- PLAINTIFF IS DUTY BOUND TO DILIGENTLY FOLLOW THE PROCEEDINGS –
– SERVICE OF ACTS ON DEFENDANT IS IMPERATIVE IN ANY CIVIL PROCEEDINGS –
– IGNORANTIA JURIS, NEMINEM EXCUSAT –
– PRO SE LITIGATION & SELF-REPRESENTED PARTIES –

SMALL CLAIMS TRIBUNAL
(EUROPEAN SMALL CLAIMS PROCEDURE)

ADJUDICATOR
ADV. DR. KEVIN CAMILLERI XUEREB

Monday, 26th of March, 2018

Claim Number: **4 / 2013**

CELINE IMBERT

VERSUS

JASMIN VOSS

The Tribunal,

Having seen the Claim Form (Form A) filed by the plaintiff on the 27th August, 2013 whereby the same, in line with Regulation (EC) no. 861/2007, requested the Tribunal to condemn defendant to pay her the sum of two hundred, sixty four euros and ninety euro cents (€264.90c) for the reasons explained under Section 8.1 of the Claim Form (see *fol*. 8).

Took cognizance of all the acts and documents relating to the case and having noted that the plaintiff required no oral hearing (*vide* section 8.3 of the Claim Form at *fol*. 9).

Took also cognizance of the decrees dated 7th March, 2016 (*fol*. 35), 6th September, 2017 (*fol*. 36), 3rd October, 2017 (*fol*. 43) and 23rd October, 2017 (*fol*. 49) and the emails sent by plaintiff in regard to the latter three decrees.

The Tribunal considers:

As to the factual aspects of the case,[1] this may be briefly described in the following terms: during her stay in Malta (circa from July until September, 2012), the plaintiff appears to have rented an apartment from the defendant in St. Julians.[2] When the plaintiff's stay was over, she demanded the security deposit[3] back from the defendant, in the amount of €200.00c, but the defendant refused to pay back the said amount, alleging that plaintiff had "*friends staying in the apartment*"(which appears to be contrary to the stipulations between the parties[4]). Apart from this, the plaintiff alleges that she had to spend a night in a Maltese hotel since the promised apartment was not initially made readily available by the defendant. Plaintiff's stay at the said hotel cost her the sum of €64.90c.[5] Plaintiff is seeking redress against the defendant for the refund of the said two amounts, thus claiming a total of €264.90c from the defendant.

However, plaintiff failed to follow the pertinent procedure and serve the defendant with the acts of these proceedings, notwithstanding the Tribunal's repeated directives and orders in this respect (see decrees at *fol*. 35, *fol*. 36, *fol*. 43 and *fol*. 49).

The following is a chronological account of how the present proceedings progressed from date of inception (i.e., filing) to the present.

The acts show that the claim was filed on the 27th of August, 2013 but do not show the very first attempt of service upon the defendant with the relative acts of the proceedings, even though the relative registry fee of €1.16c was paid along with the fee to lodge the case (see *fol*. 1). After the introduction of these proceedings in August 2013 there appears to have reigned a state of complete inertia and abeyance – on both the plaintiff and this Tribunal (as then presided) – of about two years and a half (to be precise, 924 days). Then, on the 7th March, 2016, this Tribunal, as diversely presided, issued a decree ordering plaintiff "*to notify the defendant* [...] *by making use, if necessary, of the procedure established in Article 13 and 14 of regulation (EC) Number 805/2004*" (see *fol*. 35). Notwithstanding such decree, which also warned the plaintiff that "*in the absence* [of service/notification] *the necessary measures will be taken*", there appears to have been no attempt on the plaintiff's part to notify the

[1] As emerging from Section 8.1 of the Claim Form (*fol*. 8) and from a copy of a letter which the plaintiff had sent to the defendant on the 28th November, 2012 (*fol*. 12).
[2] See Guest Agreement between the parties dated 7th July, 2012 (*fol*. 25).
[3] The relative bank transfer appears to have been effected by plaintiff to defendant on the 4th July, 2012 (*fol*. 29).
[4] See email by defendant dated 4th October, 2012 (*fol*. 17).
[5] See relative invoice dated 26th September, 2012 (*fol*. 28).

defendant. It must be stated that the acts do not indicate whether the said decree was properly communicated to the plaintiff or brought to her attention.

Thereafter, another state of abeyance seems to have re-embraced these proceedings. This state was, partially, administratively induced, due to the change in this Tribunal's Adjudicator. Then, the Tribunal, as currently presided, issued a decree on the 6th September, 2017 (*fol*. 36) which stated thus:

> The Tribunal,
>
> Having seen the acts of the present proceedings, including its decree dated 7th March, 2016;
>
> The Tribunal notices that the defendant has not yet been properly notified with the relative claim in terms of EC Regulation no. 861/2007 and that the claimant has not adhered to the terms set in the said Tribunal's decree;
>
> Having seen Articles 12(2) and 14(1) of EC Regulation no. 861/2007, the Tribunal orders and directs the claimant, for the last time, to notify the defendant, within a period of thirty (30) running days from service of this decree, with the relative acts of these proceedings in terms of the relevant provisions of EC Regulation no. 861/2007.
>
> The Tribunal makes it clear that failure to abide by the directions contained in the present decree, after the lapse of the stated time-frame, the Tribunal shall proceed for judgment.
>
> The Tribunal orders that a copy of the present decree be communicated immediately to the claimant on the email address shown in her claim 'Form A'.

