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 Wednesday, 15th November 2023.

Number: 35

Application Number: 255/14/1 JZM

Sonia Gatt

v.

Thomas Thomas

The Court:

1. This is an appeal filed by the plaintiff Sonia Gatt, from a judgment delivered by the Civil Court, First Hall on the 31st of October 2016, wherein it upheld the defendant's second, fourth, fifth and seventh pleas and thus rejected all the demands made by the plaintiff.

Preliminaries:

2. The plaintiff, by virtue of a sworn application filed on the 28th of March 2014, requested that the Civil Court, First Hall:

> *"1. Tiddikjara illi l-konvenut naqas milli jottempera ruhu mal-obbligazzjonijiet minnu assunti permezz tal-iskrittura datata 29 ta` Novembru 2006.*
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> *2. Tordna lill-konvenut sabiex fi zmien qasir u perentorju jillibera lill-attrici Sonia Gatt mill-garanziji minnha moghtija lill-HSBC Bank Malta plc fis-somma ta` hamsa u sittin elf u sittin Euro (EUR 65,060) inkluzi kwalsiasi spejjez u/jew interessi u/jew charges li l-imsemmi Bank jista` jimponi sabiex tigi liberata l-attrici mill-garanziji minnha moghtija.*
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> *3. Tordna wkoll illi fl-eventwalita` illi l-konvenut, entro t-terminu moghti ma jottemperax ruhu ma dak mitlub fit-tieni talba suesposta, l-istess konvenut ikun ikkundannat illi jhallas lill-attrici s-somma ta` hamsa u sittin elf u sittin Euro (EUR 65,060) sabiex hija tkun tista` tillibera ruhha mill-garanziji moghtija lill-HSBC Bank Malta plc, inkluzi kwalsiasi spejjez u/jew interessi u/jew charges li l-imsemmi Bank jista` jimponi sabiex tigi liberata l-attrici mill-imsemmija garanziji, kollox kif intqal fuq u ghar-ragunijiet fuq premessi".*

3. That the plaintiff made such demands based on the following basis:

> *"1. Illi bejn is-snin 2005 u 2007 il-partijiet kienu f`relazzjoni personali flimkien.*
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> *2. Illi l-konvenut, illi kien jiggestixxi negozju konsistenti f`Internet Café, gewwa 17, Triq Ponsomby, Gzira u kien qieghed f`sitwazzjoni finanzjarja difficli, ssellef flus brevi manu minghand l-attrici, skont il-kundizzjonijiet stipulati fl-annessa skrittura mmarkata Dok SG1.*
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> *3. Illi inoltre u minbarra dan is-self, il-konvenut inghata loan u overdraft facility mill-HSBC Bank Malta plc, b`dan illi l-konvenuta kkostitwiet ruhha garanti solidali flimkien mad-debitur principali u cioe`, Thomas Thomas, fis-somma ta` EUR 30,000 in konnessjoni mal-loan, u fis-somma ta` EUR 35,060 in konnessjoni mal-overdraft facility kif ukoll estenzjoni sussegwenti tal-istes overdraft.*
>
> *4. Illi bhala garanzija ghall-hlas tal-imsemmija loan u overdraft facility mahrugin a favur Thomas Thomas, gew iskritti rispettivament fil-*

konfront tal-attrici ipoteka generali kif ukoll ipoteka specjali fuq il-fond 67, Triq F.M. Ferretti, Birzebbugia, proprjeta` tal-istess attrici, kif jirrizulta min-noti ta` iskrizzjoni mmarkati Dok SG2 u SG3, bin-numru progressiv 13055 u 14719 rispettivament.

5. Illi l-garanzija moghtija mill-attrici kienet maghmula bl-intendiment car u espress bejn il-partijiet, u cioe`, illi d-debitu kellu jithallas lura lill-attrici entro sena u nofs mid-data tal-iskrittura citata, ossia sad-29 ta` Mejju 2008, kif jirrizulta mid-Dok SG1, senjatament l-Artikolu [f]; "Parties also agree that Creditor shall be allowed to sell the above mentioned property, subject to bank`s prior approval, and in which case she shall deposit an amount equal to the Bank facility existing at the time of sale to make good and instead of the guarantee made on behalf of the debtor until such time as the debt is totally extinguished, that is within one and a half years from the date of this agreement as well as fulfil and adhere to any other conditions required by the Bank" ; Illi l-garanzija moghtija kellha tibqa` in vigore biss, entro dan l-istess terminu ta` sena u nofs.

6. Illi inoltre, ai termini tal-Artikolu (h) tal-istess skrittura Dok SG1, il-konvenut kien obbligat illi jirrevoka u jikkancella l-imsemmija garanzija, 'as soon as the bank loan is extinguished'. Illi nonostante illi l-Bank loan ilu li thallas, il-konvenut m`ghamilx l-arrangamenti necessarji mal-Bank HSBC Bank Malta plc sabiex l-imsemmija garanziji jigu revokati kif obbliga ruhu illi jaghmel.

7. Illi minhabba n-nonottemperanza tal-konvenut, l-attrici spiccat f`sitwazzjoni prekarja stante illi hija ghadha qed taghmel tajjeb solidalment flimkien mal-konvenut ghad-djun tieghu, bil-proprjeta` taghha, u cioe`, 67, Triq F.M. Ferretti, Birzebbugia, minkejja illi l-konvenut kien intrabat mal-attrici illi l-imsemmija garanzija kellha tibqa` fis-sehh sa mhux aktar mid-29 ta` Mejju 2008.

8. Illi dan l-agir abbuziv, bi ksur tal-obbligazzjonijiet ikkuntrattati mill-konvenut stess qieghed jesponi lill-attrici ghall-hsara u pregudizzju kbir.

9. Illi minkejja mitlub jonora l-obbligi kuntrattwali tieghu, u jaghmel dak kollu necessarju sabiex titnehha l-attrici bhala garanti in solidum, huwa baqa` inadempjenti".

4. That following the first plea brought forward by the defendant, the First Court, during the sitting of the 7th of October 2014[1], acceded to the request that proceedings be conducted in English.

[1] Fol. 35.

5. The defendant raised the following pleas:

"1. Illi preliminarjament, in vista tal-fatt illi l-eccipjenti huwa persuna li titkellem u tifhem biss bil-lingwa Ingliza, jehtieg illi dawn il-proceduri jinstemghu bil-lingwa Ingliza.

2. Illi l-ewwel talba attrici ghandha tigi michuda bl-ispejjez kontra taghha stante illi fl-ewwel lok, l-attrici naqset milli tispecifika liema obbligazzjoni jew obbligazzjonijiet l-eccipjenti allegatament naqas milli jadempixxi u ghalhekk l-ewwel talba, fil-generalita` taghha, ma tistax tintlaqa`, u fit-tieni lok, u minghajr pregudizzju, ma huwiex minnu illi l-eccipjenti naqas milli jottempera ruhu mal-obbligazzjonijiet minnu assunti permezz tal-iskrittura privata datata 29 ta` Novembru 2006.

