Principles of Civil Law

Lecture Title: Mandate, Deposit, Loan and Suretyship

Diploma in Law (Malta)

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Date: 19th December 2024

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Mandate

- Whatever the term used for mandate, it consists in the granting of authority to a person in order to act on his behalf. **Thus there is a principal-agent relationship**, under whatever name that may be called.

- **1856.** (1) Mandate or procuration is a contract whereby a person gives to another the power to do something for him.
- (2) The contract is not perfected until the mandatary has accepted the mandate.

- Every mandate must have for its object something lawful which the mandator might have done himself.
- Subject to any other special provision of the law, a mandate can be granted by a public deed, by a private writing, by letter, or verbally, or even tacitly.

Power of Attorney:

- General
- Limited

- A very wide power of attorney is dangerous because mandates are not registered anywhere and so can be easily abused. The full implications of the possible dangers of a power of attorney comes into being the case when there is mandate between spouses and in case of trouble, the spouse having the mandate swipes the assets.
- Since power of attorneys are not registered, when one wants to revoke them there is a difficulty as to how third parties will be notified. The third party who contracts in bona fede with the mandatory, even if the power of attorney has been revoked, the principal remains bound by that contract.
- Thus since the power of attorneys are not registered; when it is revoked, there is a great difficulty to notify third parties. Thus while it is not difficult to revoke the power of attorney inter parties, it is very difficult in notifying third parties.

POWER OF ATTORNEY

KNOW all men by these presents that I the undersigned

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Even a tacit mandate is valid. However, this will be a complex task to prove.

- Banks
- Advocate who instituted a court case through a verbal mandate

In the case of spouses, for the extraordinary acts of administration, the law requires the written form. This is an exception in the notion of the power of attorney. This is a question of procedure, and without that warning of the notary, the instrument is null.

Powers of Mandate

A mandatary cannot do anything beyond the limits of the mandate.

For the carrying out of the mandate, the mandatary may institute legal proceedings; make and prosecute appeals; make proof by reference to the oath of his adversary; take the oath *in litem* or the suppletory oath; enforce judgments both on movable and immovable property; make demand for the i s s u e of precautionary acts including those for the issue of which an application or declaration on oath is required; make demand for the personal arrest of the debtor of the mandator, where such demand is competent; and do any other thing which the mandator might do personally, notwithstanding that such powers have not been expressly given in the mandate.

The mandatary may also, in virtue of the said powers, be a defendant on behalf of the mandator, in any law-suit concerning the matter included in the mandate.

Limits of Mandate

- If the mandatary enters into a deal which is beneficial for the principal but beyond the mandatary's powers, it is then an issue of ratification by the mandator (tacit or express consent of the mandator).

Termination of Mandate

- By an act of the parties
- By an operation of law; death operates as an *ex lege* termination of the mandate
- Termination of the powers of the mandator
- Expiration of the time of the mandate
- Renunciation of the mandatary

28 ta' Jannar, 2016 Rikors Numru 959/2009 in the names *Joseph Mamo (ID 274836 M) vs Nutar Rachelle Farrugia Buhagiar LL.D.*

Responsibility of Professionals vis-à-vis mandate

The facts are the following:

- Joseph Mamo sellef mija u sitta u tmenin elf, tlett mija u disgha u erbghin Ewro u sebgha u tmenin centezmu, (€186,349.87), lil Emanuel Gatt b'kuntratt in atti tan- Nutar Pierre Falzon datat l-5 t'Awwissu, 2004, liema ammont Gatt kellu jroddu lura lir-rikorrenti fi zmien tlett, (3), xhur;
- Illi l-istess self kien kawtelat permezz t'ipoteka specjali fuq il-fond numru 112, Triq Salvu Psaila, Birkirkara;
- Illi bis-sahha ta' prokura datata s-16 ta' Jannar, 2003, u ffirmata mill-istess fuq imsemmi Emanuel Gatt quddiem in-Nutar intimata, Christopher Gatt kien deher f'isem l- istess Emanuel Gatt fil-kuntratt indikat fl-ewwel paragrafu;
- Illi xhur wara l-kuntratt fuq riferit, ir-rikorrenti kien talab lill-imsemmi Emanuel Gatt biex ihallas u jirrifondi l- ammont lilhu misluf fl-istess kuntratt;