On the same date, this decree was sent to the plaintiff via email (see *fol*. 37) and on the same date plaintiff replied by email (see *fol*. 38) as follows:

> « Thank you for your email. I'm quite surprised to receive information about this claim. Please note that it is the first time in years that I am notified about this matter. I did not receive anything in 2016 as stated in this document. Can you please explain what I am supposed to do? What am I supposed to notify? Jasmin Voss has been advised by certified letter weeks before the claim – and she never picked up the letter. What can I do to communicate with her? I don't have her address, nothing after all those years. Please can you help? If I have only 30 days left to act I would like to know what to do. She stole my money when I was only [a] student, and I've paid fees to the tribunal to get helped [sic] without any results till today. Please help. »

On the 11th September, 2017, the Tribunal's deputy registrar sent an email to the plaintiff inviting her to "*follow the instructions given by the adjudicator in the decree* [...] *If you have any question or require any further assistance it would be better if you contact a lawyer*" (see *fol*. 39). Plaintiff replied on the same day via email (see *fol*. 41) and wrote thus:

« The decree you've sent makes reference to the decree dated 7th March, 2016. I believe I have the right to be informed of the content of this decree. Please inform or put me in contact with someone that could help me. According to REGULATION (EC) No 861/2007 – (15) – The parties should not be obliged to be represented by a lawyer or another legal professional. Thanks in advance for your help. »

In the light of plaintiff's last email, the Tribunal's deputy registrar forwarded a copy of the Tribunal's decree dated 7th March, 2016 to the plaintiff by email dated 3rd October, 2017 (see *fol*. 46). On the same day, namely on the 3rd October, 2017, the Tribunal issued another decree (see *fol*. 43), which stated that:

The Tribunal,

Having seen the acts of the present proceedings anew, including its decree dated 6th September, 2017;

The Tribunal notices that the said decree was communicated to claimant on the 6th September, 2017 by the Tribunal's deputy registrar *via* email and the claimant replied *via* email on the same date stating, among other things, that:

- she had never been notified with anything since the introduction of her claim;
- she did not receive the Tribunal's decree dated 7th March, 2016;
- she does not know exactly who to notify her claim to;
- she tried communicating by certified letter with that defendant but said letter was never picked up by the defendant.

In view of the above, and upon the Tribunal's instructions, the deputy registrar communicated again with claimant *via* email on the 11th of September, 2017 urging claimant to follow the instructions detailed in the Tribunal's decree of 6th September, 2017 and if claimant had further queries or was in need of assistance, she ought to obtain legal advice or be assisted by counsel in this matter. Claimant replied on the same day *via* email stating that:

- once again, she did not receive the Tribunal's decree of 7th March, 2016;
- to be put in contact with someone who could help her (in this procedure);
- in line with Regulation (EC) no. 861/2007 the parties should not be obliged to be represented by a lawyer or another legal professional.

The Tribunal considers;

Although it is true that Article 10 of Regulation (EC) no. 861/2007 states that "*Representation by a lawyer or another legal professional shall not be mandatory*", the Tribunal deems that claimant ought to seek legal counsel in regard to these special proceedings which were initiated by herself on the 27th of August, 2013. This is even more so when the claimant, a non-Maltese resident, is considered not familiar and/or conversant with the relevant (and intricate) procedural norms of Maltese Civil Procedural Law. If the claimant elects to pursue these proceedings without the aid of a "*lawyer or another legal*

professional", the Tribunal shall respect that decision. However, in such a case the claimant shall be putting the *onus* upon herself to abide with the directions emitted by this Tribunal and as a corollary, the Tribunal shall expect claimant to follow its orders and decrees according to Law.

In view of the above, having seen Articles 12(2) and 14(1) of Regulation (EC) no. 861/2007, the Tribunal orders and directs the claimant, for the last time, to notify the defendant, within a period of thirty (30) running days from service of this decree, with the relative acts of these proceedings in terms of the relevant provisions of the said Regulation.

Again, the Tribunal makes it clear to the claimant that failure to abide by the directions contained in the present decree, after the lapse of the stated time-frame, the Tribunal shall proceed for judgment.

The Tribunal orders that a copy of the present decree be communicated immediately to the claimant on the email address shown in her claim 'Form A'.