3. Illi kif jista` jirrizulta ahjar waqt it-trattazzjoni tal-kawza, l-eccipjenti hallas lill-attrici l-ammonti kollha li silfitu (u ferm iktar) u li huma mertu tal-imsemmija skrittura privata (Dok. SG1) u ma ghandu jaghti xejn iktar lill-attrici taht l-iskrittura in kwistjoni. Fil-fatt, ghalhekk l-eccipjenti ghadu marbut biss lejn il-bank ossia s-socjeta` HSBC Bank Malta p.l.c u dan taht dawk it-termini u kundizzjonijiet naxxenti mill-kuntratti ta` self u overdraft it-tnejn datati 5 ta` Frar 2007 fl-atti tan-Nutar Dr Carmel Gafa` u li kopji taghhom qed jigu hawn annessi, esebiti u mmarkati bhala Dok. TT1 u TT2, inkluz dawk tar-ripagament ta` self u overdraft in kwistjoni, liema termini u kundizzjonijiet tinsab marbuta bihom bl-istess mod l-attrici bhala garanti solidali.

4. Illi t-tieni talba ghandha tigi michuda stante illi ma tezisti l-ebda obbligazzjoni fl-iskrittura privata Dok. SG1 illi torbot lill-eccipjenti li jillibera l-attrici mill-garanzija minnha moghtija lill-bank hlief qabel jigi saldat is-self u overdraft lill-imsemmi bank. Fil-fatt, skont il-klawsola (h) tal-iskrittura privata Dok. SG1 il-partijiet ftiehmu illi : "as soon as the bank loan is extinguished, the bank guarantee will be waived and cancelled."

5. Illi t-tieni talba ghandha tigi michuda wkoll stante illi l-eccipjenti qatt ma jista` jillibera lill-attrici mill-garanzija minnha moghtija ghat-twettiq tal-obbligazzjonijiet versu l-bank HSBC Bank (Malta) p.l.c, stante huwa biss l-istess bank li jista` jillibera lill-attrici kif minnha mitlub. Ghalhekk l-eccipjenti lanqas ma huwa l-legittimu kontradittur ghal din it-talba attrici. B`danakollu, u inoltre, peress illi l-istess bank ma huwiex parti fl-iskrittura privata Dok. SG1, u lanqas parti fil-kawza de quo, kwalsiasi obbligazzjoni li tista` torbot lill-kontraenti partijiet f`din il-kawza, inkluza xi obbligazzjoni ghat-thassir jew sostituzzjoni tal-garanzija solidali moghtija mill-attrici, hija res inter alios acta ghall-istess bank. Konsegwentement, il-bank qatt ma jista` jigi kostrett jaccetta thassir jew sostituzzjoni tal-garanzija solidali moghtija mill-attrici.

6. Illi r-ripagamenti tas-self u tal-facilita` ta` overdraft huwa regolat bil-kuntratti Dok. TT1 u TT2, liema termini u kundizzjonijiet ma jistghux jigu mibdula hlief bil-kunsens tal-kreditur li, f`dan il-kaz huwa biss il-bank u mhux l-attrici, u l-eccipjenti huwa marbut lejn il-bank biss taht dawk it-termini u kundizzjonijiet rizultanti mill-kuntratti relattivi fuq imsemmija. Konsegwentement, ma hemmx lok ghall-akkoljiment tat-tieni talba fil-konfront tal-eccipjenti li ghalhekk ukoll ghandu jigi liberat mill-osservanza tal-gudizzju f`dan ir-rigward.

7. Illi konsegwentement, it-tielet talba, illi hija msejsa kompletament u esklussivament fuq it-tieni talba, ukoll ghandha tigi michuda.

8. Illi minghajr pregudizzju ghas-sueccepit, it-tielet talba ghandha tigi michuda wkoll stante illi l-eccipjenti ma huwa bl-ebda mod marbut skont it-termini u kundizzjonijiet tal-iskrittura privata (Dok. SG1), illi jhallas lill-attrici s-somma ta` hamsa u sittin elf u sittin Euro (€65,060) kif mitlub minnha, u fi kwalsiasi kaz, kwalunkwe ammont li ghadu dovut illumrelattivament ghall-kuntest tal-iskrittura privata (Dok. SG1) huwa dovut biss lill-bank HSBC Bank (Malta) p.l.c. u mhux lill-attrici".

6. By virtue of the judgment delivered on the 31st of October 2016, the Civil Court, First Hall decided the dispute in the following manner:

"Upholds defendant`s second, fourth, fifth and seventh pleas.

Rejects all plaintiff`s demands.

Orders that all costs are to be borne by plaintiff".

This, after having made the following considerations:

"The demands made by plaintiff basically revolve on the agreement signed between parties dated on the 29 November 2006. Although it was alleged that the amounts mentioned in the agreement were not actually paid by plaintiff to defendant, and that defendant was under duress when he signed the agreement, no action was taken to rescind the contract, and this Court will therefore deem that contract as valid and binding between the parties. Furthermore the Court maintains that agreements that may have been concluded prior to that of the 29 November 2006 are not relevant to the merits of this cause, as this lawsuit relates only to the latter contract, taking into account that by virtue of clause (k) of the agreement, plaintiff waived any rights arising from previous agreements.

1. The first demand

Plaintiff is demanding from the Court a declaration that defendant failed to comply with his obligations arising from the contract of the 29 November 2006. The nature of the demand requires an analysis of the details of the agreement, as the parties are given conflicting interpretations of the contract.

*The legal principles that regulate the interpretation of contracts are found in Art 1003 – 1009 of Chapter 16. In a judgement given on the 13 February 1950 in re "**Onor. Edgar Cuschieri O.B.E. ne vs Perit Gustavo R. Vincenti A. & C.E**." the court of Appeal stated as follows:-*

