 2156 (f) of the Civil Code states that -

"2156. The following actions are barred by the lapse of five years:

(.....)

(f) actions for the payment of any other debt arising from commercial transactions or other causes, unless such debt is, under this or any other law, barred by the lapse of a shorter period or unless it results from a public deed;"

In the case **Montebello Enterprises Limited vs Paolo Soldi et decided on the 25th November 2015** the Court stated -

"Illi bħal kull eċċezzjoni oħra l-eċċezzjoni tal-preskrizzjoni għandha tingħata interpretazzjoni restrittiva. Illi huwa prinċipju stabbilit fil-ġurisprudenza nostrana illi l-preskrizzjoni taħt l-Artikolu 2156 (f) tal- Kap. 16 hija soġġetta għal interpretazzjoni eiusdem generis.

Għaldaqstant, il-kelma "kreditu" minħabba fir-restrizzjoni tar-regola ta' interpretazzjoni ta' eiusdem generis, tiġbor fiha biss jeddijiet li huma ta' l-istess natura bħal jeddijiet l-oħra imsemmija fl-Artikolu 2156. F'dan il- kuntest, ta' min igħid li l-ebda wieħed mill-krediti imsemmija fl-Artikolu 2156 ma huwa kreditu ta' obbligazione di fare, imma huma kollha obbligazzjonijiet għall-ħlas ta' flus. Dan iġib miegħu l-effett li l-obbligazzjoni li kontra tagħha titressaq eċċezzjoni bħal din trid tkun waħda għall-ħlas ta' flus."

There is no doubt that this action is one based on a claim for the payment of money.

Moreover, as the Court stated in the case **De Tigne Limited vs Rada 99 Limited** decided on the 5th October 2015 -

"L-aħħar pagamenti jservu bħala interruzzjoni tal-preskrizzjoni….Ħlas fih innifsu hu rikonoxximent li persuna hi debitriċi ta' persuna oħra…"

Thus, contrary to defendants' argument, the five year prescriptive period starts running from the date when the last payment was made and not when it was due.

From the evidence filed, it transpires that the last payment made by defendants was on the 3rd October 2017. Plaintiff filed the court case on the 11th September 2018 and therefore the action is not time-barred.

So even this plea is going to be rejected.

Merits of the case

With regard to his claim, plaintiff testified that although in the contract of the 9th November 2009 the parties had agreed about the dates and amounts of payments due by defendants to pay back the loan given to them, they only started paying him on the 28th May 2010 with monthly repayments of €500. He exhibited a list of repayments made by defendants. He added that according to the said agreement, interest would be due only should the payments agreed upon be made after the indicated dates. He stated that the defendants paid him the amount of €44,500 and the last payment was made on the 3rd October 2017. He claims that the commercial interest as at 15th June 2018 amounted to €16,942.81.

On the other hand defendants stated in their evidence that due to financial difficulties they faced at the time, they had verbally agreed with plaintiff that notwisthstanding what was written in the agreement they would pay him €500 monthly. These payments were always made and they were accepted by plaintiff. In October 2017 the sum due was paid in full. They claimed that they always made the payments with plaintiff's consent and he never said anything even though the payments were effected later than when they were due.

The Court notes two points emanating from defendants' evidence. Firstly Gabriella Vella testifies that the sum lent was an inferior amount, thus hinting that the capital expected to be repaid in itself already incorporates a substantial amount of extra thousands of Euros, presumably incurred as interests, thus ***użura.*** Strangely enough her co-defendant makes no mention of such an event. Thus seeing that no more evidence was so advanced, the Court will not delve anymore on this issue, on the principle *'incumbit probatio qui dicit, non quo negat'*.

Futhermore through their evidence defendants seem to hint that there has been a novation with respect to the agreement originally reached between the parties.

The Court emphasizes the fact that in principle, the modification of the object of the agreement leads to novation when this gives rise to a new obligation which is not compatible with the original obligation.

Article 1181 (1) of the Civil Code states that –

"Novation shall not take place if the former obligation is not extinguished, although it is modified."

The *animus novandi* must not only be common to the parties involved but must also be concretely and unequivocally proven in the records of the case.

The Courts have been consistent in this regard. In the case **Francis Paris et vs Maltacom plc decided on the 7th July 2008** the Court of Appeal stated that -

"In-novazzjoni hi regolata bl-artikolu 1179 tal-Kodici Ċivili li testwalment iddisponi li - "Hemm novazzjoni (a) meta d-debitur jagħmel mal-kuntrattur tiegħu dejn ġdid, u dan jiġi mqiegħed flok il-qadim, illi jispiċċa ... ..."