This decree was, once again, communicated to the plaintiff by email by the Tribunal's deputy registrar on the same date (see *fol*. 45) to which email the plaintiff replied on the 4th October, 2017 (see *fol*. 47) by stating as follows:

« Jasmin Voss has been notified by certified letter on September 2012 and as asked by the tribunal again now by email. Please find below email sent.[6] Please note that this email is the only way I have to contact with her. I understand that 5 years after the facts, the company MaltaRooms closed and nobody will never be able to contact with Jasmin Voss and localize her. Please proceed. »

On the 23rd October, 2017 the Tribunal issued another decree (see *fol*. 49). The said decree directed and ordered plaintiff as follows:

The Tribunal,

Having seen the acts of the present proceedings anew, including its decrees dated 6th September, 2017 (fol. 36) and 3rd of October, 2017 (fol. 43);

The Tribunal notices that after the claimant was notified with the Tribunal's decree dated 3rd October, 2017 (on the same day via email – fol. 45) the same communicated with the Deputy Registrar (via email dated 4th October, 2017 – fol. 47) informing, inter alia, that defendant "has been notified by certified letter on September, 2012 and as asked by the tribunal again now by email." Claimant added that, "Please note that this email is the only way I have to contact with [the defendant]. I understand that 5 years after the facts, the company MaltaRooms closed and nobody will never [sic] be able to contact with Jasmin Voss and localize her. Please proceed."

[6] The said email, dated 4th October, 2017, shows that plaintiff wrote to the defendant, explaining her grievances and informing her that there were European Small Claims Procedure proceedings pending against her (see *fol*. 47).

The Tribunal underlines that the notification referred-to by the claimant precedes the present proceedings in that, claimant is stating that she notified the defendant by certified letter on September, 2012 whereas these proceedings were filed on the 27th of August, 2013 (circa less than a year after the alleged service by certified letter).

The Tribunal cannot deem or consider such notification as legitimate or valid. Regulation (EC) no. 861/2007 explicitly states that defendant is to be notified with the claim form and other acts or documents of the proceedings [see Article 5(2) and Article 13 of the mentioned Regulation]. This implicitly signifies that the claimant is to serve the defendant with the relative acts after the filing of this special procedure and not before the filing thereof.

The Tribunal is assuming that in her email the claimant is referring to some ex parte correspondence she had sent to the defendant prior to the lodging of the current procedures (presumably those exhibited at fol. 12 of the acts). In that case, such service (i.e., of the "certified letter" mentioned by the claimant) is outside the ambit of the said Regulations.

Again, the Tribunal stresses that the defendant is to be served with the acts of these proceedings in accordance with the requirements enshrined and explained under Regulation (EC) no. 861/2007.

In this regard, the Tribunal draws the claimant's attention to the service procedure delineated under Article 13 and 14 of Regulation (EC) no. 805/2004, as mentioned under Article 13 of Regulation (EC) no. 861/2007 and orders the claimant to comply with the requirements thereof.

The Tribunal notes further that, since the claimant is a pro se litigant in these proceedings (i.e., a 'non-represented party' or a 'party not represented by legal counsel'), it cannot provide legal advice on how to effect service. It can solely provide legal information and direct the claimant towards the relative provisions of the applicable Law.

In the light of the above, the Tribunal extends the time-limit established in its decree of the 3rd of October, 2017 by a further thirty (30) running days from service of this decree so that the claimant proceeds to notify the defendant with the relative acts of these proceedings in terms of the relevant provisions of the mentioned EC Regulations.

Again, the Tribunal makes it clear that failure to abide by the directions contained in the present decree, after the lapse of the stated time-frame, the Tribunal shall proceed for judgment.

The Tribunal orders that a copy of the present decree be communicated immediately to the claimant on the email address shown in her claim 'Form A'.

The above-cited decree was communicated to the plaintiff by the Tribunal's deputy registrar on the same day by email (see *fol*. 51), to which the plaintiff replied, also on the 23rd October, 2017 (see *fol*. 52), as follows:

« Good Afternoon. Thank you for your email. I cannot contact Jasmin Voss neither by email or by ordinary/certified letter to notify her the procedure as requested by the court. The

company MaltaRooms closed, email failed and I do not have any valid address. I cannot localize the defendant. »

After the plaintiff's email of 23rd October, 2017 the acts of the present proceedings are completely silent – there was no other email by the plaintiff and there results no notification attempt. The Tribunal did not proceed immediately to deliver its judgment but kept the matter on-hold so to allow plaintiff some more leeway and time. However, now that more than five (5) months have elapsed from plaintiff's last communication, the Tribunal decided to hand down its decision.

In view of the above, the Tribunal makes the following considerations:

As asserted by this Tribunal on previous occasions,[7] it is a known tenet at Law that a party who initiates proceedings is duty bound to diligently follow the proceedings which it instigated and gave rise to. A party is not allowed to file judicial proceedings and expect Justice to take its course in the absence of any contribution on its part or without any impetus whatsoever from its side. When proceedings are initiated, the party instigating such judicial process (i.e., the plaintiff) triggers a number of procedural mechanisms by virtue of which it calls upon the Court's or Tribunal's jurisdictional authority to delve into a specific subject-matter and decide thereupon. However, in order to do so the Court or Tribunal (i.e., to consider and decide the issue at hand) must be 'aided' by the party calling upon its authority. Certain formal requirements, particular procedural norms and specific normative mechanisms must be addressed and adhered to by the interested party in order for the Court or Tribunal to do so, failing which the deciding authority finds itself incapable and paralysed to consider or accord that which is desired or demanded. All this dilutes itself into the imperative requirement that when proceedings are set in motion, the party seeking a remedy ought to meet a certain level of diligence, care, zeal and vigour in following the process it voluntarily gave rise to. In relation to these observations, reference is made to the judgment *in re* **Raymond Cauchi et v. Kontrollur tad-Dwana** (Court of Appeal, 15th December, 2015)[8] and *in re* **Mary Zammit v. Paul Camilleri pro et noe** (First Hall, Civil Court, 16th March, 2012).[9]

