SMALL CLAIMS TRIBUNAL

ADJUDICATOR
ADV. DR. KEVIN CAMILLERI XUEREB

Sitting of Tuesday, 26th of November, 2019

Notice of Claim number: **98/2017**

CONCORDE INTERNATIONAL FREIGHT FORWARDERS LIMITED
[COMPANY REG. NO. C-11393]

VERSUS

THE MEDITERRANEAN WELLBEING COMPANY LIMITED
[COMPANY REG. NO. C-40909]

By means of Notice of Claim filed on the 23rd February, 2017 plaintiff company requested this Tribunal to condemn defendant company to pay the amount of three thousand and ninety three euros (€3,093.00c) representing the price due for services rendered by plaintiff company to defendant company, as better explained in the said Notice of Claim. In the said Notice of Claim, plaintiff company omitted to specifically demand costs and any judicial interest.

By means of a Reply dated 30th May, 2017 defendant company raised the following pleas:

1. That the requests of plaintiff company cannot be accepted since the invoices on which they are based were not filed;

2. Without prejudice, that plaintiff company must prove in detail its demands;

3. Without prejudice, that plaintiff company's requests are unfounded.

In the sitting dated 13th October, 2017 (*fol*. 17) the parties, through their respective legal counsel, agreed that the proceedings be held in the English language due to the fact that the representative of defendant company does not understand the Maltese language. Thus, as duly registered in the minutes of the said sitting, the

Tribunal ordered that from that stage onwards, the proceedings be held in English. As a necessary corollary, the present decision is in the English language.

In the sitting dated 11th October, 2018 (*fol.* 65) the parties, through their respective legal counsel, agreed that the evidence submitted in the proceedings in the inverse names (i.e., Notice of Claim number 191/2018) shall also apply *mutatis mutandis* to these proceedings.

After the parties produced their respective evidence, it was agreed, in the sitting dated 3rd July, 2019 (*fol*. 78), that the case be adjourned for judgement.

Having examined all the evidence produced (in this case, as well as in the other one), having examined all the relative acts of the proceedings (in this case, as well as in the other one) and also having weighed respective counsels' submissions (see *foll.* 142–146 of case file number 191/2018), the Tribunal considers as follows.

First and foremost, the Tribunal deems imperative the following preliminary description and observation.

As a matter of fact, plaintiff company supplied general cargo services to defendant company, for the transportation of beds, mattresses and related goods by land and by sea from Italy to Malta. In 2016 a dispute arose between the parties regarding the amount due by defendant company. Plaintiff company maintains that defendant company has failed to pay the amounts due for cargo services rendered in February and March, 2016, with the total amount due totalling three thousand and ninety-three euro (€3,093.00c). On its part, defendant company maintains that it was being overcharged by palintiff company, and for that reason has made an overpayment in the amount of three thousand and ninety-three euro and fifty-two cents (€3,093.52c).[1] Defendant company also maintains that while the parties were in the process of negotiating the aforementioned dispute it had made a payment of two thousand and five hundred euro (€2,500.00c) after being asked to make an interim payment. In this regard, plaintiff company alleges that this payment was made on account of invoices which are not part of the merits of these proceedings and that therefore such payment is not relevant to this case.

Having established a brief depiction of the factual backdrop of the present case, the Tribunal now proceeds to delve into the merits thereof.

The Tribunal considers;

Defendant company pleaded that plaintiff company's requests cannot be accepted because the invoices on which they are based were not filed with the Notice of Claim.

[1] This is the subject matter of the case in the inverse names with the Notice of Claim number 191/2018.

The Tribunal observes that according to rule 3 of the Small Claims Tribunal Rules (S.L. 380.01) in order to make a claim, the claimant shall (a) fill in the claim form; (b) file the claim in the Registry of the Tribunal; (c) pay the prescribed fee and (d) request the Tribunal to serve the claim on the defendant. Regarding the production of evidence, rule 11 then provides that "*a party may present either oral or documentary evidence or both such types of evidence in support of his case*." As can therefore be seen, the rules which govern these proceedings do not require that a plaintiff necessarily files the documentary evidence upon which his claim is based together with the notice of claim. Perhaps it would be ideal if a party, whether plaintiff or else defendant, tenders documentary evidence together with its Notice of Claim or with its Reply thereto (so that the opposite party is placed in a better position to understand the matter), but failure to do so would not automatically or *per se* render a claim unjustified or null. After all, the sittings before an adjudicating authority, such as the present Tribunal, are aimed and destined for the submission of evidence in support of the parties claims and allegations.