- Illi meta r-rikorrenti wera kopja tal-prokura de quo li permezz taghha Christopher Gatt kien deher fl- imsemmi kuntratt f'isem Emanuel Gatt, dan tal-ahhar informa lir-rikorrenti li l-firma fuq il-prokura ma kienitx tieghu;

- 1.6. Illi permezz ta' rikors numru 47/2005 datat is-27 ta' Mejju, 2005 , ir-rikorrenti odjern talab l-bejgh bis- subbasta tar-residenza ta' Emanuel Gatt;

- 1.7. Illi fil-kawza fl-ismijiet Emanuel Gatt vs. Avukat Martin Fenech et nomine et, rikors numru 614/2005 il-qorti kkonkludiet li l-firma fuq il-prokura fuq riferita ma kienitx ta' Emanuel Gatt;

- 1.8. Illi fl-istess procedura indikata fil-paragrafu precedenti l-qorti kkonkludiet ukoll li l-firma tan-nutar hawn intimata ma kienitx tiswa;

- Illi konsegwentement, l-istess qorti annullat il-kuntratt ta' self datat il-5 t'Awwissu, 2004, fuq riferit, (ara paragrafu numru wiehed punt wiehed, (1.1.), aktar qabel), flimkien mall-procedura tas-subbasta numru 47/2005, (ara paragrafu numru wiehed punt sitta, (1.6.), aktar qabel), oltre wkoll il-mandat ta' sekwestru numru 889/2005;

- **Illi rizultat tal-istess irrizulta li n-nutar hawn intimata kienet iffirmat il-prokura in dizamina meta din kienet ghada vojta u meta l-firem t'Emanuel Gatt ma sarux fil-presenza taghha**;

Illi permezz ta' dan l-agir negligenti grossolan taghha l-intimata ppermettiet li jsiru firem foloz li permezz taghhom ir-rikorrenti sofra danni kbar billi gie defrawdat is-somma ta' 'l fuq minn €186,349.87

The plaintiff through these procedures sued the Notary in her personal name, and asked the Court to order the Notary the reimbursement of the total sum.

Illi meta r-rikorrenti pproceda kontra Emanuel Gatt ghall-hlas lura tal-ammont hekk minnu lilhu mislufa, r- rikorrenti tilef il-kawza stante li l-qorti annullat il-prokura in dizamina redatta mill-intimata odjerna peress li ma rrizultax li din kienet giet redatta skont il-ligi ghaliex l-istess nutar intimata kienet iffirmat il-prokura vojta biex b'hekk irrizulta debitament assodat li l-firem tal-partijiet ma sarux fil-presenza tan-nutar intimata skont il-ligi.

The Court noted:

- *Illi ghandu jkun pacifiku ghalhekk li prokura hi att pubbliku serju u ta' importanza kbira li ma jippermettix agir superficjali u kontra l-ligi, stante li permezz tieghu terz appozitament hemm dikjarat ikun jista` jagixxi f'isem il-mandatarju tieghu;*

- *Illi ghalhekk hu l-obbligu tan-nutar redigenti li jizgura li l-firem hemm annessi jigu effettivament iffirmati fil-presenza tieghu, stante li hi biss il-presenza tieghu li tiggustifika l-effetti kollha naxxenti mill-istess;*

- *Illi rizultat tal-istess ir-rikorrenti sofra d-danni minnhu allegati stante li s-somma minnhu mislufa fil-kuntratt ta' kostituzzjoni ta' debitu, (ara paragrafu wiehed punt wiehed, (1.1.), aktar qabel), giet minnhu hekk mislufa a bazi tal-prokura in dizamina, liema prokura kif redatta minn nutar intimata ma kienitx garantita minn Emanuel Gatt kif hemm allegat;*