> *"Illi fid-dritt dwar il-materja ta` interpretazzjoni tal-kuntratti, meta l-partijiet ma jkunux spjegaw ruhhom car, jew ikunu spjegaw ruhhom ekwivokament, jew fil-kaz li posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx preveduta u li hemm bzonn li tigi maqtugha, allura l-Qrati jkunu obligati jinterpretaw il-konvenzjoni; u din ghandha tigi primarjament interpretata skond l-intenzjoni komuni tal-partijiet li jkunu hadu parti fil-kuntratt u li tkun tidher car mill-kumpless talkonvenzjonijiet (ara L. 34 ff. de regulis juris, Ulpiano - semper in stipulationibius, et in ceteris contractibus id sequimur quod actum est; aut si non appareat quid actum est, erit consequens ut id est; aut si non appareat quid actum est, erit consequens ut id sequamar quod in regione in qua actum est frequentatur. Quid sequamur quod in regione in qua actum est freqwuentatur. Quid ergo, si neque regionis mos appareat, quai varibus fuit? Ad id quod minimum est redigenda summa est). F`materja hekk difficili, bhalma hija l-interpretazzjoni tal-kuntratti, **il-legislatur, sabiex jevita l-konsegwenzi fatali dovuti ghall-arbitriju tal-gudikant, nizzel fil-ligi certi regoli li huma suffragati mill-gherf tad-Dritt Ruman u mill-esperjenza tas-sekoli, pjuttost bhala direttivi anzikke` bhala normi assoluti u inflessibili, b`mod li bhala normi direttivi dawk l-istess regoli skond ic-cirkustanzi jistghu ma jigux pedissekwament segwiti**, kif qalet il-Qorti tal-Kassazzjoni ta` Franza fit-18 ta` Marzu 1807 riportata mill-Merlin fir-Repertorju tieghu taht il-vuci "Convention", para. 7 fl-ahhar".*

The Court of Appeal pointed out that these are not absolute norms rules that are to be rigidly applied but are intended to guide the Court in order to determine the intention of the contracting parties. The Court continued to state as follows:-

> *"Infatti inghad li anki l-istess gurekonsulti romani rigward din il-verita`, kif jidher mill-L. 17 ff. de regulis juris, fejn hemm kanonizzat il-principju li "cum tempus in testamento adjicitur credendum est pro haerede adjectum nisi alia mens fuerit testatoris, sicuti in stipulationibus promissoris gratis fuerit testatoris, sicuti in stipulationibus promissoris gratia tempus adjicitur", u kif huwa konfermat mill-eccezzjoni ghar-regoli u definizzjonijiet proposti, "nisi mens testatoris obsistat. . ." tal-L. 19. para. 1 ff. de cond. et demonst. u bnadi ohra tad-Digest; **u r-raguni guridika ghal dana l-adattament tinsab fil-fatt li r-regoli proposti ma jistghux ikunu nfiniti u adattabili ghall-kazi kollha u tant varjati u molteplici tal-manjeri kif il-bnedmin fil-hajja ordinarja jistghu***

> ***jesprimu ruhhom**. Kien ghalhekk li l-legislatur kwindi beda biex l-ewwelnett jiffissa l-principju li meta t-termini huma oskuri jrid jigi kunsidrat dak li l-partijiet kontraenti riedu; u jekk il-volonta` taghhom tista` tigi nterpretata per mezz ta` xi uzu ta` l-istess partijiet, jew tal-lokalita` jew regjoni fejn jghammru u ordinarjament imexxu x-xoghol taghhom, jew b`mezzi ohra, huwa konvenjenti li jigi segwit dak li huwa l-aktar verosimili skond dawk il-veduti anzikke` l-bniedem jattjeni ruhu ghas-sens letterali tal-kliem (ara l-L. 34 ff. "de regulis juris" fuq imnizzla "in extenso" u l-ligi 114 ff. "de regulis juris" li tghid "in obscures in speci solet quod verisimilius est, aut quod plerumque fieri solet"). Mill-banda l-ohra jinghad li hija norma ta` interpretazzjoni stabbilita mill-ligi illi meta l-espressjonijiet fil-konvenzjoni skond is-sens lilhom attribwit mill-uzu fl-epoka tal-kuntratt, huma cari, m`hemmx lok ghal ebda interpretazzjoni. Mhux lanqas ozjuz li jinghad li, stabbilit il-principju nkonkuss, logiku u naturali, li r-rabta tal-konvenzjonijiet titnissel necessarjament mill-unjoni tal-kunsens tal-kontraenti, il-konsegwenza hija li l-kliem tal-konvenzjoni ghandhom (1) jassumu s-sens li l-partijiet li jkunu ntrabtu jkunu manifestament riedu jaghtuhom, jew jassumu s-sinifikat li (2) il-manjera komuni ta` l-espressjoni "per se" tiddetermina, jew (3) il-verita` ta` l-operat tirrikjedi." (XXXIV.I.30)*

*In a judgement of the 29 November 2001 in re **"General Cleaners Co. Ltd. vs Accountant General et"** this Court (PA/RCP) stated as follows:-*

> *"Jibda biex jinghad illi bhala principju generali, l-ligi u senjatament l-artikolu 1002 tal-Kodici Civili jghid illi "Meta l-kliem ta` konvenzjoni, mehud fis-sens li ghandu skond l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghal interpretazzjoni".*
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> *Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa` dejjem dak li l-vinkolu kontrattwali ghandu jigi rispettat u li hi l-volonta` tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tigi osservata. Pacta sunt servanda". (A.C. 5 ta` Ottubru, 1998 - "Gloria mart Jonathan Beacom et vs L-Arkitett u Inginier Civili Anthony Spiteri Staines"). Tkompli tghid din is-sentenza ta` l-Onorabbli Qorti ta` l-Appell:*
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> > *"Illi l-gurisprudenza nostrali hi kostanti filli rriteniet li ma hiex ammissibbli li prova testimonjali kontra jew in aggjunta ghall-kontenut ta' att miktub u hi talvalta ammessa biex tikkjarifika l-intenzjoni tal-partijiet meta din hi espressa b`mod ambigwu" (Vol. XXXIV, P. III., p. 746). Jintqal inoltre illi: "Il-Qrati jkunu obbligati jinterpretaw il-konvenzjoni meta f`kuntratt il-partijiet ma jkunux spjegaw ruhhom car jew posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx giet preveduta u li kien hemm bzonn li tigi maqtugha, u din ghandha tigi primarjament interpretata skond l-intenzjoni tal-partijiet li jkunu hadu parti fil-kuntratt u li tkun tidher car mill-kumpless tal-konvenzjonijiet" (Vol. XXIV, P. I., p.27) (ikkwotata fis-sentenza "Beacom vs Spiteri Staines" - ibid; "Suzanne Xuereb vs Gilbert Terreni" - P.A. RCP. 12 ta` Lulju 2001; "AntonSpiteri vs Alfred Borg" - P.A. RCP. 30 ta` Novembru 2000; "Emanuel Schembri vs Leonard Ellul" - P.A. RCP 30 t`Ottubru 2001).*

The Court continued to state that :-

> *"Jirrizulta, u din hi anke r-ratio tal-ligi, (art. 1004 tal-Kodici Civili) illi l-interpretazzjoni li trid tinghata, meta klawsola tista` tfisser haga w ohra, din ghandha tinftiehem dik il-haga li biha jista` jkun hemm xi effetti milli dik il-haga li biha ma seta` jkun hemm ebda effett. Disposizzjoni li tirrifletti l-principju "in dubiis interpretatio capienda est, ut dispositio potius valeat quam pereat".*

*In a judgement in re "**Stanislao Cassar et vs Chevalier Antonio Cassar**" of the 15th December 1995 (Kollez. Vol. LXXIX.II.704), after referring to Art 1002 of Chapter 16, the Court of Appeal affirmed :-*