The Tribunal further observes that in fact, throughout the course of these proceedings, plaintiff company filed documentation in support of its claim, produced a witnesses (Nikolai Xerxen) and cross-examined the witness produced by defendant company (Kenneth Donaldson). Whether this evidence will be sufficient for plaintiff company's requests to be upheld is a matter to be determined during the examination of the merits of the case. However, as far as this preliminary plea is concerned, it is clear that the deficiency pleaded by defendant company cannot lead to the automatic rejection of plaintiff company's requests without an examination of their merits. Therefore, this plea is consequently being rejected.

The Tribunal considers;

It appears that defendant company is not contesting that plaintiff company did indeed render the services for which it is now demanding payment. Defendant company is however contesting the quantity of the cargo that plaintiff company alleges to have delivered and consequently the amount due. On its part plaintiff company denies having overcharged defendant company and maintains that the amounts claimed are all due since there is no discrepancy between the freight billed and that actually shipped.

In his testimony Nikolai Xerxen explained that the amount charged by plaintiff company depends on the amount of cubic metres transported and the place of collection of the shipment. He explained that this information is collected from the client, but added that plaintiff company also confirms the information given with the supplier. He also explained that although a quotation is not always supplied, when it is it is only meant to be a guideline for the parties. According to Xerxen's testimony, the goods would then be measured when they arrive, with the client having the

possibility to be present and also take measurements himself, after which an invoice would be issued based on these measurements. He also added that there is no specific price per cubic metre since the price depends on the place of collection of the goods.[2] In this regard, Kenneth Donaldson maintained that the average cost per cubic metre shipped is in the amount of eight euro (€80.00c) per cubic metre.[3] Plaintiff company also produced Cargo receipts, Notices of Arrival, Import Freight Quotations and Invoices as documentary evidence, in order to sustain its claim. On its part, defendant company filed copies of the itemised invoices from its suppliers which show how many items were shipped *per* order and an indication of the box size of these items and also produced Kenneth Donaldson as a witness. In his testimony Donaldson contended that there have already been instances where plaintiff company overcharged for the services it rendered, and had issued credit notes in favour of defendant company after the overbilling was brought to its attention.

As has been previously observed by this Tribunal in an earlier decision[4], an invoice[5] is a rather curious object from a juridical point of view. Its efficacy does not come from the document itself, as in the case of validly drawn up and signed public deeds, private writings or bills of exchange, but depends on the acceptance of the consignee and other ancillary and concomitant factors which give it value and weight. If the consignee accepts the invoice the same acquires probative value having a bearing on the nature of the transaction made by the parties and it generates a *iuris tantum* presumption of the existence of a link between the creditor and the debtor.[6] On the other hand, if the debtor opposes the invoice invoked by the creditor, the invoice does not acquire probatory value *a se stante* but will merely constitute a sort of clue that the creditor needs to substantiate with further relevant evidence. On this matter it has been held that "*L'efficacia della fattura inter partes*

[2] Testimony of Nikolai Xerxen, given during the sittings held on 28th November, 2017 (*fol.* 33) and on 5th February, 2018 (*foll.* 41–44).
[3] Affidavit of Kenneth Donaldson, filed on 2 May, 2018 (*fol.* 53).
[4] *vide* **Mario Farrugia v. Jonathan Pellegrini** (Small Claims Tribunal, 31st October, 2019).
[5] A general definition of the term 'invoice' may be considered to be: "*Dicesi fattura, nel linguaggio commerciale, il documento dal quale risulta la qualità, quantità e prezzo delle merci, che hanno formato oggetto di un contratto e le eventuali condizioni di questo. I contratti, in cui più frequentemente si redige la fattura, sono quelli di compravendita, per quanto possa intervenire anche in contratti di altra specie. La fattura accettata costituisce prova del contratto e delle modalità di esso. L'accettazione poi, può essere, secondo la prevalente dottrina, o espresso quando cioè la fattura viene ritornata con la firma di colui al quale è rilasciata, oppure tacita, quando nulla venga eccepito contro di essa e il compratore ritiri la merce inviatagli, senza proteste o reserve*." (*cfr*. **VITTORIO SCIALOJA, ROBERTO DE RUGGIERO** and **PIETRO BONFANTE**, "Dizionario Pratico Del Diritto Privato", F. Vallardi ed., 1923; Vol. III, parte I, vuci: «fattura», p. 109)
[6] This is also embedded in Art. 1234 of the Civil Code: "*Any person having in his favour a presumption established by law, shall be exempted from any proof as to the fact forming the subject-matter of the presumption*." According to **FRANCESO RICCI** ("Delle Prove", UTET, 1891; §34; pp. 52-53), "*L'attore che ha a favore della sua domanda una presunzione è dispensato dall'onere della prova: così pure dallo stesso onere é dispensato il convenuto la cui eccezione ha base in una presunzione. Effetto della presunzione é, come si esprime la Cassazione di Torino (decis. 16 febbraio 1855, VII, 1, 176), di far considerare la cosa presunta come provata sinchè non si dimostri il contrario. La parte, quindi, cui una presunzione è opposta, non può limitarsi ad asserire il contrario, ma deve distruggere la presunzione stessa con una chiara e indubitata prova della fatta impugnativa*."