- *Illi konsegwenza tal-istess, ir-rikorrenti alura sab ruhhu f'posizzjoni li ma jistax jirkupra il-flus minnhu hekk mislufa, u dan, tenut kont tal-fatt li l-imsemmi Christopher Gatt, id- debitur, jinsab mahrub minn Malta, (ara foll 292)*

- *Illi skont l-artiklu 1031 tal-Kap 16 fuq gia` riferit, kull persuna twiegeb ghall-hsara li tigi bi htija taghha;*
- *Illi di piu`, skont l-artiklu 1032 tal-istess Kap indikat fil- paragrafu precedenti, jitqies fi htija kull min bl-ghemil tieghu ma juzax il-prudenza, id-diligenza u l-hsieb ta' missier tajjeb tal-familja;*
- *Illi meta n-nutar intimata irrilaxxat il-prokura in dizamina minghajr ma din kienet iffirmata quddiemha mill- mandatarju hemm indikat, hi kienet negligenti fl-ezercizzju tal-professjoni taghha;*
- *Illi ghandu jkun pacifiku li fl-ezercizzju tal-funzjoni professjonali tieghu nutar pubbliku hu essenzjalment ufficjal pubbliku u f'din il-mansjoni partikolari ghandu ghalhekk l-oneru legali li jimxi skont il-ligi u jevita l- pressapokizmu riskontrat;*
- *Illi jezisti ness dirett bejn l-agir tal-istess intimata u d- dannu soffert mir-rikorrenti*;

Therefore the Court decided in this fashion:

40.2. Takkolji t-talbiet kollha tar-rikorrenti, u ghalhekk:

40.2.1. Tordna li bl-agir negligenti grossolan taghha l-intimata hi responsabbli ghad-danni sofferti mir-rikorrenti;

40.2.2. Tillikwida d-danni hekk sofferti mir-rikorrenti fl-ammont ta' €186,349.87;

40.2.3. Tikkundanna lill-intimata biex thallas lill-istess rikorrenti s-somma hekk likwidata fil-paragrafu precedenti, u dan bl-imghaxijiet mill-5 t'Ottubru, 2009;

40.2.4. Bl-ispejjez ta' din il-procedura kontra l- intimata.

Deposit

Deposit, in general, is a contract whereby a person receives a thing belonging to another person subject to the obligation of preserving it and of returning it in kind.

A deposit is only perfected by the delivery of the thing to the depositary.

A deposit of money or of other things which are consumed by use, is regulated by the laws relating to loan for consumption or mutuum, whenever power has been granted to the depositary to make use of the thing deposited on the sole condition of returning as much of the same kind and quality.

Deposit is voluntary or necessary.

Voluntary Deposit

A voluntary deposit takes place by the mutual consent of the person who makes the deposit and of the person who receives the thing on deposit.

A voluntary deposit can only take place between persons who are capable of contracting

Necessary Deposit

A necessary deposit is that which a person is compelled to make owing to some calamity, as, for instance, in case of a fire, destruction, shipwreck or other unforeseen emergency.

Therefore, while in voluntary deposit, there is the mutual consent of the two parties, under necessary deposit, there are circumstances which compel the depositary to effectively make the deposit.

The two forms of deposit are regulated by the same provisions of the Civil Code, as far as obligations and termination are concerned.

Obligations of Depositary

A depositary must, for the custody of the thing deposited, use the same diligence which he uses for the custody of his own things.

A depositary is in no case answerable for accidents resulting from irresistible force, unless he has been put in default for delay in restoring the thing deposited; nor shall he be answerable, in the latter case, if the thing would have equally perished in the possession of the depositor.

The depositary cannot make use of the thing deposited without the express or implied consent of the depositor

The depositary shall not attempt to discover what are the things which have been deposited with him, if they have been entrusted to him in a closed box or under a sealed cover.

The depositary must restore the identical thing which he has received, in the condition in which it may be at the time of its restitution. Any deterioration which occurs through no fault of the depositary, shall be borne by the depositor.

The depositary may compel the depositor to withdraw the deposit.

He cannot, however, without just cause, compel him to withdraw the deposit before the time agreed upon

Obligations of Depositor

The depositor is bound to reimburse to the depositary the expenses which the latter has incurred for the preservation of the thing deposited and to make good to him all the losses which the deposit may have occasioned him.