[7] See *in re* **Antoinette Pullicino v. Rynair Limited** and *in re* **Dorianne Zammit Gugliemi v. Myngcar Leon Yousefzadeh**, both delivered by this Tribunal (in its current special competence) on the 6th of November, 2017.
[8] The Court held that, "*huwa palezi li l-partijiet f'kawza ghandhom l-obbligu li jsegwu l-kawza b'mod diligenti u li jattendu ghall-udjenza fid-data u fil-hin indikat fl-udjenza precedenti sabiex jinformaw ruhhom dwar dak li jkun qed isir fl-udjenza u dak li jkun qed jigri fil-kawza*."
[9] The Court stated that, "*parti ghandha l-oneru li kull tant zmien tivverifika mill-atti x'ordnijiet ikunu qeghdin jinghataw mill-qorti in camera b'riferenza ghall-kawza*."

Moreover, a party must diligently abide by the orders and/or directives issued from time to time by the deciding authority during the proceedings.

In the present case – as amply shown here-above – the plaintiff, although surely interested in the outcome of the proceedings, failed to abide by the procedural requirement of service/notification of the relative acts upon the defendant. Although, the Tribunal understands and sympathises with the plaintiff's predicament, the Tribunal cannot transcend fundamental requirements (that of service of the acts) and start entertaining plaintiff's allegations if these preliminary procedural essentials are not properly addressed and duly satisfied.

The service of the acts of the proceedings upon the defendant is a crucial aspect of any litigation. By such legal mechanism, the defendant is made formally aware of the plaintiff's claim and allegations. By that procedural method also, the defendant is placed in a formal position to either accept (wholly or partially) the allegations preferred against him or her or else contest the same. Moreover, after being formally notified, the defendant has even the right to elect to ignore to activate him- or herself in such regard (which neglect would render him contumacious[10]). Whatever line of

[10] Contumacious is derived from the Latin word "*contumelia*". According to **DIZIONARIO ETIMOLOGICO** (Rusconi Libri, revised edition, 2004; p.257) – "*contumàce*" is described/defined as follows: "*dal latino 'contumax' (= arrogante) forse collegato a 'temnere' (= disprezzare) o a 'tumere' (= essere gonfio, in questo caso di orgoglio)*." This principle is described in detail *in re* **Joseph Vella noe v. John Vella**, (Court of Appeal, 21st May, 1993) wherein there was stated that it is based upon "*il-presuppost li l-konvenut bin-nuqqas tieghu wera contumelia u dispett ghas-sejha tal-Qorti. Meta huwa gie konvenut fl-avviz, citazzjoni, rikors, libell jew petizzjoni u hija din id-dizubbidjenza animata psikologikament b'dawk il-fatturi ta' contumelia u dispett li l-ligi trid tirreprimi u timponixxi. In kwantu contumelia bhal dik hi element ta' disordni socjali. Dan gie ricentement ribadit minn din il-Qorti (Sede Civili) fis-sentenza taghha tal-14 ta' Jannar, 1993 fl-ismijiet Pauline Grech noe vs. Nazzareno Zammit*." (see also **Dr. Giannella Caruana Curran v. Stephen Chetcuti et**, Court of Appeal, 20th April, 2005; **Dr. Christopher Muscat v. Raymond Bugeja noe**, First Hall, Civil Court, 16th March, 1999; **Inginier Emmanuel Farrugia v. Felix Agius et noe**, Court of Magistrates (Malta) 11th July, 2005). This notwithstanding, and in line with defendant's rights of defence, the contumacious state has always been interpreted as outright contestation of the claim (*vide* **Antonio Debono et v. Paolo Borg**, Civil Court, First Hall, 2nd April, 1955 and also **Anthony Grech et v. Joseph Farrugia et**, Court of Appeal, 17th February, 2004). Therefore, the defendant's lack of formal and active participation in the proceedings does not translate into an acceptance of the plaintiff's allegations or claim, whatever they may be. According to established legal doctrine, "*la contumacia vale resistenza, che il contumace tacitamente respinge le domande dello avversario ... il contumace affida al giudice la propria difesa ... questa difesa deve limitarsi ad esaminare se le forme del rito sian rispettate, se l'assunto della parte presente sia fondato in fatto ed in diritto*" (**SALVATORE LA ROSA**, "Il Contumace nel Giudizio Civile", Filippo Tropea ed. 1887; §118, p.175). Domestic case-law on the matter, like the case *in re* **Giuseppe Gerada v. Salvu Attard** (Commercial Appeal, 6th November, 1959), holds that, "*Ghalkemm il-konvenut jibqa' kontumaci, dan ma jaghtix lok ghall-prezunzjoni ta' abbandun tal-liti, ghad-difett ta' eccezzjonijiet legittimi, jew ghal adezjoni ghad-domanda; imma, inveci, ghas-suppozizzjoni ta' rimessjoni ghall-gustizzja tat-tribunal*." On the same lines is the decision reported in **Volume XXIX-III-35** (Maltese Court's Decisions) which states thus: "*ghalkemm il-konvenut jibqa' kontumaci dana ma jfissirx illi huwa abbanduna kull eccezzjoni li seta' jaghti fil-kawza u ammetta d-domandi. Il-gudikant ghandu jezamina jekk it-talba hiex gustifikata indipendentement mill-kontumacja tal-konvenuti*." In the case *in re* **Id-Direttur tar-Registru Pubbliku v. Ermelina Silos Mendoza et** (First Hall, Civil Court, 16th November, 2010) there was