presuppone quindi, che il suo contenuto non venga constestato o, ed è lo stesso, che la fattura sia stata accettata dalla parte cui s'intende opporla; e ciò risponde al già rilevato principio che nessuno può da sè medesimo costituirsi titolo di acquisto di diritti." (*cfr*. "**NOVISSIMO DIGESTO ITALIANO**", 3ª ed., UTET 1957, Vol. VII – 'fattura'; §5, p. 140). The author **GIORGIO BIANCHI** ("La Prova Civile", CEDAM 2009; p. 116) delves further into the matter and opines that, "*La fattura costituisce piena prova fra le parti del relativo contratto in conseguenza della sua accettazione da parte del destinatario, ma non può costituire fonte di prova documentale di diritti ed obblighi di terzi estranei al rapporto contrattuale sottostante. Tuttavia, in presenza di una contestazione del rapporto tra le parti, la fattura di per sé non costituisce prova unilaterale a favore di chi la emette, né produce un'inversione dell'onere probatorio secondo i principi ordinari, altrimenti si arriverebbe alla conclusione, assurda, che sia sufficiente emettere una fattura per vantare giudizialmente un credito*."

The Italian Court of Cassation has pronounced itself on various occasions regarding the nature of an invoice. In case number 490 of the year 1986 the aforementioned foreign court stated that, "*La ricevuta di pagamento, in quanto espressiva dell'attestazione unilaterale del creditore in ordine al pagamento, si differenzia dalla fattura, la quale costituisce un documento destinato a far risultare gli elementi attinenti all'esecuzione di un contratto già concluso; pertanto la fattura, pur assurgendo, in caso di accettazione da parte del destinatario, ad elemento di prova in ordine all'esistenza del rapporto intercorso tra le parti, non acquista, nell'opposto caso di contestazione, efficacia probatoria, dovendo le dichiarazioni che il suo autore unilateralmente affida al documento risultare non contradette da altri obiettivi e concludenti elementi di prova, atti ad inficiare la veradicità e l'attendibilità*." (*cfr*. "Commentario Breve al Codice Civile" of the authors **GIORGIO CIAN** and **ALBERTO TRABUCCHI**, 8ª ed., CEDAM 2001; p. 2937). The same court has also stated that, "*che la fattura commerciale, avuto riguardo alla sua formazione unilaterale ed alla funzione di far risultare documentalmente elementi relativi all'esecuzione del contratto, si inquadra tra gli atti giuridici a contenuto partecipativo, consistendo nella dichiarazione indirizzata all'altra parte di fatti concernanti un rapporto già costituto, con le conseguenze che, laddove il rapporto è contestato tra le parti, la fattura stessa non può costituire un valido elemento di prova delle prestazioni eseguite, ma può al massimo costituire un mero indizio*." (*vide* also in this vein: *cass. civ*., 18.02.1995 n° 1798; *cass. civ*., 03.07.1998 n° 6502; *cass. civ*., 13.06.2006 n° 13651; *cass. civ.*, 15.01.2009 n° 806; *cass. civ*., 28.06.2010 n° 15383; *cass. civ*., 21.07.2003 n° 11343; *cass. civ*., 17.12.2004 n° 23499; *cass. civ*., 05.08.2011 n° 17050; and *cass. civ*. 13.01.2014 n° 462; *ibid*. pp. 2937–2938).

After reviewing the evidence produced by the parties the Tribunal is of the opinion that defendant company has not successfully shown an objective contestation[7] against the amounts billed by plaintiff company.

[7] See **AP Spa v. Comune di X**, Corte Supreme di Cassazione (867/2019) of 2nd July, 2019.