The depositary may retain the deposit until full payment of what is due to him by reason of such deposit.§ II.

Cachia vs Commissioner of Police – decided 7th July 2006 (Court of Appeal)

The First Hall of the Civil Court interpreted the fact that items seized during police investigation, are regulated by the laws of deposit.

However the Court of Appeal overruled this principle and, contrary to what was held in the FHCC, in this case there was no contract of deposit in the civil sense, regulated by the Civil Code. The Court of Appeal held that the FHCC had made the mistake of confusing the civil law institute of deposit with the public function of the Commissioner of Police in confiscating and preserving items for investigations. This is a function regulated by the Criminal Code.

Does contract of deposit require paymnet?

It can be either or: it can be against payment or for free.

However this creates an important difference:

When the agreement is against payment, it verges dangerously close to an *appalt*, and therefore the responsibility of the depository is higher; the level of responsibility expected from the depositary would be higher if there is is payment involved.

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Loan

Our law recognises three types of loans:

- Commodatum is a loan for a particular use, and this can be anything, like lending a mobile or a car. It can also be an immovable property. This has to be gratuitously.
- Precarium is equivalent to Commodatum however, with the only difference that the lender has the power to take back the thing when he pleases
- Mutuum is a loan for consumption, meaning that one of the parties delivers to the other a certain quantity of things which are consumed by use subject to the obligation of the borrower to return to the lender as much of the same kind and quality. Here there is a passing of ownership.

Obligations of the Borrower

The borrower is bound to take care of and preserve the thing borrowed as a bonus paterfamilias. He cannot, under pain of paying damages, apply the thing to any other use than that for which it is intended by its nature or by agreement.

If the thing perishes by a fortuitous event, without the fault of the borrower, the borrower is not liable for any indemnity.

If the borrower uses the thing for another purpose or for a longer time than he ought, he shall be answerable for the loss which may occur even by a fortuitous event, unless he proves that the thing would have equally perished if he had not used it for another purpose, or had restored it at the time fixed in the contract

Provisions applicable to the Loan of Mutuum (Loan for Money)

- No interest is due in respect of mutuum unless agreed upon, saving when the borrower does not return the things borrowed at the time agreed upon, or at the time which, in the absence of an agreement, is fixed by the court.
- It shall be lawful to stipulate for interest on a loan, whether of money or of goods or other movable things.
- It shall also be lawful to convert into a new capital at interest, the amount of interest due, provided such interest be not due for a time less than one year.
- Any other agreement for payment of interest on interest, is null.
- The borrower who has paid interest which was not agreed upon, can neither claim it back nor deduct it from the capital, except in so far as such interest exceeds the rate fixed in the law (i.e. 8%).

The rate of interest cannot exceed eight per cent per annum.

Any higher interest agreed upon shall be reduced to the said rate.

If a higher interest than that fixed by law has been paid, the excess shall be deducted from the capital.

Any contract, whatever its designation, made in evasion of the provisions of the last preceding article, is subject to rescission; and in any such case, if the things given cannot be returned, the creditor can only demand the payment of their value at the time when he delivered them to the debtor.

Where rate of interest is not agreed upon.1854. If the borrower has bound himself to pay interest without fixing the rate, interest shall be at the rate of five per cent per annum.

20th December 1946, *Lorenza Attard v. Michele Bountempo*

The plaintiff stated that she had permitted the defendant to occupy without payment a room in Paola. She had demanded the return of that return, because the plaintiff requires it, however the defendant failed to return it back. The commercial court had accepted the demand of the plaintiff and had ordered the eviction of the defendant.

The defendant claimed that the contract is one of commdatum, while the plaintiff is holding that the contract is one of *prekarju.*

The court held that in this case the legal features of the contract of *prekarju since,* the plaintiff not only did not keep the faculty of taking back the thing, but she also permitted the defendant to occupy the room when she in fact needed it. The court thus explained that in terms of the principle of Commodatum, this was for a definite time and thus since the owner needs the room the defendant is obliged to return back the thing. Thus the Court of Appeal confirmed the judgment of the Commercial Court.

