



**Court of Magistrates (Malta)  
As a Court of Criminal Judicature**

**Magistrate Dr. Joseph Mifsud LL.D.**

**The Police  
(Inspector Anne Marie Micallef)**

**vs**

**Donald Micallef  
Celine Lee Bentley**

**Case number 384 / 2012**

**Today 30th January 2018**

The Court,

Having seen the charges against Donald Micallef holder of Maltese Identity Card number 207082 (M) and Celine Lee Bentley holder of Maltese Identity Card number 57584 (A), charged with having in February 2011 and in the preceding months, in these islands, by means of several provision of the Law and which were committed in pursuance of the same design, personally and/or in their capacity as director or official of the company Market Handle Limited (reg. No. C 49546)

1. Misapplied, converted to their own benefit or to the benefit of any other person, the sum of more than two thousand, three hundred and twenty nine Euro and thirty seven cents (€2,329.37) to the detriment of WE Advertise Limited, which sum has been entrusted or delivered to them under a title which implies an obligation to return such thing

or to make use thereof for a specific purpose, and which sum has been entrusted or delivered to them by reason of their profession, trade, business, management, office or service.

To Donald Micallef only:

2. Furthermore, by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, made gain not exceeding two hundred and thirty two Euros and ninety four cents (€232.94), to the detriment of Adrian Galea and the Establishment YAL Home and Electronics;
3. Also with having during the same period of time and circumstances to the detriment of Adrian Galea and the Establishment YAL Home and Electronics, committed fraudulent gain of not more than two hundred and thirty two Euros and ninety four cents (€232.94);
4. Also with having during the same period of time and circumstances, committed forgery of any authentic and public instrument or of any commercial document or private bank document, by counterfeiting or altering the writing or signature, by feigning any fictitious agreement, disposition, obligation or discharge, or by the insertion of any such agreement, disposition, obligation or discharge in any of the said instruments or documents after the formation thereof, or by any addition to the alteration of any clause, declaration or fact which such instruments or documents were intended to contain or prove;
5. Also with having during the same period of time and circumstances knowingly made use of any of these false acts, writings, instruments or documents;
6. And also with having during the same period of time and circumstances made or issued any declaration or certificate, falsely make;

The Court was hereby kindly requested that in case of a finding of guilt of the accused, apart from inflicting the punishment prescribed at Law, also orders the forfeiture of all the objects exhibited in these proceedings.

The Court was also kindly requested that, in pronouncing judgment or in any subsequent order, sentence the person/s convicted, jointly or severally, to the payment, wholly or in part, to the Registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee, within such period and in such amount as shall be determined in the judgment or order, as per Section 533 of Chapter 9 of the Laws of Malta.

Having seen that this case was assigned to this Court as presided by means of a decree dated 30 June 2015 delivered by the Honorable Chief Justice;

### **The facts of this case**

These proceedings were instigated by means of a complaint made by WE Advertise Limited a copy of which is found at fol. 42 of the records of the case. The allegation in the said criminal complaint is that co-accused Donald Micallef allegedly in his capacity as an agent bought advertising space on Television Malta from WE Advertise Limited in order that advertisements pertaining to clients of his are aired. The relative booking form is addressed to Public Broadcasting Services Limited the company operating and running Television Malta. It is further alleged in the said criminal complaint that a particular booking was made in the name of Adrian Galea of YAL Home and Electronics who paid the whole amount to co-accused Donald Micallef who retained all the money and did not pay WE Advertise Limited instead of just retaining his 15% agency commission.

**Having considered:**

### **Legal Considerations Regarding the Level of Proof Required**

That the Prosecution is bound to bring forward evidence so that the Court can find the accused guilty as charged. Manzini<sup>1</sup> notes the following:

*“Il così detto onero della prova, cioè il carico di fornire, spetta a chi accusa – onus probandi incumbit qui osservit”.*

In the Criminal field the burden of the Prosecution is to prove the charges beyond reasonable doubt. With regards to the defence, enhanced by the presumption of innocence, the defence can base or prove its case even on a balance of probabilities meaning that one has to take into consideration the probability of that version accounted by the accused as corroborated by any circumstances. This means that the Prosecution has the duty to prove the tort attributable to the accused beyond every reasonable doubt and in the case that the Prosecution is considered as not proving the element of tort the Court has a duty to acquit the accused.

That the following principles, as clearly outlined by the Constitutional Court in its judgment of the 1<sup>st</sup>. of April 2005 in the case **The Republic of Malta vs. Gregory Robert Eyre et**, must be applied:

*“(i) it is for the Prosecution to prove the guilt of the accused beyond reasonable doubt; (ii) if the accused is called upon, either by law or by the need to rebut the evidence adduced against him by the Prosecution,*

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<sup>1</sup> Diritto Penale (Vol. III, Chapter IV, page 234, Edition 1890).