Since defendant company's plea was based on a factual allegation (that it was being overcharged by plaintiff company), the burden of proof attached to such allegation rested with defendant company itself, in light of the maxim *reus in excipiendo fit actor.*[8] Being proceedings of a civil nature the standard of proof applicable is on a balance of probabilities (i.e., "preponderance of the evidence"). This standard is satisfied with the production of relevant and sufficient evidence that give weight to the allegations of one of the parties, and is reached when the claim or allegation appears to be more likely than not when envisaged within the factual context of the case. In «Miller v. Minister of Pensions» ([1947] 2 All ER 372), **LORD DENNING J**. explained this norm in the following fashion: "*If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal it is not*." Also relevant is the statement made by **LORD HOFFMAN J**. in «Re B» ([2008] UKHL 35) to the effect that "*If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened*."[9] As has been previously observed by this Tribunal *in*

[8] *vide* **Alf. Mizzi & Sons (Marketing) Limited v. Patricia Genovese et** (Inferior Appeal, 1st November, 2006): "*Fil-kaz, imbaghad, li l-konvenut ma jikkuntentax ruhu bis-semplici kontestazzjoni generika tal-assunt tal-attur, u anzi jikkontrapponga difiza artikolata fuq fatti diversi minn dawk formanti l-bazi tad-domanda attrici, u dan tramite eccezzjoni sostanzjali, allura jinsorgi fih l-obbligu li hu wkoll igib il-quddiem prova dimostrattiva a sensu tal-Artikolu 562*." See also, *inter alia*: **Gustav Ricci v. Harry Latzen**(First Hall of the Civil Court, 18th February, 1965); **Ignatius Busuttil v. Water Services Corporation** (Inferior Appeal, 12th January, 2005); **Windsor Co Ltd v. Fithome Ltd** (Inferior Appeal, 26th March, 2010). Moreover, as stated in the cited case *in re* **Alf. Mizzi & Sons (Marketing) Limited vs Patricia Genovese et**, the evidence adduced by the party must be "*adegwata, u fuq kollox konvincenti. In-nuqqas ta' prova bhal din tittraduci ruhha fi zvantagg a kariku ta' min fost il-litiskonsorti kien mghobbi bil-piz taghha. Dan ghaliex il-kwestjoni tithalla fi stat ta' incertezza fuq il-fatt allegat u din tirrisolvi ruhhaf'dannu lil min kien hekk gravat li joffri c-certezza.*"

[9] The Tribunal observes that Maltese procedural law finds its basis in English law. The Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) was modelled, in its majority, on Anglo-Saxon procedural norms that were enshrined in our domestic legal system during Colonial times. In fact, in his monograph "Storia della Legislazione in Malta", the Maltese jurist **PAOLO DE BONO** (Malta, 1897) explains that under the British empire "*Varie altre leggi parziali, riguardanti l'organizzazione, il procedimento, le prove giudiziarie, furono pubblicate sino al 1850. Nel quale anno la commissione legislativa nominata il 7 agosto 1848 presentò il progetto del codice di leggi organiche e di procedura civile." (p.320) u noltre illi, "Il diritto probatorio è in gran parte modellato sul sistema inglese, giá introdotto nell'isola sin dall'anno 1825. Ma i singoli provvedimenti sono alcune volte superiori a quelli delle leggi inglesi medesime.*" (p. 322). Importantly, the same author, in a footnote to the excerpt just cited explains, *inter alia*, that: «*Ma lo studio delle opera de' giuristi inglesi è in questo ramo indispensabile. Ai giovani raccomando specialmente la lettura del BEST, 'The principles of the law of evidence' 8th edizione curata dal LELY (Londra 1893). È un'opera che tratta metodicamente la materia, esponendo i canoni fondamentali del diritto probatorio inglese, tracciandone le sorgenti, e mostrandone il nesso*.» (pp. 322–323). As a tangible example of this, the Tribunal refers to the judgement *in re* **Lawrence sive Lorry Sant v. In-Nutar Guze' Abela** (First Hall of the Civil Court, 27th April, 1993) wherein the Court made ample reference to English doctrine on the law of evidence relative to witnesses, citing the author Peter Murphy ("Modern Law of Evidence", 2nd edition) and "Cross on Evidence" (2nd Australian edition). Additionally, the First Hall of the Civil Court *in re* **Michael Agius v. Rita Caruana** (10th March, 2011; decree *in camera*) made ample reference to the English rules of evidence relative to the production of documentary evidence and its probative value. Furthermore, in the decision given *in re* **Robert**

re **Ivan Blazek v. Personal Exchange International Ltd** (European Small Claims Procedure, 21st March, 2018), "*From the Tribunal's viewpoint, it is rather like a pair of scales – to win the case one needs to tip them a little bit past level. Therefore, if a judge reaches the conclusion that it is fifty per cent (50%) likely that the plaintiff is in the right, the plaintiff will have his case rejected or dismissed. On the other hands, if the judge reaches the conclusion that it is fifty one per cent (51%), or more, likely that the plaintiff is in the right, then the plaintiff will win the case. In the present case, it is the plaintiff who is 'burdened' to prove his allegations against the defendant company.*"