> *"Issa hu ovvju illi fil-kliem espress fil-klawsoli taz-zewg kuntratti fuq riportati ma hemm l-ebda ambigwita` jew ekwivocita`. . .*
>
> *Hu biss "meta s-sens tal-kliem ma jaqbilx ma` dak li kellhom fi hsiebhom il-partijiet kollha, kif ikun jidher mill-pattijiet mehudin kollha flimkien, (li) ghandha tghodd l-intenzjoni tal-partijiet" (artikolu 1003 tal-Kap. 16). . . "Kif gie osservat mill-Qorti Civili, Prim`Awla fil-kawza Sciberras Trigona - Aneico tas-6 ta` Ottubru, 1883, "quando le parole dell`atto sono chiare si deve stare alla lettura dell`atto, e non vi e` luogo a ricorrere a congetture" (Vol.XXXVI.I.1911) ;*
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> *Il-legislatur fil-materja ta` interpretazzjoni ta` kuntratt inissel certi regoli, li huma pjuttost direttivi milli assoluti, li ghandhom jigu segwiti skond ic-cirkostanzi, u principalment il-principju illi partijiet kontraenti riedu. A contrario sensu meta t-termini jkunu cari mhux lecitu ghall-Qorti li tinterpreta l-volonta` tal-kontraenti oltre dak li gie konvenut u miktub".*

The intention of the parties was highlighted in a judgement given by the Court of Appeal on the 1 July 1985 in re "Dr. Joseph Vella Galea vs Joseph Vella" where it was stated that :

> *"Kif gie deciz minn din il-Qorti, infatti, fil-kawza fl-ismijiet "Vincenti vs Staines", deciza fil-25 t`Ottubru, 1940, u ripetut fil-kawza fl-ismijiet "Attard vs Borg", deciza fil-21 ta` Marzu, 1941 (Vol. XXXi,I,49), "Hemm lok ta` interpretazzjoni ghalkemm il-kliem ikunu cari, meta mill-istess kuntest . . . ta` l-atti inter vivos. . . l-intenzjoni . . . tal-partijiet tkun tidher manifesta, ghaliex huwa assodat fid-dottrina illi l-Qrati ghandhom jaghmlu l-interpretazzjoni mhux fil-kaz biss li l-kliem ikunu oskuri, izda ukoll meta jkun hemm konflitt bejn il-kliem, anke cari, u l-intenzjoni rikavata mill-istess kontest. . . tad-disposizzjoni tal-bniedem; u dan in forza tal-kanoni ta` l-ermenewtika legali : non mens verbis sed verba menti servire debent." (LXIX.II.282)*

*In Vol IV of "**Obligazioni**", **Giorgi** examines the principles that guide the interpretation of contracts :-*

> *"Puo` accadere, che le parole del contratto siano equivoche od ambigue; ed in tale presupposto tutta l`arte dell`interprete deve rivolgersi a trascegliere il piu` plausibile fra i due significati. Escluderne uno col dimostrarne le inammissibilita`; includerne l`altro, perche` piu` probabile e da preferirsi; e la perfezione dell`ermeneutica si ragguiunge*

> *col riunire entrambi questi argomenti: giacche` in simile guisa la spiegazione del contratto rimane coartata al senso che si sostiene.*
>
> *Le regole piu` idonee per attuare questo metodo sono le seguenti. Chi fa un atto giuridico intende principalmente farlo valido ed efficace: percio`, se una clausola e` suscettiva di due sensi, deve spiegarsi piuttosto in quello che puo` avere qualche effetto, anziche` nell`altro che non ne avrebbe alcuno." (p.200) " … Ma possiamo dire liberamente qualche cosa di piu`. L`ufficio dell`interprete non consiste soltanto nel decifrare il senso oscuro delle parole` sibbene comprende anche quello di indagare fino a qual segno il sensoapparentemente chiaro delle parole concordi coll`intenzione dei contraenti, e di ricondurre mediante l`uso opportune della interpretazione estensiva o restrittiva la necessaria armonia fra la manifestazione esteriore fallace e il sentimento vero dei contraenti." (p.216)*

Within this framework of judgements and doctrine, and upon an examination of the contract in question, it results that defendant accepted to be a debtor of plaintiff for the sum of Lm49,000. According to clause (b) of the agreement (at folio 4) the parties agreed that defendant would take a bank loan and bank overdraft facilities in his personal name, with plaintiff`s immovable property in Birzebbugia, his creditor, as collateral. It was agreed in clause (c) that repayment of the Lm49,000 would be affected as follows : Lm20,000 directly to plaintiff`s mother immediately upon the loan and overdraft becoming operative and by no means later than two months from the date of the agreement ; the balance of Lm29,000 would be settled over eighteen months or earlier from the date of the agreement without interest.

In line with the evidence of defendant, it was expressly stated that plaintiff was not entitled to interfere with the running of any business managed by the defendant. Nor was she to have a say in the management of the running of the business. Nor could she hinder or obstruct defendant in the performance of his obligations.

The first demand has as its basis clauses (h) and (f) of the agreement. Clause (h) states that : "Parties also agree that as soon as the bank loan is extinguished, the bank guarantee will be waived and cancelled." while clause (f) reads that : "Parties also agree that creditor shall be allowed to sell the above mentioned property, subject to bank`s prior approval, and in which case she shall deposit an amount equal to the bank facility existing at the time of sale to make good and instead of the guarantee made on behalf of debtor until such time as the debt is totally extinguished that is within one and half years from the date of this agreement as well as fulfil and adhere to any other conditions required by the bank."

Plaintiff argues that defendant did not comply with his obligations, because according to clause (f), the validity of plaintiff`s guarantee was subject to a time-limit of eighteen months (or a year and a half). In

addition plaintiff argued that although the bank loan had been fully extinguished, the guarantee was not revoked in terms of clause (h).

Defendant testified that he settled all his dues to plaintiff. On her part plaintiff insisted that defendant still owed her around €4,000. However apart from this issue, plaintiff`s main contention is that the contract should be understood to mean that once defendant settles his sues, then he was obliged to release her guarantee that is her property. Plaintiff also argued that clause (h) covered both the loan and the overdraft, and that clause (f) implied that both the loan and the overdraft had to be settled within eighteen months.

This Court does not endorse plaintiff`s interpretation.

From a proper understanding of the terms of the contract, it results quite clearly from clause (c) that the time limit of one year and a half was the time limit within which defendant had to pay plaintiff the amounts outstanding, not the time limit within which defendant had to settle the bank loan and the bank overdraft. The latter limit-limits were determined in subsequent contracts entered with the bank in February 2007 to which plaintiff adhered. Moreover clause (h) stipulates that it is when the bank loan is extinguished, that the bank guarantee will be waived and cancelled. In their oral submissions, both parties agreed that by bank loan, the parties were referring to the bank loan and the overdraft facility. Hence it results that it was only when the bank loan and overdraft facility are extinguished, that the bank guarantee would be waived and cancelled. The Court does not find any breach of clause (h) on the part of defendant.