*to prove or disprove certain facts, he need only prove or disprove that fact or those facts on a balance of probabilities; (iii) if the accused proves on a balance of probabilities a fact that he has been called upon to prove, and if that fact is decisive as to the question of guilt, then he is entitled to be acquitted; (iv) to determine whether the Prosecution has proved a fact beyond reasonable doubt or whether the accused has proved a fact on a balance of probabilities, account must be taken of all the evidence and of all the circumstances of the case; (v) before the accused can be found guilty, whoever has to judge must be satisfied beyond reasonable doubt, after weighing all the evidence, of the existence of both the material and the formal element of the offence."*

That Lord Denning in the case **Miller vs. Minister of Pension** explained what constitutes "*proof beyond a reasonable doubt*".

He stated:

*"Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it is possible but not in the least probable' the case is proved beyond reasonable doubt, but nothing shall of that will suffice".*

## Elements of the crime of misappropriation

The elements of the crime of misappropriation were illustrated in the judgment given by the Court of Magistrates (Gozo) as a Court of Criminal Judicature on the 21<sup>st</sup> July, 2016 in the names **Il-Pulizija v. Victor Camilleri** wherein the following was observed:

*Illi l-appropriazzjoni indebita hija ikkontemplat fl-artikoli 293 u 294 tal-Kodici Kriminali. Illi ghalkemm l-artikolu 293 jispecifica illi sabiex tirnexxi dina l-azzjoni kriminali jehtieg il-kwerela tal-parti offiza, madanakollu l-artikolu 294 jiddisponi illi l-azzjoni titmexxa ex officio mill-Pulizija meta l-oggett jigi fdat jew ikkunsinnjat lill-hati minhabba l-professjoni, industrija, kummerc, amministrazzjoni, kariga jew servizz tal-persuna akkuzata.*

*“Skont giurisprudenza kostanti u anke skont awturi, generalment huwa ritenut li l-estremi ta’ dan r-reat ta’ appropriazzjoni indebita huma dawn li gejjin:*

*1. Illi l-pussess tal-haga jkun gie trasferit lis-suggett attiv tar-reat volontarjament mill-proprjetarju jew detentur, ikun min ikun. Jigi specificat hawnhekk biex ma jkunx hemm ekwivocita’, li l-konsenja da parti tal-proprjetarju jew detentur lill-agent jew lis-suggett attiv tad-delitt, trid tkun maghmula con l’animo di spostarsi del possesso, ghax*

*altrimenti jiffugura mhux r-reat tal-appropriazzjoni ndebita, imma s-serq.*

2. *Illi t-trasferiment tal-pussess ma jridx ukoll ikun jimporta t-trasferiment tad-dominju cioe' tal-proprjeta' ghaliex f'dan il-kaz ma jiffigurax l-element tal-azzjoni indebita.*

3. *Illi l-oggett irid ikun mobbli;*

4. *Illi l-konsenjatarju in vjolazzjoni tal-kuntratt jaghmel tieghu l-haga cioe' japproprja ruhu minnha, jew ibieghha, jew jiddistruggiha a proprio commodo o vantaggio;*

5. *Irid ikun hemm ukoll l-intenzjoni tas-suggett attiv tar-reat li japproprja ruhu mill-oggett li jkun jaf li huwa ta' haddiehor" (Il-Pulizija vs Marbeck Cremona - Qorti tal-Magistrati (Ghawdex) – 15/02/2007)*

*Illi f'sentenza moghtija mill-Qorti tal-Appelli Kriminali fl-ismijiet **Il-Pulizija vs Enrico Petroni u Edwin Petroni** deciza fid-9 ta' Gunju 1998, il-Qorti ghaddiet sabiex elenkat l-element essenzjali li jsawru dana r-reat.*

*"Dana ir-reat isehh meta wiehed (1) jircievi flus jew xi haga ohra minghand xi hadd; (2) bl-obbligu li jrodd dawk il-flus jew dik ix-xi*

*haga lura jew li jaghmel uzu minnhom b'mod specifiku; (sottolinjar tal-Qorti) (3) u minflok ma jaghmel hekk idawwar daww il-flus jew dak l-oggett bi profitt ghalih jew ghal haddiehor."*

*Illi ghalhekk l-awtur ta' dana r-reat irid ikollu l-intenzjoni specifika illi l-oggett li jigi fdat lili u li jkun qed jippossjedi ghal ghan specifiku, jigi imdawwar minnu daqs li kieku huwa l-proprjetarju u jaghmel uzu minnu jew jiddisponi minnu bi profitt ghalih jew ghal haddiehor.*