31st October 1941, *Kan. Don. Carmelo Bezzina v. Costantino Micallef*

The plaintiff had offered his premises to the defendant so that the latter can put his tools in the premises. The plaintiff has demanded the giving back of the premises which were occupied by the defendant, however the latter failed to return possession of thing. On the other hand, the defendant is claiming that it is not true that he was allowed to put the tools there as *per tolleranza* which gives him no title at law, but he was allowed to put such things there under a contract of Commodatum. The agreement as the defendant is claiming was valid as long as the war lapses, and thus, since the war has not finished yet, he can still occupy the premises. On the other hand the plaintiff is of the opinion that such an agreement was ex gratia and not ex contractu, and thus it could be revoked whenever he wants. The Civil Court, Court of Appeal had rejected the demand of the plaintiff.

The court held that there was no contract between the parties but a question of tolerance that the plaintiff let the defendant use his premises. This highlights the fact that the juridical form was that of a *prekarju.* Our law provides that that *prekarju* is the same as a contract of loan ad uso, and thus whoever lends has the right of taking back the thing when he needs it back. The court thus accepted the appealed plea of the plaintiff. The court ordered the eviction of the defendant form the premises within a month.

6th October 1999, *Julia Borg and James Borg v. Carmel Bringone*

From the evidence that the court collected, it was evident that the plaintiff (now dead) used to provide money for people who used to gamble. In fact the defendant is claiming that it was the plaintiff himself who has encouraged him to start gambling.

The court held that such gambling is prohibited by the Criminal Code. The court also established that no action exits under our law for the payment of money lent for the purpose of gambling.

Article 987 of the Civil Code explains that an obligation based on an illicit causa has no effect, and consequently the contract that is based on such a causa is null. The court claimed that there is no doubt that the contract entered between the parties of Loan is simulated, as this was not a loan between the parties, and also, the fact of gambling which was the objective behind the borrowing was not mentioned in the contract. The First Court held that this was an illicit causa, and thus the payment cannot be enforced. This was also upheld by the Court of Appeal.

- The plaintiffs had brought forward the claim that the defendant should have acted through a separate court action to annul the contract. However the court held that this claim is unfounded at law. This is because our courts have always followed the notion that the nullity of a contract and consequently of the obligation that derives from that contract can result from an action, which aim is not the nullity of the contract.

- On these considerations the court rejected the appeal and upheld the judgment of the First Court.

Robert Borg v. Francesco Abela, 16th December 1949

- The plaintiff is claiming that there was a private writing whereby the defendant was to store cereals and other things in his property, however, the plaintiff reserved the right that upon the lapse of three months he would take possession of the store upon a notification made seven days prior, under a fine of one pound every day after the lapse of those seven days. The plaintiff had asked as agreed for the possession of the store, however, the defendant remained to occupy the store. Plaintiff is demanding the court to order the eviction of the defendant from his stores.
- The plaintiff is claiming that this was a contract of Commodatum. However the First Court held, that this is not a Commodatum as the conditions are ones of *sullokazzjoni* and not of a simply comodatum. This is because there was an agreement between the parties for the payment as a compensation at the termination of the three months. There was even an agreement on the consumption of light and electricity and the painting of the premises. The defendant was also bound with the obligation of repairs and alteration of the premises.
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- The Court of First Instance held that although the parties give the agreement the legal structure, it is the court which will then determine what the parties had in fact agreed upon. In the present case, the court held that this is a contract of *sullokazzjoni moħbija* and therefore the court held that the laws of *sullokazzjoni* applies. Since that *fis-sullokazzjoni s-sullokatur* cannot take the property back without the permit of the Rent Regulation Board, the plaintiff is still lacking that permit, and thus his demand cannot be accepted. This was appealed by the plaintiff.

- The Court of Appeal also held that the contract between the parties is not one of Commodatum, but of *sullokazzjoni* since there is an element of gratuity. The fact that there was payment between the parties excludes the possibility of a contract of commodatum. The Court upheld the judgement of the First Court and denied the appeal.