defence the defendant may eventually opt for, the imperative feature is that he or she is first and foremost duly served with the pertinent and relative acts of the proceedings by the plaintiff (in this case, Form A) so to enable him or her to defend him- or herself or otherwise, as just explained. Therefore, service (or notification) of the relative acts of the proceedings provides the defendant with formal notice of a pending lawsuit asserted against him or her. This is a vital procedural requisite because it upholds the tenet of due process of law.

Even though the Tribunal understands the problems or difficulties faced by the plaintiff in attempting to serve the defendant (being unable to find a relevant address to effect notification), the Tribunal is impeded in assisting the plaintiff in the said procedure.

The plaintiff chose to retain no legal counsel in these proceedings and thus implicitly elected to proceed forward with the same as a *pro se* litigant. As stated in the Tribunal's decrees, «*If the claimant elects to pursue these proceedings without the aid of a "lawyer or another legal professional", the Tribunal shall respect that decision. However, in such a case the claimant shall be putting the onus upon herself to abide with the directions emitted by this Tribunal and as a corollary, the Tribunal shall expect claimant to follow its orders and decrees according to Law*.» (decree of 3rd October, 2017) and that, «*The Tribunal notes further that, since the claimant is a pro se litigant in these proceedings (i.e., a 'non-represented party' or a 'party not represented by legal counsel'), it cannot provide legal advice on how to effect service. It can solely provide legal information and direct the claimant towards the relative provisions of the applicable Law*» (decree of 23rd October, 2017).

When this Tribunal invited the plaintiff to consult a legal professional (see above), she pointed out that Regulation (EC) no. 861/2007 (*ex* Art. 10 thereof) gave her the right not to be represented by any lawyer or other legal professional. By doing so the burden to follow and the responsibility to abide by all procedural requirements rested solely and exclusively upon the plaintiff. As a corollary, any failure in such regard is solely imputable to the plaintiff since "ignorantia eorum quæ quis scire tenetur non excusat"[11] or as it is commonly know "ignorantia juris, neminem

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held that the party (defendant) who is in a contumacious state "*titqies li halliet ix-xorti taghha f'idejn il-Qorti biex taghmel haqq ghall-kaz taghha*." Also in this vein is the decision *in re* **Carmela Zahra armla v. Direttur tax-Xogholijiet Pubblici** (Court of Appeal, 28th February, 1975; not published).

[11] "*Ignorance affords no excuse in reference to those things which one is bound to know*" (Trayner's Latin Maxims, by **A.G.M. DUNCAN**, Sweet & Maxwell 1993, 4th ed.; p.248).

excusat" (ignorance of the law excuses no one; ignorance of the law is no defense)[12]. It was the plaintiff's exclusive responsibility to trace the defendant's place of abode or her place of work or any other relevant address in order for service to be effected. If that endevour became a problem or an impossibility, the Tribunal surely cannot be blamed or held accountable. Most certainly these proceedings cannot remain any longer suspended, or on hold *ad eternum*, and neither can the same naturally proceed towards the substance and merits of the case by turning a blind eye to the said deficiency (i.e. lack of due service).

Since the defendant has remained not formally notified (and therefore not aware) with the relevant acts of the proceedings, the Tribunal cannot delve into the merits of the plaintiff's claim and it surely cannot decide whether the same has any merit in law and in fact or otherwise. There was sufficient time and plenty of occasions for the plaintiff to address and remedy this situation. This failure impedes the Tribunal from moving forward with this case. Thus, in the light of how matters evolved, plaintiff's case shall be cancelled (not her allegations rejected).

At this stage, the Tribunal feels compelled to make the following *obiter* comments regarding *pro se* litigation and self-represented parties.

It is becoming a frequent phenomenon before this Tribunal – particularly, but not solely, in special proceedings like the one at hand – wherein parties elect to run legal proceedings without any aid or assistance from a legal professional. As a natural consequence, logistical difficulties are met and intricate legal/procedural predicaments raise their head – both for the interested party (who seeks effective justice and a speedy remedy) and also for the Tribunal (who is called upon to dispense that justice and remedy) – resulting in the inherent inefficiencies that manifest from inexperienced litigants attempting to navigate the procedural and substantive complexities of the judicial system and the law.

A *pro se* [13] proceeding is one in which one (or more) of the parties choose not to be represented by legal counsel. The right of a party to elect self-representation is, now-a-days, universally recognized, and this ability or faculty to civilly prosecute or defend one's own case appears to have its juridical *fons et origo* in British common

[12] This tenet is also applicable in procedings of a civil nature (and not solely in criminal cases) as evidenced in the domestic case *in re* **Maggur Hannibal A. Scicluna M.B.E. noe v. Avv. Dr. Edgar Grima et noe** (First Hall, Civil Court, 23rd February, 1965).