This Court is of the view that nothing in the agreement in question can be construed to impose an obligation on defendant to pay the bank within a time limit of one year and a half. That time limit was imposed for defendant to settle his dues towards plaintiff. The explanation given by plaintiff that through clause (f) it was agreed that the guarantee had to be valid for a year and a half is unfounded, because the applicability of this clause was made subject to the bank`s prior approval, and also subject to any other conditions which could be made by the bank.

This Court further notes that upon an examination of the two deeds dated 5 February 2007 (folio 27 et seq) no such time-limit was imposed with regards to the repayment of the loan and the overdraft. Plaintiff was a party and a signatory on the two deeds. Had plaintiff intended in the agreement of the 26 November 2006 that the guarantee would be only valid just for a year and a half, she would most certainly have insisted that an eighteenmonth time limit for repayment would be included in the two deeds. Nonetheless, no mention of such an important condition was made in the deeds; nor was any reference made therein to the agreement in question. Indeed by virtue of the two contracts (at folio 27 et seq) the defendant was granted a loan of Lm20,000 and an overdraft facility of Lm15,000; and plaintiff agreed to

act as surety in solidum with plaintiff. On both contracts, a special hypothec was granted by plaintiff to the bank on tenement number 67, Triq F.M. Ferretti, Birzebbuga. Plaintiff agreed to adhere to these contracts and never contested their validity. Again it is to be noted that had the intention of the parties been that once the amounts due to plaintiff would be paid, the guarantee would be waived and cancelled, plaintiff would have definitely insisted that such a condition be also included in the deeds which she also signed with the bank.

A proper assessment of the facts and circumstances of this case lies in that plaintiff wanted repayment of the funds she had given defendant so that she would reimburse her mother. Plaintiff trusted defendant who was her partner at the time, after that he had taken responsibility for the funds that had been given to his Arab associates and never returned. Although the account of the facts as relayed by the parties are conflictual on certain aspects, the fact remains that defendant accepted to bear a direct liability for debts which were contracted by Remote Technologies Limited; in return plaintiff would act as surety for the grant of bank facilities which were going to finance the repayment of the funds. This Court underlines the point that had the intention actually been that once all amounts owed to plaintiff were paid the guarantee would be waived, this would have been reflected in the bank deeds that followed and in which both parties were directly involved.

The plaintiff cannot succeed in her attempt to divest herself from obligations vis-à-vis third parties.

The first demand is dismissed.

2. The second demand

Plaintiff is requesting the Court to order defendant to release her from the guarantees she had given in favour of HSBC Bank Malta plc.

Once the first demand has been rejected, the second demand would have to be dismissed as well.

The release of the guarantee can only be given by HSBC Bank Malta plc who had contracted with both parties. Incidentally the bank is not a party in this cause.

This Court cannot put aside the fact that the guarantee was part of a contract. Therefore the Court cannot order the release of the guarantee without the consent of the bank, more so in this case, whereby the bank is not a party. For all intents and purposes of law, the agreement in question is res inter alios acta as far as the bank is concerned. The bank is not bound with whatever was agreed between the parties in the contract in question. Art 1001 of Chapter 16 is unequivocally clear that contracts have effect between the contracting parties, and cannot be of prejudice or give an advantage to third parties, unless otherwise

specified by the law. ("Emanuel Abela vs AIC Lawrence Montebello et" decided by this Court [PA/JRM] ; and "Giuseppe Ricardo Bugeja vs Carlo Pace" of the 1 October 1935).

What has already been affirmed with regard to the cancellation of the guarantee in the case of the first demand, applies in the case of the second demand as well. As the original overdraft of Lm15,000 as extended by a further €35,060 is still outstanding, the fulfilment of the obligation has still to take place. Plaintiff argued that after defendant paid the loan to the bank, he then proceeded to extend the original overdraft availing himself of her guarantee without her consent or approval. Defendant contests this by claiming that plaintiff did give her consent. On the basis of the evidence given by Edward Mizzi on behalf of HSBC Bank Malta plc, it results that after the loan was paid, the overdraft in its original figure was left outstanding ; the extension for a further amount of €35,060 was affected on the 25 July 2008. Mizzi denied that the bank had the authority to add, shift or cause movement of funds from one account to another, or to increase or shift funds from a loan to an overdraft or vice versa whilst retaining the same guarantee without informing the guarantor. Nonetheless witness declared that in this case it was not required to inform the guarantor because despite the increase in amount of the overdraft the exposure of plaintiff as guarantor did not exceed the original figure of €70,000.

This Court will not enter into the merits as to whether plaintiff gave her consent or not for the extension of the amount of the overdraft. Nor will this Court consider whether had there been no such consent, the decision of the bank to extend the overdraft on the strength of the guarantee was in order or not. What is indeed relevant for this Court is that clause (h) of the agreement in question was specific on the time when the guarantee was due for removal. It has clearly resulted from the evidence as a whole that the overdraft as originally contracted on the 5 February 2007 was still in place. Plaintiff had specifically endorsed the granting of that bank facility by her signature on the relative deed.

***The second demand is dismissed**.*

3. The third demand

The consideration of the third demand is entirely dependent on the acceptance by this Court of the second demand. Once the second demand was dismissed, it is only consequential for this Court to dismiss that third demand as well".

7. The plaintiff felt aggrieved by the above-cited decision and filed an appeal on the 18th of November 2016. A reply was filed by the defendant

on the 15th of May 2017.

8. The plaintiff based her appeal on one ground of grievance, that is, that the First Court did not properly assess the facts and applicable law pertaining to the case.

Facts:

9. This Court examined the evidence brought forward, including the witnesses' testimonies and documentation, and refers to the summary of evidence produced by the Court of first instance:

> *"II. The evidence*
>
> *Plaintiff testified that between 2005 and 2007 she had a relationship with defendant. At the time defendant conducted an internet café in Gzira. Defendant asked her to lend him money in order to better the services provided at his internet cafe`. She accepted and gave him the sum of Lm49,000 on loan. Plaintiff explained that defendant had a foreign business partner. They both signed a written agreement with her. Later another agreement was signed before a lawyer (folio 4 of the court file). Defendant used to pay back the loan by regular installments, but then stopped. Plaintiff had queried defendant on the purpose for which the money was being used; however the reasons he gave were untrue. He later alleged that the money had been unlawfully taken by his business partner. On being given that news, plaintiff stated that she was distressed.*
>
> *Plaintiff continued to state that defendant insisted with her to obtain a bank loan and overdraft in his name in order to repay her. She said that he told her that she had to place her property as security for the bank facilities as he did not have property of his own to put forward as collateral. They consulted a lawyer; they agreed that she would initially receive part of the money, and would be paid back the balance when*

his business would restart to generate revenue. A time-limit of eighteen months was imposed within which payment had to be effected. It was also agreed that when the loan was settled, her property would not be retained as security. Plaintiff confirmed that she is still owed circa €4,000. She also stated that she received a letter from the bank (Doc SG4) due to the guarantee she had given in favour of defendant when he took out the loan.