The transactions upon which this claim is based occurred on the 23rd of February, 2016 (Notice of Arrival 021193 at *fol.* 21 and Invoice 022427 at *fol.* 46) for the amount of €361.85c, the 7th of March, 2016 (Notice of Arrival 021444 at *fol.* 25) for the amount of €757.15c, the 8th of March, 2016 (Notice of Arrival 021506 at *fol.* 23 and Invoice 022785) for the amount of €683.99c and the 29th of March, 2016 (Notice of Arrival 022015 at *fol.* 27 and Invoice 023380 at *fol.* 50) for €1,564.39c. The total amount so invoiced amounts to €3,367.38. However, in its Notice of Claim plaintiff company demanded payment from defendant company in the amount of €3,093.00c, and therefore this is the maximum amount that may be adjudicated by this Tribunal.
Regarding Invoice number 022427, plaintiff company produced a document that had been delivered with the cargo by the supplier which states that three cubic metre ($3m^3$) of cargo were delivered to plaintiff company by the supplier to be shipped to defendant company,[10] which confirms the amount billed by plaintiff company. The authenticity of this document was in no way contested by defendant company. Furthermore, the Tribunal notes that the supplier's invoice relative to this shipment[11] contains more items than what is indicated in 'Doc: KD1' (*fol.* 18), drawn up by defendant company, which necessarily weakens its argument that it was overcharged in this invoice since its calculations appear to have been based on the wrong quantities.
Defendant company filed a table showing its calculations of the cubic metres delivered to it by plaintiff company (*fol.* 18), together with itemised invoices from its suppliers. The Tribunal notes however that neither this table nor the supplier's invoices submitted shed any light on invoice numbers 022785, 023380 and Notice of Arrival 021444 (*fol.* 25).[12] Regarding these amounts, defendant company gave no explanation as to how it arrived to its conclusion that it was overbilled and produced

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Hornyold Strickland v. Allied Newspapers Ltd (Superior Appeal, 31st January, 2019) one can see how the Court made express reference to Anglo-Saxon law and rules [*vide* page 13 of the said judgement].

[10] 'Doc: AA.2', *fol.* 130 of case number 191/2018.

[11] Invoice issued by Home Relax srl on 19th February, 2016, *foll.* 31–34 of case number 191/2018.

[12] No invoice relative to this Notice of Arrival was exhibited, however as has already been noted, defendant's contestation relates to the exact amounts shipped and not whether the shipment was delivered in general. In view of defendant company's lack of contestation that it did receive the goods indicated in the Notice of Arrival the Tribunal considers that this Notice of Arrival is sufficient, also in light of Art. 9(2)(b) of the Small Claims Tribunal Act which states that the Adjudicator "*shall inform himself in any manner he thinks fit and shall not be bound by the rules of best evidence or the rules relative to hearsay evidence if he is satisfied that the evidence before him is sufficiently reliable for him to reach a conclusion on the case before him*."

no evidence regarding the items that were ordered from its supplier and shipped by plaintiff company.

Since, as explained further above, the burden of proof regarding the allegation of over-billing rested on defendant company as the party making such allegation, it was up to defendant company to prove an objective contestation to the invoices on which plaintiff company's claim rests. In light of defendant company's failure to substantiate its allegation in this regard, the Tribunal considers and concludes that defendant company's allegation of over-billing relative to the above-mentioned transactions is unfounded and is consequently being rejected.