[13] « *pro se* » is a Latin term meaning "for oneself" or "on one's own behalf."

law.[14] Before that, as a classical example, one may cite Plato's "Apologia Socratis" that presents the speech of legal self-defence, which Socrates presented at his own trial for impiety and corruption, in 399 BC. Thus, Socrates may be cited as one of the leading *pro se* litigants.

Self-representation is indirectly recognised under Maltese Law under Art. 205(2) of the 'Code of Organisation and Civil Procedure' [Chapter 12 of the Laws of Malta[15]]. Such ability is, however, qualified as the said provision denotes. Therefore, the law grants the right to a party to plead his' or her your own case, but if "*in the opinion of the court, such party is unable adequately to plead his case*", that litigant may be directed and ordered otherwise.[16]

But apart from the said Code, the unqualified ability for self-representation is expressly identified in a number of other legislations before a number of domestic Boards and Tribunals as for instance the Rent Regulation Board [Art. 32 of Chapter 69 of the Laws of Malta[17]], the Rural Leases Control Board [Art. 8 of Chapter 199 of the Laws of Malta[18]], the Partition of Inheritances Tribunal [Art. 11 of Chapter 308 of the Laws of Malta[19]], the Consumer Claims Tribunal [Rule 13.1 of Subsidiary Legislation 378.01 of the Laws of Malta[20]], the Small Claims Tribunal [Art. 14 of

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[14] *vide* **INGWER VAN WORMER**, "Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon", (60 Vand., Law Review, 2007; 983, 987) wherein the article succinctly traces the right to represent oneself to medieval England and, in particular, to the *Magna Carta Libertatum* (commonly referret to as 'Magna Carta') of 15th June, 1215.

[15] The said provision states that: "*The court may order the party who is not assisted by an advocate to engage one if, in the opinion of the court, such party is unable adequately to plead his case; and if such party fails to engage an advocate, the court shall appoint, for the purpose, one of the official curators to be selected according to the turn on the rota; if the party refuses to give the necessary information to the advocate so appointed, the court may dispose of the case after hearing such evidence as the court may consider necessary.*"

[16] Reference is made to the decree by the First Hall of the Civil Court, dated 5th April, 2017, in the domestic proceedings (still pending) *in re* **Agenzija Heritage Malta v. Maltaticket.com Limited** (ref. no. 1278/2011/JPG). The right to self-representation was here denied due to fair hearing and constitutional issues. In the said decree it was, *inter alia*, stated that, "*The court must therefore seek to strike a balance between the wishes of the party who wants to exercise his right to self-representation with the rest of the other aspects of the right to a fair trial, and it is only if the court considers that the party's right to a fair trial generally can be guaranteed, that a request to self-represent should be accepted. In the case at hand, the request was made by Dr. Pollina, CEO of the defendant company, who is a lawyer albeit not one who qualified or practices in Malta. The Court is morally convinced that it be in the interest of justice to deny his request as it is unlikely that he would be able to adequately defend his case ...*".

[17] Art. 32 hold that: "*The parties may appear before the Board in person or may appear or be assisted by an advocate or a legal procurator.*"

[18] Art. 8 states that: "*The parties may appear before the Board in person or through an advocate or legal procurator and may be assisted by an advocate or legal procurator*."

[19] Art. 11 provides thus: "*The parties may appear before the Tribunal in person or may be duly represented by another person*."

[20] Rule. 13.1 provides as follows: "*A party may conduct his own case during a hearing. He may also be assisted by any other person including an advocate or a legal procurator*."

Chapter 380 of the Laws of Malta[21]], the Industrial Tribunal [Art. 78(2) of Chapter 452 of the Laws of Malta[22]], the Administrative Review Tribunal [Art. 14(1) and (2) of Chapter 490 of the Laws of Malta[23]] the Environment and Planning Review Tribunal [Art. of Chapter 551 of the Laws of Malta[24]]. In criminal proceedings this right is embedded in the Constitution of Malta [Art. 39(6), sub-paragraphs (c)[25] and (d)[26]] and in The European Convention Act [Art. 6(3), sup-paragraphs (c)[27] and (d)[28] of Chapter 319 of the Laws of Malta].[29]

Saving what shall be said later, although *pro se* litigants are, technically speaking, required to adhere to the same rules of procedure and law that represented parties are bound to follow, those entrusted with passing judgment ought to afford significant leniency to *pro se* litigants during each stage of litigation, in order to strike a balance between the otherwise exacting nature of the courtroom, and the rights of anyone who opts to go *pro se*.[30] This leniency extends to time-limits for the formal exhibition of documents, quality and decorum of oral or written submissions, knowledge of the law, and a variety of other procedural or substantive aspects of the judicial system which would be required from a person trained and versed in the Law (i.e., the advocate) but cannot, generally, be reasonably expected of the common