L-Artikolu 1180(2) ikompli jipprovdi li n-novazzjoni ma tista' qatt tiġi preżunta. Ma hemmx għalfejn, pero`, li jiġi espressament dikjarat li qed issir novazzjoni, pero' l-intenzjoni li ssir novazzjoni għandha tirriżulta b'mod ċar. B'hekk ġie diversi drabi ritenut li l-intenzjoni li ssir novazzjoni ma tistax tkun presunta pero` lanqas ma hemm bżonn li tkun espressa. Hu biżżejjed li l-intenzjoni tan-novazzjoni tirriżulta kjarament.

Inoltre l-artikolu 1181 jipprovdi li "ma hemmx novazzjoni jekk l-obbligazzjoni l-qadima ma tiġix maqtula, għalkemm tiġi mbiddla."

Basikament in-novazzjoni hija mod ta' estinzjoni tal-obbligazzjoni. L-obbligazzjoni preċedenti tiġi estinta u dan billi tinħoloq obbligazzjoni oħra. Il-liġi tiddefinixxi li ssir novazzjoni meta d-debitur jagħmel mal-kreditur tiegħu dejn ġdid, u dan id-dejn il-ġdid jieħu post id-dejn il-qadim li jispiċċa...B'referenza għal ġurisprudenza nostrani ġie ritenut li biex isseħħ novazzjoni hemm bżonn li jirriżulta kjarament li ż-żewġ partijiet riedu li sseħħ novazzjoni. (ara "Frendo Randon vs Gera" deċiża minn din il-Qorti fis-27 ta' Ġunju 1952). Ġie ukoll ritenut li biex jista' jingħad li seħħet novazzjoni hemm bżonn li tirriżulta inkompatibilita' fl-eżistenza ta' żewġ obbligazzjonijiet, u fil-każ ta' dubbju n-novazzjoni għandha tiġi eskluża. L-ewwel Qorti għamlet referenza għal kawża "Koludrovich vs Muscat" deċiża minn din il-Qorti fit-25 ta' Mejju, 1956 u hu rilevanti li, fil-presenti sentenza, jiġi riportat dak li qalet il-Qorti u ċioe' - "Ma hemmx novazzjoni jekk l-obbligazzjoni antika ma tiġix maqtula, imma sempliċement modifikata; għalhiex, billi ssir xi modifikazzjoni fi ftehim, ma

tavverax ruħha novazzjoni bejn il-partijiet, jekk ma kienx hemm l-intenzjoni li ssir obbligazzjoni ġdida in sostituzzjoni għall-antika, li tiġi mill-partijiet imħassra.

Mhux kull modifika, għalhekk, iġġib l-estinzjoni tal-obbligazzjoni, billi l-partijiet jistgħu jżidu jew inaqqsu xi ħaġa mingħajr ma tiġi annullata l-obbligazzjoni, bir-riżultat li tkun ġiet biss modifikata ... In-novazzjoni trid tiġi pruvata minn min jallegaha, u f'każ ta' dubju għandha tiġi eskluża".

Applied to the acts of this case, the Court considers that the requisites necessary for novation to be brought about are not satisfied.

It is clear that in the agreement of the 9th November 2009 the parties had agreed on the *quantum* of the payments which defendants had to make to re-pay the loan, and they also agreed on the dates on which such payments had to be made. They also agreed on the legal consequences of non-adherence by defendants to such terms of payments and dates. Now, with regard to the verbal agreement which defendants refer to, the Court notes that at most what they agreed about was just a variation in the modality of payment and nothing else[2]. In fact, defendants admitted that although plaintiff had accepted the new terms of payment, he never spoke about any changes regarding the payment of the interest from what had been agreed to originally. Thus he did not exclude that they would incurr interests as previously agreed if they were late *"moruzi"* in payments, which they were.

Thus, the above cannot be considered as amounting to a novation for all intents and purposes of the law because the original obligation as set out in the agreement of the 9th November 2009 remained intact.

On the other hand, what the parties agreed between them in the said written contract binds them reciprocally and these obligations have the same effect of law between them. *Pacta sunt servanda*. They certainly cannot turn away from it now.

The law and jurisprudence are clear on this point.

[2] At one point, defendant Gabiella Vella alleged that although the loan was of €45,000 in the contract, in reality it was €36,000. This allegation was however neither corroborated by the other defendant nor by other evidence.