During cross-examination, plaintiff denied that she had given her money on loan to a company and not to defendant. She stated that she had no involvement with Remote Technologies Limited. Defendant had told her that he would invest the money in the company of which he was a director. The company was constituted by an investor Abdullah Nawafleh, and another person who was his partner. She confirmed that originally she had given defendant a loan of Lm10,000. Later she forwarded to him a further Lm32,000 which she acquired from her mother. Therefore a total of Lm42,000 which was handed to defendant over a period of one year. She stated that when she gave the money to defendant she was still going out with defendant. She was paid a Lm1,000 which was given to her mother.

Plaintiff insisted that she was not involved in the business dealings of defendant. When requested to be given her money back, defendant raised excuses by involving his partner. She explained that the first agreement between them involved both defendant and his Arab business partner ; both were made responsible for repayment. This agreement was concluded in September 2006. She signed that agreement. She confirmed that on that agreement (Doc TT3) the borrower is indicated as Remote Technologies Limited. She confirmed that Abdullah Nawafleh remained in Malta until 2012. Her relationship with defendant until 2012 ; she stayed with him hoping to be repaid and in turn return to her mother the funds she had given her.

Plaintiff testified that the Lm42,000 were given to her by her mother. She gave defendant a further Lm7,000 which came out from her personal account. She confirmed that later she entered into another agreement with defendant personally. This second agreement was effected because she was continually asking defendant about the money her mother had forwarded. Defendant told her that the money had been invested in the company and in property. When she requested defendant to provide her details of this property, he did not ; as far as she was concerned, defendant had lied to her. It was only after she disputed the matter directly with defendant that the latter retorted by stating that he would request bank facilities. The second agreement was signed in the presence of Dr Geoffrey Muscat Farrugia. This agreement cancelled the first agreement on the insistence of defendant.

Plaintiff stated that she had not made any enquires with regard to defendant prior to her loan. She stated that defendant had borrowed

Lm2,200 for his dental care. Subsequently he borrowed the Lm42,000 which she had obtained from her mother. From her personal funds, she gave defendant a further Lm5,000 on loan. Defendant had promised a pay a bonus of Lm2,000 in favour of her mother. She explained that defendant still owed €3,975. Out of the loan taken from the bank, defendant had paid Lm10,000 directly to her mother.

Plaintiff pointed out that according to the agreement, the guarantee had to be removed after five years. Nonetheless the guarantee was not removed. She confirmed that she had signed the contract with the bank as a guarantor. After the loan had been paid, the bank renewed the overdraft facility, and she was left with the guarantee tied to the entire original amount of €70,000.

Plaintiff testified that she filed this lawsuit for her guarantee to be removed by court order. She has not as yet instituted a cause against defendant for payment of what was still due. She confirmed that defendant managed to pay the loan due to his new business. The overdraft was given together with the loan. Once the loan was paid, the overdraft was extended. She stated that she was not aware of what was happening with the bank as she was not the client. Once the loan was settled, she could not request the bank directly to remove the guarantee as the guarantee covered the loan and the overdraft. She confirmed that she knew that the guarantee was being effected to cover both the loan and the overdraft ; in fact that was the reason why the five-year time-limit was established for removal of the guarantee.

The bank was not a party to the agreement between the defendant and herself. Plaintiff insisted that she had given the money to defendant not to his business partner. She claimed that the only hypothec on her property was the one serving as guarantee for defendant following the loan and overdraft he had been granted by HSBC Bank Malta plc.

Edward Mizzi – HSBC Bank Malta plc representative – testified that defendant was granted an overdraft facility for € 70,000, and a loan facility for €46,537, together with another overdraft facility for €30,000 in connection with his business to operate an internet café in Gzira. The original debt was in the name of defendant while plaintiff was acting as guarantor for the overdraft for €70,000, and the loan for €46,537.

He explained that the overdraft for €30,000 and the loan for €46,537 had been settled, but the overdraft for €70,000 was still outstanding. The loan for €46,537 was paid in October 2011. The guarantee given by plaintiff could not be released as long as the overdraft remained outstanding. Meetings were held with the parties, and there was an agreement that monthly installments of €1,767 had to be paid. However no payments were affected. He confirmed that the general hypothec and the special hypothec were still operative with regard to the outstanding overdraft. He pointed out that the overdraft originally

amounted to €35,000, but it was increased to €70,000 ; an additional hypothec was made by plaintiff.

Witness continued to state that there were no special hypothecs covering the loan. In fact an application had been filed for the registration of the relative note of cancellation.

He stated that to date there are two hypothecs regarding the matter. Hypothec no. 2914/2007 was registered on the 12 August 2007. It covered the original amount of the overdraft which was Lm15,000. Subsequently on the 25 July 2008 there was an extension for a further €35,060 ; hypothec no. 12638/08. The latter was corrected by hypothec no. 14719/2011 which was registered on the 28 September 2011. The correction was necessary as by mistake the creditor bank was indicated as Bank of Valletta plc.

Witness denied that the bank has authority to add or shift or cause the movement of funds from one account to another or to increase or shift from a loan to an overdraft or vice versa whilst retaining the same guarantee and 10 not informing the guarantor that further debts are being added. The original agreement was in the sense that plaintiff was acting as guarantor for the figure of €70,000. In the event that there was an increase in the liability, the bank had no obligation to inform plaintiff as long as the amount of the guarantee remained unaltered. In fact the guarantor remains liable for the amount that he had originally guaranteed.

Defendant testified that he met plaintiff in 2003 after they both had separated from their respective spouses. Their personal relationship ended in 2013. Plaintiff used to help him in the running of his business, which consisted in the sale of telephone cards, the repair of computers, and the provision of IT services. He was approached by Abudallah Nawalfeh and Gopinath Moorthy to set up an internet service provider company. He informed them that he had the technical knowledge and experience but that he did not have any funds to invest. Plaintiff liked the idea, and she convinced him that they should both invest in the proposed venture. Plaintiff gave on loan to investors the sum of Lm10,000 on condition that she would be repaid the sum of Lm13,000 after one year. A company by the name Remote Technologies Limited was constituted. Eventually it turned out that the entire business venture was a scam. Although the others did not repay plaintiff the sum of Lm13,000 as agreed, they convinced her that if she would invest another Lm20,000 they would repay her Lm40,000 after another year. Plaintiff accepted and invested Lm20,000 which she borrowed from her mother. It happened that the persons concerned left Malta with plaintiff`s money.