Suretyship

- Suretyship is a contract accessory to an obligation, the execution of which it guarantees. It differs from pledge and hypothec because these securities guarantee the performance of the obligation by means of the creation of a right over property belonging to the debtor or a third party, whilst suretyship binds the surety personally towards the creditor to satisfy the obligation of the principal debtor.

- Suretyship is a contract whereby a person binds himself towards the creditor to satisfy the obligation of another person, if the latter fails to satisfy it himself.

This contract does not require the intervention of the debtor;

Any person may become surety without the request and even without the knowledge of the party for whom he binds himself.

Suretyship secures the performance of an obligation which becomes the obligation of the surety, it is, therefore, extinguished as soon as the principal obligation which it secures, is satisfied.

The requisites are:

- The capacity of the parties: The capacity of the contracting parties is sufficient.
- Consent: Only the surety's and the creditor's consent is required, that of the debtor is not necessary
- The existence of a principal obligation which the surety assumes in favour of the creditor: This is the subject-matter of the obligation which is undertaken by the surety to the principal obligation. Any obligation, whatever its nature, subject or consideration, may be thus guaranteed.

Suretyship, is one of the contracts which must be made by means of a public deed or a private writing.

Also, the surety produced must be suitable and therefore;

- **1931.** A debtor who is obliged to produce a surety must offer a person who is capable of entering into contracts, who has sufficient property to answer for the subject-matter of the obligation, and whose domicile is in Malta.

Suretyship may be: Legal, Judicial or Conventional

Suretyship is legal or judicial when the debtor is bound to produce a surety either by law or by a judgement or other order of the Court. It is conventional when the debtor, without being bound as in the case of legal suretyship, promises to produce a surety. Where a person required by law or by an order of the Court to produce a surety cannot find one, he may in lieu thereof give a pledge or other security sufficient for the discharge of the debt.

Given that suretyship is an accessory contract it follows that:

1. If the principal obligation is null, the contract of suretyship is also null. Suretyship can only exist in respect of a valid obligation.

2. Suretyship cannot exceed what is due by the debtor nor be contracted under mere onerous conditions though it may be contracted for a part only of the debt and under less onerous conditions. The suretyship which exceeds the debt or is contracted under more onerous conditions shall only be valid to the extent of the principal obligation.

The surety can be Joint and Severally liable with the Debtor or Simply liable

If the surety is bound jointly and severally, his position is hardly different from that of the principal debtor and he may not therefore, avail him of the benefit of discussion.

If the surety is not so bound, his position is that of a subsidiary debtor and he may plead the said benefit.

A surety is not presumed to be bound jointly and severally with the debtor, except in commercial matters where, in the absence of an agreement to the contrary, the surety is always presumed to be bound in solidum.

Effects of Suretyship

A. Effects as between creditor and surety

The surety is only bound to pay in the event of the default of the principal debtor who property must first be discussed.

What is the right of discussion?

If the surety is sued for payment he may demand that the creditor should first try to obtain payment from the debtor, in whole or in part, and that, for this purpose, the debtor's property be discussed. The effects of this benefit depend on whether as a result of such discussion, the debt is or is not satisfied, wholly or in part: if it is satisfied, the surety is discharged; if it is not satisfied, the surety remains bound for what may still be due.

B. Surety of the Surety

1940. A surety for the surety is not liable towards the creditor, except where the principal debtor and all the sureties are insolvent, or have been released consequent on some plea personal to the debtor and to the sureties.

This means that such a surety may avail himself of this benefit against the principal debtor and all the sureties.

C. Several surities for the same debt and debtor

Benefit of Division

- According to the general principles, when several persons become sureties for the same debtor and the same debt, each one is liable for the whole debt;

- All securities are of their nature indivisible, which means that the creditor may demand full payment from any of the persons bound towards him by way of security. However:

- (Nevertheless, each one of them may, unless he has renounced the benefit of division, or unless he has bound himself jointly and severally with the debtor, demand that the creditor should divide his action and reduce it to the share due by each surety.