The Tribunal further considers;

It is settled jurisprudence that a debtor who alleges to have paid, or settled, the debt being claimed by his creditor has to validly prove that such payment was indeed made.[13] Proof of payment may be made by means of any conclusive and convincing evidence, and the debtor is not required to necessarily produce a receipt for the payment alleged by him.[14] It is also generally accepted that if there remains doubt as to the payment of the debt alleged by the debtor, this debt has to be resolved in favour of the creditor, since a debtor alleging payment must prove his allegation beyond reasonable doubt.[15]

In the case at hand, plaintiff company is not contesting that defendant company made a payment to the amount of two thousand and five hundred euro (€2,500.00c) on the 19th of August 2016.[16] Plaintiff company however contends that this payment

[13] *vide* **Manuel Zerafa v. Nazzareno Muscat Scerri** (First Hall of the Civil Court, 27th May, 1970); **Avv. John Buttigieg noe v. Joseph Portelli noe** (Commercial Appeal, 26th January, 1976); **MacPherson Mediterranean Limited v. J. Lautier Company Limited** (First Hall of the Civil Court, 12th December, 2002); **Emanuela Cefai et v. Angelo Xuereb (Construction) Limited** (Inferior Appeal, 28th January, 2004); **Maltacom p.l.c. v. Kurt Galea Pace** (Inferior Appeal, 19th May, 2004); **Epifanio Azzopardi et v. Alfred Attard** (First Hall of the Civili Court, 14th December, 2009).

[14] In the judgment *in re* **Emmanuele Bezzina v. Emmanuele Attard et** (First Hall of the Civil Court (12 February, 1959) there was stated that, "*il-pagament jista' jigi pruvat bil-mezzi kollha ammessi u rikonoxxuti mid-dritt probatorju, jigifieri bi provi diretti, bhal dokumenti, xhieda u l-konfessjoni tal-kreditur, kif ukoll bi provi indiretti, bhal ma huma l-presunzjonijiet u l-indizji kapaci li jikkonvincu lil gudikant*." On the same lines is the decision *in re* **Avv John Buttigieg noe v. Joseph Portelli noe** (Commercial Appeal, 26th January, 1976). In the case *in re* **Iris Dalmas v. Mond. J Dalmas et** (Inferior Appeal, 12th January, 2005) it was asserted that, "*fejn il-ligi tezigi dawn il-provi skritti ad probationem vel substantiam. Anke hawn, il-produzzjoni tar-ricevuta jew tad-dokument mhix indispensabbli; anzi hu permess li tingieb prova ohra konvincenti ghall-konferma tal-ftehim u tal-pattijiet tieghu*". See also *in re* **Ian Abela Fitzpatrick noe v. Web Trading Limited** (Inferior Appeal, 24th November, 2003).

[15] *vide* **Andrew Dalli v. Michael Balzon noe** (Inferior Appeal, 31st January, 2003); **Ian Abela Fitzpatrick noe v. Web Trading Limited** (Inferior Appeal, 24th November, 2003); **Emanuela Cefai et v. Angelo Xuereb (Construction) Limited** (Inferior Appeal, 28th January, 2004); **Von Brockdorff Insurance Agency Ltd v. Visa Travel Ltd** (Superior Appeal, 16th February, 2007): "*In linea ta' massima jinsab akkolt, ghall-iskop ta' l-attendibilità u verosimiljanza tal-versjonijiet reciproci tal-kontendenti, illi l-kreditur jenhtieglu jipprova b'mod adegwat il-kreditu tieghu mentri d-debitur minn naha tieghu jrid jaghmel il-prova tal-pagament lil hinn mid-dubbju ragonevoli. Dan qed jigi sottolinejat in kwantu hu generalment accettat illi f'kaz ta' dubbju dan kellu jkun rizolt favur l-attur kreditur li ma kellux dan l-istess oneru (Kollez. Vol. XXXV P III p 604)*."

[16] An image of the relative cheque numbered 516 ('Doc: KD.3') is exhibited at *fol.* 57.

was not made with regards to the amount being demanded in these proceedings, but rather that it was a payment made on account, relative to invoices which do not form part of the merits of these proceedings.[17]

On the financial relations between the parties, Nikolai Xerxen testified that, "*It is correct to state that the defendant company has used our services for a long period of time. It is also correct to state that there was an open account between the parties and that the defendant company had credit, however this was not honoured. I must state that after four months or five months of chasing the defendant company in order to pay its dues, then the question of the discrepancy in measurements had arisen.*"[18]

From this testimony the Tribunal considers that it can be reasonably presumed that defendant company had more than one debt with plaintiff company, since the *modus operandi* between the two parties was that defendant company could operate on credit. In fact, this was confirmed by Kenneth Donaldson in his testimony, who stated that defendant company was granted sixty (60) days credit time by plaintiff company. Furthermore, in an email sent by Charles Delicata on behalf of plaintiff company to defendant company on 15th December, 2015, Delicata brought to defendant company's attention the following: "*Kindly find attached an updated statement of account, after your last payment by BOV cheque #443, received on 14/12/15, for the amount of €2,092.68. Could you please be kind enough to try keep up with the 30 day credit terms concession, granted by Concorde. As it is right now, your statement of account is way out of the mentioned 30 day period, by 5 months from first invoice on the statement.*"[19] From this it follows that the juridical relationship between the parties as relates to the payment of the debts due by defendant company is governed by the rules relative to payment in the case of several debts, contained in Art. 1168 *et seqq.* of the Civil Code.