Defendant stated that in 2005, his father passed away and he had to return to India for three months. During this period, plaintiff phoned him stating that the investors, who were of Arab origin, had told her that he

had escaped from Malta with her money and that he wanted to reconcile with his former wife. He returned from India and found that one of the investors had left, and that plaintiff had not been paid. Plaintiff blamed him for what had happened. Before Abdullah Nawalfeh left Malta, he agreed to sign in his capacity as director a loan agreement whereby it was agreed that Remote Technologies Limited had borrowed from plaintiff the sum of Lm41,000 and that the company would repay that amount by not later than November 2007. The agreement was dated 26th September 2006.

Defendant continued to state that after Nawafleh left the scene, plaintiff insisted that he should sign another agreement to ensure that she would be paid the money due. He knew that he could build another business 11 of his own. He therefore advised plaintiff that he would give her the Lm20,000 that had been unduly taken from her by the Arab investors, provided that she would place her property as guarantee for him to obtain banking facilities. Under pressure from plaintiff, he reluctantly accepted to pay plaintiff the sum of Lm49,000, after she threatened to send members of her family after him. He confirmed that on the 26 November 2006 they agreed that he would pay plaintiff the sum of Lm49,000. Subsequently he made a request for a bank loan of Lm20,000 and an overdraft facility of Lm15,000. After the bank authorized the loan, he paid plaintiff the Lm20,000. He was informed by plaintiff that she had given the said Lm20,000 to her mother from whom she had borrowed the money. She was happy to increase the overdraft facility by a further Lm15,000 and put up her property as guarantee for that increased facility.

Defendant testified that his business was doing well. He had a very good client base to the extent that he managed to repay the entire bank loan within a short time. He insisted that plaintiff did not leave him in peace as she wanted to take over the financial side of the business ; not only by working with him, but also by taking control over the entire running of the business. Subsequently he rented a shop in Msida called Easy Café so that plaintiff would run the shop herself. Plaintiff used to pay the rent of the shop with his cheques. He never touched any money that she collected from the business, except to pay international services. He could never verify whether the money that she used to deposit represented the entire takings from the two shops. Plaintiff had a business credit card, a power of attorney enabling her to control his own bank accounts.

Defendant stated that plaintiff was paying herself from the business, either by cheque or in cash, the monthly sum of Lm500 initially, then Lm1,000 and finally EUR 1,000 per month on account of the remaining Lm29,000 still owing to her.

Defendant stated that plaintiff eventually destroyed the business and caused him much distress. Ultimately the business failed and he could not repay the bank loan despite having tried to explain to the bank that

he simply needed more time to get the business back on its feet. He gave plaintiff the opportunity to leave him in peace in order for him to try to recover the business, but she decided to file the current cause.

He stated that plaintiff was not claiming the amount of Lm49,000, since she never lent him that money. That was the money which she wanted from him for having lost her mother`s investment of Lm20,000 investment with the Arabs.

In cross-examination, defendant stated that plaintiff gave him on loan the sum of Lm5,000 and Lm10,000 for the intended business with the Arab associates. Subsequently he gave him a further Lm20,000. He stated that plaintiff encouraged him on this venture even though he was suspicious that the Arabs were fraudsters. He was however willing to take the risk without using plaintiff`s money. He came to know that the Arabs were fraudsters later on. He tried to dissuade plaintiff from investing in this venture because he had a lot of experience with Arabs, and most of the time, the outcome was negative. Plaintiff did not form part of the company or the venture as she was receiving social assistance benefits, and did not want to appear on any document, even though in actual fact she had full control. He stated that the first payment of Lm10,000 made by plaintiff was paid back with an additional Lm3,000. She then invested Lm20,000 on the understanding that the Arabs would give her Lm40,000. Although he formed part of the company in the beginning, he then resigned after a month. He reiterated that he had signed the agreement on behalf of the company because of the pressure that plaintiff exerted on him.

Defendant acknowledged his signature and that of plaintiff on Doc TT3 exhibited at fol 127. He stated that he accepted responsibility for the payment of Lm49,000 which he never received, because plaintiff was making his life miserable and making threats. Despite these facts, he did not take any legal action to have the agreement revoked. He further stated that he kept his relationship with plaintiff notwithstanding her pressure and her threats. He pointed out that her threats stopped when she was making money and collecting money in 2012. Once she received all the money, she wanted to stop the business and forced him to pay the overdraft. He confirmed that the bank loans were settled. As far as he is concerned, plaintiff is not owed any money.

Defendant testified that the overdraft had an outstanding liability of €72,000. Plaintiff was liable only for a part of this liability. Plaintiff was happy to extend the guarantee when the business was doing well. He denied that he told plaintiff that if she did not agree to extend the overdraft, he would stop paying so that she would lose her property. He needed money from the bank to increase the business. He stated that he opened the new 13 shop "Easy Café" for plaintiff ; she conducted the business for four or five years".

Legal Considerations:

10. The main grievance of the appellant is directed towards the First Court's conclusions and the manner it assessed the facts brought forward.

11. The plaintiff complains that she had lent money to the defendant, a portion of which she had acquired from her mother, to assist the defendant in setting up his information-technology business. The plaintiff gives a summary of facts and complains that the First Court failed to distinguish between the obligations contracted by the parties with HSBC Bank plc on the 5th of February 2007 and those obligations contracted between themselves on the 29th of November 2006 by virtue of a private writing, which obligations she asserts were back-to-back. Plaintiff states that this case was limitedly filed against the defendant as it solely concerns the defendant's obligations as *per* the agreement of the 29th of November 2006 and that it does not impinge on the parties' obligations towards HSBC Bank plc.

12. The plaintiff continues to argue that the private writing refers, in paragraph (c), to the Bank loan and overdraft which are separate from the defendant's obligation to reimburse the sum of LM49,000 and that the only connection that exists between these two agreements is that the loan

taken out from the Bank was intended to reimburse the plaintiff. She argues that she is not in agreement with the First Court which concluded that:

> *"From a proper understanding of the terms of the contract, it results quite clearly from clause (c) that the time limit of one year and a half was the timelimit within which defendant had to pay plaintiff the amounts outstanding, not the time limit within which defendant had to settle the bank loan and the bank overdraft. The latter limit-limits were determined in subsequent contracts entered with the bank in February 2007 to which plaintiff adhered".*

and neither in agreement with the conclusions reached with regards to article (h) of the same private writing:

> *"Moreover clause (h) stipulates that it is when the bank loan is extinguished, that the bank guarantee will be waived and cancelled. In their oral submissions, both parties agreed that by bank loan, the parties were referring to the bank loan and the overdraft facility. Hence it results that it was only when the bank loan and overdraft facility are extinguished, that the bank guarantee would be waived and cancelled. The Court does not find any breach of clause (h) on the part of defendant".*

13. The Plaintiff complains that the First Court's interpretation of the term within which the defendant had to settle payment of the loan taken from the Bank and the term within which the defendant had to reimburse the plaintiff are not relevant for the purpose of interpreting clause (h) and that the plaintiff is basing this court case on the obligation set within clause (h): "*As soon as the bank loan is extinguished, the bank guarantee will be waived and cancelled*". She claims that the evidence is clear that the debt owed to the Bank was settled and that the wording of the private

writing is clear that once the bank loan is settled, the guarantee is removed by the defendant and that clearly it was not the Bank's responsibility to remove such a guarantee as per clause (h) of the private writing.