Civil Court First Hall, 792/2016AF, in the names *Oleg Anatolyevich Sklyarov u Maria Dolores sive Doris Sklyarov vs Anthony Mallia u Kristina Aleksandrovna Mallia* decided 26th October 2020

Facts of the Case:

- Ir-rikorrenti dahhlu f'kuntratt notarili ta' kostituzzjoni ta' debitu fl-atti tan-Nutar Alicia Agius fejn ir-rikorrenti ikkostitwew ruhhom debituri fil-konfront tal-intimati fl-ammont ta' sebghin elf Ewro (€70,000) u dan kif deskritt f'Dok. A liema kuntratt gie estiz fit-tlettax (13) ta' Lulju elfejn u sittax (2016) ghal perjodu ta' xahrejn (Dok. B).
- Skond dana l-att ir-rikorrenti ssellfu l-ammont ta' sebghin elf Ewro (€70,000) minghand l-intimati fit-tielet (3) ta' Mejju tas- sena elfejn u sittax (2016) liema ammont kellu jinghata lura lill-intimati fi zmien xahren minghajr interessi.

- *L-ammont ta’ sebghin elf Ewro (€70,000) ma nghatax quddiem in-Nutar Alicia Agius izda wara u dana ghax fil-verità l-intimati ma ssellfux lir-rikorrenti is-somma ta’ sebghin elf Ewro (€70,000) izda s-somma ta’ hamsin elf Ewro (€50,000) u fi zmien xahrejn ir-rikorrenti kellhom ihallsu sebghin elf Ewro (€70,000), ossia l-hamsin elf Ewro (€50,000) li ssellfu kif ukoll ghoxrin elf Ewro (€20,000) bhala interessi.*

- *Is-somma ta’ ghoxrin elf Ewro (€20,000) bhala interessi fi zmien xahrejn tammonta ghal uzura ghax hija ferm iktar gholja mir-rata ta’ interessi permessibbli mill-Ligi.*

- *Ir-rikorrenti hallsu minn dan id-dejn erbghin elf Ewro (€40,000) in kontanti u dana ghaliex l-intimati rrifjutaw cekk.*

The Court was asked to order that:

- *Tiddikjara illi l-kuntratt bejn il-partijiet tat-3 ta' Mejju 2016 fl-atti tan-Nutar Alicia Agius kif ukoll l-estensjoni tat- 13 ta' Lulju 2016 ghandhom kawza illecita.*

- *Tiddikjara illi l-kuntratt bejn il-partijiet tat-3 ta' Mejju 2016 fl-atti tan-Nutar Alicia Agius kif ukoll l-estensjoni tat- 13 ta' Lulju 2016 huma nulli u bla effett u dana minhabba li huma kawza illecita.*

- *Minghajr pregudizzju ghaz-zewg talbiet jekk dina l- Onorabbli Qorti ma sisbx li l-kuntratt huwa kolpit minn kawza illecita tordna illi r-rikorrenti ghandhom ihallsu lura l-interess skond l-Artikolu 1852 tal-Kodici Civili fuq il-bilanc li ghadu ma thallasx mill-kapital ossia fuq l-ammont ta' ghaxart elef Ewro (€10,000).*

From their end the respondents claimed that they had:

i. Lent the sum of Eur76,000

ii. Nothing had been paid from the outstanding balance

iii. They had never committed any criminal offence as is being implied by the plaintiffs.

The Court referred to other judgments, such as:

" … fil-każ fl-ismijiet Guzeppi Axisa et vs Mark Belli et, tal-24 ta' April 2007, irriteniet li:

lli dwar imgħaxijiet f'kazijiet ta' mutwu, l-ligi trid li l- imgħax ma jaqbizx ir-rata tat-tmienja fil-mija (8%), u kull rata miftehma ogħla minn hekk tigi mnaqqsa sa dak l-ogħla limitu. Il-ligi ma tgħidx li l-ebda mgħax ma jkun dovut jew li l-obbligazzjoni kollha ma tkunx tiswa;