The Court in the case **David Borg vs W.V.S. (Marketing) Ltd decided on the 1st December 2004** stated that –

"Jingħad a propożitu fl-Artikolu 992, Kodiċi Ċivili illi "l-kuntratti magħmula skond il-liġi għandhom saħħa ta' liġi għal dawk li jkunu għamluhom". Din l-espressjoni għandha karattru enfatiku fis-sens illi patt miftiehem fi skrittura ma jistax jiġi varjat b' volonta` unilaterali ta' parti waħda mill-kontraenti....."

In the case **Francis Carbone vs Bart Attard et noe et decided on the 30th June 2004** the Court stated that –

"Egwal saħħa rafforzata tingħata lil din il-konsiderazzjoni mill-preċetti tal-liġi a norma ta' l-Artikoli 992 (1) u 993 tal-Kodici Civili. Dan fis-sens illi l-kuntratt hu liġi għal dawk li jkunu għamluh u allura dan għandu jiġi eżegwit bil-bona fidi. Taħt l-ewwel espressjoni, in linea ta' prinċipju s-sinjifikat tal-kunċett hu dak tan-non-modifikabilita` ta' l-obbligazzjoni ta' l-adempiment permezz tal-volonta` unilaterali. Fil-każ tat-tieni, konsiderata f'sens oġġettiv, din għandha titqies bħala regola ta' mġieba li trid tiġi osservata mill-kontraenti. Dan mhux biss fil-fażi in contrahendo fil-kors tan-negozjati iżda wkoll, u fuq kollox, fil-konklużjoni, u eżekuzzjoni, tal-ftehim kontrattat. Sinifikattivi ħafna huma d-dmirijiet ta' l-informazzjoni u tal-kjarezza u d-dover tal-kompiment ta' l-atti kollha neċessarji għall-effikaċja tal-kuntratt u ri-entranti fir-regola tal-lealta` u tal-korrettezza;"

Moreover in the case **Patrick Staines vs L-Avukat Godfrey Gauci Maistre noe deċiż fit-18 ta' Jannar 2006** it was stated that -

"Hi disposizzjoni ferm għaqlija dik dettata fl-Artikolu 993 tal-Kodiċi Ċivili li trid li l-kuntratti ta' ftehim jiġu esegwiti bil-bona fidi. Din timporta li kull parti, b' impenn, tesegwixxi dawk ir-regoli ta' kondotta idonei biex jippreżervaw l-interessi tal-parti l-oħra."

In the light of the above, once from the evidence it transpires that the parties had voluntarily agreed and accepted that failure by defendants to *"make any of the said payments on the date stipulated"* in the contract, then the interest as set out in the agreement of the 9th November 2009 automatically applies.

According to the contract, interest becomes due as a result of failure to make any of the said payments on the dates stipulated. Thus, defendants are bound to pay interest from the 15th December 2009 because although such date was meant to be the first one on which the first payment would be affected, in reality defendants made their first payment on the 28th May 2010 when they paid €500.

Consequently plaintiff's first claim is going to be upheld as indicated.

In his **second and third claim**, plaintiff is requesting the liquidation and payment of the interest due according to the contract.

Plaintiff filed a document attached to his affidavit with the amounts of commercial interest at the rate of 0.6660% accumulating over the period of time for which the repayments of the loan were being made. The Court verified the applicable commercial interest rate and confirms it as the correct rate. After having verified the sums indicated in plaintiff's documents and adding the interest payable for the remaining period of time until the loan was fuly settled, the Court reaches the conclusion that the commercial interest due to plaintiff is the sum of €16,942.81 as claimed by him. The Court also notes that defendants did not challenge the quantum of interest claimed by plaintiff but the date when, if at all, the interests should be incurred, that is start to run.

For these reasons the second and third claim will be upheld for the said sum.

On the basis of the above considerations, the remaining pleas of defendants are going to be rejected.

For all the above reasons the Court decides the case as follows –

1. It rejects all pleas raised by defendants;

2. It upholds the first claim of plaintiff and declares that the defendants together and in solidum between themselves are liable to pay to plaintiff interest in accordance with the Constitution of Debt agreement dated 9th November 2009 done by Notary Dr Andre Farrugia;

3. It upholds the remaining claims and liquidates the sum of sixteen thousand nine hundred and forty two Euros and eighty one cents (€16,942.81) and orders defendants together and in solidum between themselves to pay him such sum. Legal interests till the effective payment;

4. Costs are to be borne by defendants together and in solidum between themselves.

Hon. Dr. Miriam Hayman LL.D.
Judge

Victor Deguara
Deputy Registrar