14. The plaintiff laments that the First Court interpreted the term "*Bank Loan*", in clause (h) to include the overdraft facility and that this interpretation goes against the parties' intention and that there are no ambiguities in the contract, specifically in clause (g) and that the First Court had no reason to interpret that which was clear. The plaintiff reiterated that the contract in question does not say that the bank loan should include the overdraft and that the First Court should not solely have relied on oral submissions. The obligation to remove the guarantee was dependent on the settlement of the bank loan and that the First Court left the plaintiff exposed.

15. The defendant argues that the plaintiff should have filed the appeal in English, however he will not be requesting its striking off from the records of the case. On the merits of the appeal, he argues that appeals brought forward before a Court of Appeal should not lead to a disturbance of the 'appreciation of facts' carried out by the Court at first instance. The defendant claims that the appeal is unfounded as it is based solely on the fact that the plaintiff disagrees with the First Court's appreciation of the

facts and its interpretation thereof. The defendant states that the plaintiff changed her stance when it comes to the interpretation of the term “bank loan” and whether this includes the term “bank overdraft”. He continues that even though the Court should not solely rely on the oral or written submissions made by the parties’ defendants, these submissions are in fact a reflection of the parties’ stance and that the party bringing forward the claim should have juridical interest and that this is lacking where a court case is solely filed for the sake of obtaining a declaration or opinion, solely for personal satisfaction.

16. **This Court has assessed the issue brought in front of it and considers that it cannot agree with the plaintiff’s position.**

17. It notes that the parties, as per clause (b) of the private writing[2], both recognised that for a bank loan[3] and an overdraft facility[4] to be granted, security had to be given to the Bank*: “Parties agree that the debtor will take a bank loan and overdraft facilities in his personal name, using the creditor’s property, namely the immoveable property having the official number 67, situated at F.M. Ferretti Street, Birzebbugia as guarantee for the bank*.” Moreover, following the issuance of the bank loan and the overdraft facility, more than one hypothec was registered in

[2] Pg. 4 *et. seq.* of the records.
[3] Pg 27 *et. seq.* of the records.
[4] Pg. 31 *et. seq.* of the records.

favour of HSBC Bank Malta plc, and in fact, the Bank was given a general and special hypothec with regards to the bank loan[5] and, separately, a general and special hypothec with regards to the overdraft facility[6] which was then increased[7].

18. The Court considers that were it to agree with the plaintiff that clause (h) of the private writing of the 29th of November 2006, refers only to the bank loan, then consequently the argument should follow that the bank guarantee being referred to is the general and special hypothec filed specifically as a result of such loan and not the hypothec filed with regards to the overdraft facility. In such case, HSBC Bank Malta p.l.c.'s representative Edward Mizzi testified[8] that the hypothec pertaining to the bank loan had to be removed:

> *"Witness : There are two documents but one has more than one paper ovvjament. Documents HSBC 1 and HSBC 2. And I had to confirm regarding the cancellation of a hypotech there is a form B number 709113 which was dated 18th October 2013 we issued the Form B from* ***our side when we are saying the Form B the Bank is giving rights to cancel the hypotech with regards to loan since it was repaid, but the cancellation was never affected because the effective cancellation has to be done by a Notary and till then there were no Notary filed an application to the cancellation.***
>
> *Dr. Carlo Bisazza : Has the application been filed?*
>
> ***Witness : Yes the number is 709113.***
>
> ***Dr. Carlo Bisazza : Mela we have established that there are no special hypotechs covering the loan and that the application has been filed for the relative cancellation note to be registered.***

[5] Pg. 7 – Note of Registration of Hypothec No. 013055.
[6] Pg. 8 – Note of Registration of Hypothec No. 4914.
[7] Pg. 8 – Note of Registration of Hypothec No. 014719.
[8] Pp. 56 *et. seq.* u and 66 *et. seq.* of the records.

The Court : Is that correct?

Witness : Yes.

The Court : Correct.

Dr. Carlo Bisazza : As to the overdraft in the last sitting you had stated that Sonia Gatt is guaranteeing her property over the amount, on the amount of seventy five thousand, seventy thousand euros against her personal property and I had remarked that from searches carried out that property vis –a- vis the overdraft is burdened, that property is burdened a special hypotech on the amount of thirty five thousand and you insisted again know there is a special hypotech in connection with the overdraft on seventy five thousand.

Witness : Seventy, seventy.

Dr. Carlo Bisazza : Seventy.

Witness : I produced the documents stating that there are two hypotechs one of which is 4914 two thousand and seven whixh was registered in 12 08 2007. For an overdraft this was an original amount of the overdraft which was fifteen thousand Maltese Liri and eventually there was an extension on 25th July two thousand and eight for an extension of 35 060, the hypotech is 12638 / 08 which eventually was corrected because it was issued on, erroneously on BOV and it was amended by, corrected by hypotech number 14719 two thousand and eleven which was registered on the 28th September two thousand and eleven, I produced the evidence of both hypotechs".

19. On the other hand, were this Court to adopt the First Court's interpretation, the fact remains that as the overdraft facility is still active, the guarantees given must remain in place unless the creditor chooses otherwise.

20. Therefore, regardless of which interpretation is to apply, the fact remains that for the hypothecs to be removed or the guarantee varied, HSBC Bank Malta p.l.c. must register its consent, as it is the Bank itself

which is benefitting from such guarantees subscribed to in part by the appellant herself.

21. The plaintiff cannot use this action to shirk away from her contractual responsibilities. After all, and by virtue of the public deeds signed with HSBC Bank Malta plc, the plaintiff constituted herself as joint and several sureties with the defendant in favour of the Bank and, thus, for her to be released from such obligation it is the Bank which must consent to her release.

22. Were the Court to acquiesce to the plaintiff's demands, the plaintiff cannot expect that it would be able to enforce its judgment against a third party which is not part of these proceedings, and which third party may not agree to a variance in the type of security it requires.

23. Consequently, this ground of grievance is being rejected.

Decision:

24. To this end the Court **rejects the appeal**, as unfounded in fact and at law, and therefore confirms in whole the judgment handed down by the

First Court on October 31st, 2016, in the afore-mentioned names, and orders that **all costs** pertaining to the appeal be also borne by plaintiff.

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

Deputy Registrar
rm