Art. 1168(1) of the Civil Code grants a debtor owing several debts to impute payment to a particular debt. In order to make such imputation, the debtor must declare, at the moment of payment, that this payment should be applied to the discharge of a particular debt.[20] It is the debtor alleging imputation who has the *onus*, or obligation, to prove that he imputed the payment made by him to a particular debt at the time of payment, and it is only if the debtor satisfactorily proves such imputation that the burden of proof shifts onto the creditor to show the existence of the other debts of which he is demanding payment.[21]

[17] See Nikolai's Xerxen's testimony given on 5th February, 2018 (*fol.* 41 and *fol*. 44).
[18] *Ibid., (fol. 43).*
[19] Doc 'NX.7' (*fol*. 30).
[20] *vide* **Louis Ferris v. Alexander Borg Bartolo** (First Hall of the Civil Court, 31st January, 1994) and **Tourist Services Limited v. Naxas Srl et** (Superior Appeal, 28th April, 2017) among several others.
[21] *vide*, among several others, *in re* **Five Effs Import Co. Limited v. Island Resorts Company Limited** (Superior Appeal, 6th October, 2010).

If the debtor fails to make such imputation, the creditor may himself chose to impute the payment made by his debtor to a particular debt. Such imputation by the creditor may not subsequently be impugned by the debtor if he accepted, expressly or tacitly, the imputation.[22] As stated by **FRANCESCO RICCI** ('Corso di Diritto Civile', Vol. VI p. 347): "*L'imputazione puo farsi dal creditore allorche il debitore non dichiara nell'atto del pagamento quale debito vuol sodisfare… Il silenzio del debitore nell'imputazione fatta dal creditore nella quittanza equivale ad accettazione da sua parte quante le volte quest'ultimo non abbia con dolo o con sorpresa, impegnando cioè, raggiri per far condiscendere il debitore ad una imputazione per lui dannosa ovvero profittando dalla sua ignoranza per indurlo ad accettare quello che non avrebbe mai accettato con cognizione di cause."* In such a case, according to the jurisprudence of our domestic courts, once the debtor and creditor agree on the imputation of payment made, this imputation is final and may not be subsequently contested by them or by third parties.[23]

Having thoroughly examined the acts of the proceedings, the Tribunal considers that defendant company has failed to produce sober and sufficient evidence that when it had made the payment of €2,500.00c in August, 2016 it had made a declaration that it was imputing this payment specifically to the invoices which form part of the merits of this case. The only evidence submitted by defendant company regarding this payment is the image of the cheque with which the payment was made. As has already been established by this Tribunal, such cheque images simply show that a debtor made a payment to his creditor, but do not of themselves prove that this payment was made in satisfaction of the invoices on which the creditor is basing his present action.[24] Kenneth Donaldson's testimony relating to this payment is also not sufficient to convince the Tribunal that the payment invoked by it in these proceedings was at the time of payment imputed to the debt being claimed by plaintiff company in these proceedings.[25] In the absence of credible and convincing evidence that the payment was imputed to the invoices forming the merits of this case, the Tribunal must now consider whether there is evidence indicating that plaintiff company had imputed this payment to other debts with the consent of defendant company.

Defendant's statement of account was exhibited by Kenneth Donaldson together with his affidavit. In this statement of account, the payment made on the 19th of August, 2016 by means of cheque number 516 is clearly marked as a "*Payment on*

[22] Art. 1170 of the Civil Code.
[23] *vide* case *in re* **Louis Ferris vs Alexander Borg Bartolo** (already cited above).
[24] *vide* case *in re* **David Borg vs Frank Borg et** (Small Claims Tribunal, 31st October, 2019).
[25] It must be recalled that a party to judicial proceedings, "*articola i fatti, ma ciò non basta, e tutto ciò che essa allega come vero non costituisce che una pretensione interessata, non già una testimonianza. Le pruove debbono sempre essere prese al di fuori di tali allegazioni. In una parola, la qualità di testimonio e quella di parte non possono qui separarsi*." (*cfr*. **AUGUSTE SOURDAT**, "Trattato Generale della Responsabilitá", Napoli 1853; Vol. I, §347, p. 428). Even modern authors state that, "*Le dichiarazioni* pro sé *hanno, per evidenti ragioni, efficacia probatoria minima, in considerazione della scarsa affidibilitá della affermazione di fatti a sé favorevoli e sfavorevoli alla controparte*." (**GIORGIO BIANCHI**, "La Prova Civile", CEDAM ed. 2009; p. 172).