Illi għal zmien twil, u minħabba kwestjonijiet ta' ordni pubbliku, tqies li jekk kemm-il darba jintwera li xi somma misselfa kienet mgħobbija bi ħlas ta' rata ta' mgħax li taqbez l-ogħla rata ffissata mil-ligi, dik l-obbligazzjoni tkun assolutament ma tiswiex. Dan jgħodd għall-obbligazzjoni marbuta mal-ħlas tal-imgħax, imma mhux ukoll għall-obbligazzjoni ewlenija tas-self innifsu, li tista' titħassar, bla ma jintilef l-obbligu li jintradd lura l-valur tal-ħaga misselfa meqjus fiz-zmien ta' meta s-self ikun sar. Dan minħabba n- natura accessorja tal-obbligazzjoni tal-ħlas tal-imgħax, li ssemmiet aktar qabel. Għalhekk, meta titqanqal il- kwestjoni tal-uzura, wieħed irid jgħarbel sewwa jekk dak li jigi allegat ikunx qiegħed jipprova jwaqqa' l-ezistenza tal-obbligazzjoni ewlenija għal kollox, jew jekk ikunx qiegħed jattakka biss dik accessorja."

The Court observed:

Applikati dawn il-prinċipji għall-kawża odjerna, din il-Qorti tibda biex tgħid li assolutament ma temminx lill-konvenuti meta jgħidu li silfu lill-atturi €70,000 mingħajr imgħax.

L-ewwelnett, il-Qorti m'għandha l-ebda raġuni għalfejn ma temminx lin-Nutar Elizabeth Sciriha, l-ewwel nutar li marru għandha l-partijiet, li xehdet li meta ġew quddiemha, huma riedu li l-ftehim ikun self ta' €50,000 u imgħax ta' €20,000 u li hi rrifjutat għaliex ir-rata ta' imgħax li riedu jistipulaw tmur kontra l-liġi. Li kieku l-partijiet riedu jistipulaw 20% mill- profitt, huma kienu jiktbu hekk. Fuq kollox, kif tista' l-Qorti temmen li l-konvenuti kien mingħalihom li ser jitħallsu profitt fuq somma li ma ġietx kwantifikata? Anke li kieku għal grazzja tal-argument kien hekk, jekk din is-somma li jgħidu li kellhom jitħallsu l-konvenuti kienet taqbeż it-8% tas-somma mislufa, xorta waħda tikkostitwixxi użura!

- *Il-Qorti tqis ukoll illi kieku l-konvenuti ma kellhomx x'jaħbu, il- flus kienu jgħaddu quddiem in-Nutar. Kollox ma kollox, il-Qorti hija moralment konvinta li l-konvenut sellef kontanti bl-uzura.*
- *Madanakollu, dan ma jfissirx illi l-kuntratt de quo kollu kemm hu huwa null għaliex ivvizjat b'causa illeċita, imma li l- obligazzjoni ta' ħlas ta' imgħax hija nulla għal dak li jmur oltre mir-rata ta' tmienja fil-mija li hija l-għola rata permessibbli skont il-liġi.*

- *L-atturi jgħidu li huma fil-fatt ħallsu €40,000 lill-konvenuti iżda prova ta' dan il-pagament ma ġabux. Huwa prinċipju kardinali li l-piż tal-prova tal-pagament jispetta lil dak li jallegah. Ta' min jinnota wkoll li l-attur mhuwiex konsistenti fil-verżjoni tiegħu għaliex filwaqt li fl-affidvit tiegħu jgħid li kien ħallas lill- konvenut bil-flus li kien silfu ċertu Irismetov, in kontro eżami xehed li dawn il-flus Irismetov silifhomlu għan-negozju u mhux biex iħallas lill-konvenut. Fid-dawl ta' dan kollu, it-tielet talba attriċi m'għandhiex tintlaqa'.*

The Court therefore held, that:

- *Tilqa' l-ewwel u t-tieni talbiet tal-atturi limitatment għal dak li għandu x'jaqsam mal-imgħax li jmur oltre r-rata ta' (8%) fuq il-kapital misluf ta' ħamsin elf Ewro (€50,000);*

- *Tiċħad it-tielet talba in kwantu li ma jirriżultax li l-atturi għamlu xi pagament lill-konvenuti.*

21 ACADEMY

Diploma in Law (Malta)

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