[21] Art. 14 provides thus: "*The parties may be assisted by any person*."
[22] Art. 78(2) provides thus: "T*he case for any party to a dispute may be presented by the party itself which may choose to be represented or aided by a person or persons of its trust*."
[23] Art. 14(1) states that: "*The parties may appear before the Administrative Review Tribunal in person or be represented through an advocate, a legal procurator or another person*.", whereas Art. 14(2) states that: "*The parties may be assisted by an advocate, a legal procurator or by another person.*"
[24] Art. 18 holds that: "*The parties to the appeal may be represented by an agent before the Tribunal*."
[25] Art. 39(6)(c) states: "*Every person who is charged with a criminal offence* […] *shall be permitted to defend himself in person or by a legal representative and a person who cannot afford to pay for such legal representation as is reasonably required by the circumstances of his case shall be entitled to have such representation at the public expense*."
[26] Art. 39(6)(d) states: "*Every person who is charged with a criminal offence* […] *shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance of witnesses subject to the payment of their reasonable expenses, and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution*."
[27] Art. 6(3)(c) provides: "*Everyone charged with a criminal offence has the following minimum rights* […] *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require*."
[28] Art. 6(3)(d) provides: "*Everyone charged with a criminal offence has the following minimum rights* […] *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him*."
[29] Naturally, also included in this list is Art. 10 of Regulation (EC) 861/2007 [part and parcel of and directly applicable in the Maltse judicial system] which states that: "*Representation by a lawyer or another legal professional shall not be mandatory*."
[30] *vide* **RORY K. SCHNEIDER**, "Comment, Illiberal Construction of Pro Se Pleadings" (159, U. PA. L. REV. 585, 586-87; 2011).

non-lawyer litigant.[31] This is even recognised under Rule 12 of the 'Small Claims Tribunal Rules' (Subsidiary Legislation 380.01 of the Laws of Malta) wherein there is provided that, "*The Adjudicator may relieve any party who is not represented by an advocate or legal procurator or any other professional representative, from the consequences of the failure to comply with any of these rules, if it is shown that this was due to mistake, oversight or any other reason which the Adjudicator considers to be valid. In such cases the Adjudicator may make any order which he considers to be just*." Thus, being intrinsically a right of a party, it stands to logic and reason that the person who is ultimately called upon to decide the controversy (i.e., judge, magistrate, arbitrator, adjudicator, *etc*.) must respect the party's right to represent him- or herself and must ensure that a *pro se* party is not illegitimately penalised, illicitly sanctioned, positively disadvantaged or inherently prejudiced for having made that choice.

Relaxing some of the rules of procedure and instructing a self-represented litigant in the proper way to accomplish a procedural step, may be seen as a natural and logical extension of the principle that fundamental justice should not be sacrificed to procedural rules, stopping far short of turning the judge, magistrate, *etc*. into an advocate. Having said that, explaining procedural requirements to the *pro se* litigant does not make the judge, magistrate, *etc*. morph into an advocate or legal adviser. Thus, certain reasonable accommodations do not make the judge, magistrate, *etc*. an active player in the adversarial process but renders the adversarial process function in a more equitable manner.[32]

Having said so, establishing the appropriate equilibrium between the equal and impartial treatment of the parties and ensuring fairness is particularly challenging in cases involving an unrepresented party (or parties). On the one hand, it is the duty of the presiding judge, magistrate, *etc*., to ensure that such parties appearing before him are treated with respect and fairness. On the other hand, the judge, magistrate, *etc*., must also ensure that the cases before him are handled competently and in an efficient manner. It must also be ensured, at the same time, that the *pro se* litigant

[31] *vide* **CANDICE K. LEE**, "Access Denied: Limitations on Pro Se Litgants' Access to the Courts in the Eight Circuit" (36 U.C. Davis, L. Rev. 1261, 1264-66; 2003).

[32] Having said so, it must be recalled also, as stressed by this Tribunal *in re* **Joerg Bauerle v. Co-Gaming Ltd** (European Small Claims Procedure, 28th November, 2017), *in re* **Christopher Warner v. Bilom Group** (European Small Claims Procedure, 12th March, 2018) and *in re* **Ivan Blazek v. Personal Exchange International Ltd** (European Small Claims Procedure, 21st March, 2018), that "*Under Maltese law, as embraced by domestic case-law, it is a known tenet that a party in civil proceedings is not expected to be guided by the Court or Tribunal regarding the quantity or quality of the evidence to be exhibited. That is purely up to the party submitting the relative evidence. The Court or Tribunal is only permitted to decide on the evidence it has before it and is not allowed to raise any awareness of either of the parties with respect to any possible lacunæ or potential inadequacies in the evidence submitted*."

comprehends the judicial process and its mecchanism and has the full opportunity to put forward his or her case.

Those litigants who proceed *pro se* with full knowledge and understanding of the risks do so with no greater rights than a litigant duly represented by a lawyer, and the Court or Tribunal is under no obligation whatsoever to become an "advocate" for or to assist and guide the *pro se* layman throughout the proceedings. Courts generally do not intervene to "save" litigants from their choice of legal counsel and, as a corollary, a litigant who chooses himself as legal representative should not be treated any differently. This is mainly because a judge, magistrate, *etc*. has a responsibility not only towards the parties before him, but also – and mainly – towards the judicial process itself, always striving to ascertain that the scales of justice remain balanced, whatever the nature of the proceedings, *pro se* or otherwise.