Account."[26] In this respect, no evidence was produced by defendant company that at the time it had protested against the imputation made by plaintiff company of the payment made by it in August, 2016. In light of the principles abovementioned, the Tribunal therefore considers that defendant company had tacitly accepted the imputation that was made by plaintiff company, and that consequently it is now precluded from impugning this imputation.

However, *ex gratia argomenti* even if this Tribunal had to accept that no imputation was made by either party, or that the imputation made by plaintiff company is not binding, the payment made by defendant company in August, 2016 would nonetheless be *ex lege* imputed to debts pre-dating the ones forming part of the merits of this case. This is due to the fact that when no imputation is made at the moment of payment or when the debtor disagrees with the imputation made by the creditor the default regime provided for in Art. 1171 of the Civil Code becomes applicable.[27]

Article 1171(g) of the Civil Code provides that, "*where the debtor has no interest in discharging a particular debt in preference to another, the appropriation shall be made to the oldest debt: and in the case of several debts contracted on the same day, and falling due at different times, the debt first fallen due shall be deemed to be the oldest*." The Tribunal considers that this sub-article is applicable to the present case. As a consequence, the payment made by defendant company in August, 2016 is to be imputed to debts which pre-date the ones which form part of the merits of these proceedings. From this it follows that this payment did not extinguish the debt being claim by plaintiff company in this case.

Furthermore, the debt claimed by plaintiff company remains due irrespective of the considerations above made, since from evidence it appears that defendant company has admitted this debt.

In the email dated the 12th of January, 2017 (*fol.* 29) Kenneth Donaldson wrote thus with regards to this payment: "*Then these concerns* [with reference to the allegation by defendant company that plaintiff company was overcharging] *were very clearly and concisely listed to you at with our detailed report of 19th July 2016. And not having had a clear response from you on the issue and wishing to remain in good relations we then issued an interim payment awaiting your response. This payment was made 19th August 2016 cheque no 0516 for eu2500. We considered this to be very fair as we had in mind that we were overcharged some eu3,200 and* ***we left a book balance of eu3,093.00.***"

[26] 'Dok. KD-07' (*fol.* 112).

[27] *vide* case *in re* **Louis Magri et v. Emanuel Noel Magri et** (Superior Appeal, 26th June, 2009) and *in re* **Lombard Bank p.l.c. v. Melvyn Mifsud et** (Superior Appeal, 24th April, 2015).

Of relevance is also the statement made under oath by Kenneth Donaldson in his affidavit, wherein he states that, "*This we are arriving at our having been over charged €2,694.* ***Concorde have a balance of €3,093.52*** *but have offered a credit of €500 which would arrive at €2,593.52.*"[28]

For this Tribunal, the underlined excerpts from Donaldson's email and testimony amount to a clear admission that the debt claimed by plaintiff company is indeed owed by defendant company. In both these excerpts Donaldson plainly and evidently recognises that plaintiff company has a credit of €3,093.00c in its favour.

In light of these considerations, the Tribunal is morally convinced that the amount of three thousand and ninety-three euro (€3,093.00c) claimed by plaintiff company in these proceedings is due by defendant company.

THEREFORE, in the light of the above considerations and in line with the same, this Tribunal decides the present case by accepting plaintiff company's claim and consequently condemns defendant company to pay plaintiff company the amount of three thousand and ninety-three euro (€3,093.00c).

The Tribunal orders that interest at the rate of 8% on the said amount shall also be paid by defendant company from date of filing of these proceedings, namely from the 23rd of February, 2017, whereas the judicial costs connected with these proceedings are to be entirely borne by defendant company.[29]

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

***sgnd*. ADRIAN PACE**
Deputy Registrar

[28] Affidavit of Kenneth Donaldson, filed on 2nd May, 2018 (*fol.* 52).
[29] In accordance with Art. 177 of Chapter 12 of the Laws of Malta, "*The words "with costs" shall in all cases be deemed to be included in any written pleading where costs may be asked for*."