This Tribunal firmly believes that it is not permissible for any litigant to submit a disorganized assortment of allegations (or arguments) in hope that a factual issue or legal premise will materialize somewhere in the midst of the former. Moreover, it is not acceptable that the directions (which may be repeatedly issued) courteously extended to the *pro se* litigant remain fully or partially ignored. That is why the Court or Tribunal provides such litigants with appropriate direction/s and reasonable opportunities to cure the deficiencies in their pleadings and/or underline what is procedurally necessary so that their case may move forward and evolve/mature into the next stage of the proceedings. Thus, this Tribunal is of the firm opinion that basic procedural requirements imposed upon litigants represented by counsel should be the same for those who choose to appear *pro se*, requiring such litigants to comply with the same basic procedural norms as represented parties.

Unfortunately it must admitted that although the Maltese justice system seeks to accommodate *pro se* litigants, positively recognising that faculty and right (as evidenced by the specific legislations cited earlier), in practice, it is not inherently fashioned and designed to accommodate *pro se* litigants very well. It is manifest that the system recognises the right in an ideal vacuum, remaining taciturn on the logistical and practical aspects thereof, silently opting to adhere to the conservative and traditional stance of proceedings being conducted by parties duly represented by counsel. In this vein reference is made to the article by **WILLIAM FOTHERBY**, entitled "Law that is Pro Se (Not Poetry): Towards a System of Civil Justice that Works for Litigants Without Lawyers" (Auckland University Law Review, 2010; Vol. 16, p.64), wherein there is stated that "*Underlying our rules of civil procedure is the*

normative assumption that litigants ought to be represented; the litigant who comes to court without a lawyer is deficient. Indeed, rather than a right to self-represent, the reality is that in many cases there is a quasi-obligation of professional legal assistance. Not only the rules of the court, but also the culture that pervades the curial process, presume that the proper users of the system are legal professionals, judges and bureaucrats, and it is these actors who, by virtue of their control of the system, have shaped the structure of civil justice to a form that is most convenient to themselves […] *In short, the institution of the courts has not been designed to accommodate self-represented litigants; instead, it discourages them*."

The Maltese judicial system – as with other foreign legal systems – has its own procedural norms, rules of ethics, ethical conventions, its distinct jargon or vocabulary and its peculiar etiquette. It is no secret that in many ways the justice system creates a culture within a culture, and un-assisted litigants do not tend to fare very well within such particular microcosm. As correctly put, "*Whilst it is everyone's playing game, only the lawyers have read the instructions inside the box*."[33]

The Tribunal is not stating that our Courts and Tribunals should be (or are) insensitive or indifferent to the position of *pro se* litigants. To the contrary, this Tribunal believes that whenever the Courts or Tribunals were faced by a self-represented party they treated the same with understanding, comprehending the intrinsic difficulties encountered during the proceedings.[34] In such a scenario – without in any way diluting the respect toward the principles of fairness and due process – reasonable accommodations, a margin of latitude, leniency, special allowances and less stringent standards were applied, providing the *pro se* litigant leeway and every consideration. However, the right of self-representation is not a special licence to abuse the dignity of the courtroom and neither should a *pro se* position grant any privileged status so not to comply with the relevant rules of procedural and substantive law. Any such abuse or neglect by a *pro se* participant – to make full circle to Socrates mentioned at the beginning – may condemn the relative proceedings, sentencing the same to imbibe a sip, or two, of hemlock.

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[33] *cfr*. **LEN NIEHOFF**, "Here Comes the Pro Se Plaintiff" (32 Litigation Journal, 2006; p.13).

[34] Here reference is made to the local proceedings *in re* **Alfred Debono et v. Joseph Debono et** where the First Hall of the Civil Court, in the middle of the proceedings, accommodated the plaintiffs to represent themselves, even though in its eventual judgment, dated 29th July, 2013, it commented thus (in a footnote): "... *kien ikun ferm iktar utli ghall-atturi li kieku baqghu jigu ppatrocinati minn avukat ghat-tul tal-kawza kollha u mhux sempliciment isibu avukat u jitolbuh jiffirma n-numru mhux zghir ta' atti gudizzjarji li pprezentaw fejn dejjem jirrepetu l-istess affarijiet*." The same latitude and understanding was shown by the Court of Appeal (superior jurisdiction) in the same proceedings as one may infer from a reading of the relative judgments dated 28th April, 2017 (on certain preliminary issues) and 24th November, 2017 (on the merits of the case).

The Tribunal may delve further into this subject matter, but, for the purposes of this decision, it shall restrict itself to the above *obiter* observations.

THEREFORE, in the light of the above-mentioned reasons, this Tribunal decides the present case by cancelling plaintiff's case. All the expenses connected with these proceedings are to be borne by the plaintiff.

Finally, the Tribunal orders that a copy of this judgment is served upon the plaintiff in terms of Article 13 of Regulation (EC) no. 861/2007.

***Sgnd*. ADV. DR. KEVIN CAMILLERI XUEREB**
Adjudicator

***Sgnd*. ADRIAN PACE**
Deputy Registrar