*Illi kif jispjega l-awtur Francesco Antolisei:*

*"La vera essenza del reato [di appropriazione indebita] consiste nell'abuso del possessore, il quale dispone della cosa come se ne fosse proprietario (uti dominus). Egli assume, si arroga poteri che spettano al proprietario e, esercitandoli, ne danneggia il patrimonio" (**Manuale di Diritto Penale**, Giuffre` (Milano), 1986, Parte Speciale, Vol. 1, p. 276)*

*Illi f'sentenza ohra deciza mill-Qorti tal-Appelli Kriminali fl-ismijiet **Il-Pulizija vs John Gauci** deciza fl-14 ta' Frar 1997, il-Qorti tispjega b'mod semplici l-elementi ta' dana r-reat:*

*"Minn ezami tal-artikolu 293 tal-Kodici Kriminali jidher car li wiehed mill-elementi essenzjali tal-appropriazzjoni indebita huwa kostitwit mill-frazi: "... taht titolu illi jgib mieghu l-obbligu ... li jsir uzu*



*minnha specifikat ...". Specifikat minn min? Ovvjament minn min ikun ikkonsenja l-haga lill-agent u minn hadd izjed. Hija l-persuna li tikkonsenja l-haga u hadd hlielha li jkollha jedd timponi l-obbligu ossia tispecifica lill-agent dwar kif ikollu jaghamel uzu mill-oggett ikkonsenjat lilu minnha. Jekk il-konsenjatur jaghti flus lill-agent biex dan bihom jixtrilu dar, l-agent jikkommetti r-reat ta' approprjazzjoni indebita jekk minflok jaghtihom karita'. Jekk il-konsenjatur jaghti flus lill-agent biex dan jixtrihom armi bi skop ta' serq, l-agent ikun approprja ruhu mill-flus indebitament jekk jaghtihom karita', apparti l-kwistjoni tal-moralita'. Jekk jixtrihom armi, allura l-agent ikun ghamel uzu mill-flus kif specifikat. F'kull kaz, fl-indagini dwar il-htija jew le ta' approprjazzjoni indebita, ghandha ssir prova ta' l-uzu tal-haga specifikata mill-konsenjatur u prova ta' jekk l-agent ma ikunx ghamel mill-haga dak l-uzu jew uzu divers."*

*Illi finalment dwar id-dolo mehtieg ghall-kumissjoni ta' dana r-reat il-Qorti taghamel pjena referenza ghas-sentenza **Il-Pulizija v Dr. Seigfried Borg Cole** deciza mill-Qorti tal-Appell Kriminali fit-23 ta' Dicembru 2003 fejn il-Qorti hemmhekk ghamlet referenza ghal dak li qal il-gurista Luigi Maino fuq il-kuncett tad-dolo necessarju ghal ezistenza ta' dan r-reat. (**Commento al Codice Italiano UTET (1922)** Vol IV para 1951 pagna 105 – 106):*

*"Finalmente, a costruire il delitto di appropriazione indebita e' necessario il-dolo. Trattandosi di delitto contro la proprieta', a scopo*

*d'indebito profitto per se' o per un terzo, il dolo sara' costituito dalla volontarieta', della conversione con scienza della sua illegittimita' e dal fine di lucro; onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d'un diritto proprio da far valere, non commette reato per difetto di elemento intenzionale. Per la stessa ragione, e per difetto inoltre di elemento obiettivo, non incorrera in reato chi ne dispone della cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo ... il dolo speciale nel reato di appropriazione indebita e' [come nel furto e nella truffa] l'animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell'inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai deviazioni della pratica giudiziale che diedero spesse volte l'esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale. Rettamente pertanto fu giudicato non commettere appropriazione indebita [e neppure il delitto di ragion fattasi, per mancanza di violenza] il creditore che trattiene un oggetto di spettanza del suo debitore a garanzia del credito; l'operaio che avendo ricevuto materia prima da lavorare, si rifiuta, perche' non pagato dal committente, di proseguire nel lavoro e di rendere la materia ricevuta; l'incaricato di esigere l'importo di titoli, che non avendo potuto compiere tale esazione, trattiene i titoli a garanzia del dovutogli per le pratiche inutilmente fatte allo scopo di esigere. In generale la*

*giurisprudenza e' costante nel richiedere come elemento costitutivo imprescindibile il dolo."*

*Illi mill-esposizzjoni legali tal-elementi mehtiega dwar ir-reat tal-misappropriazzjoni jidher illi dana r-reat huwa bbazat fuq l-abbuz tal-fiducja li tkun giet fdata lill-agent. Dana l-abbuz jissarraff fil-fatt illi l-agent idawwar oggett li jkun gie fdat lilu ghal ghan specifikat f'uzu differenti minn dak patwit tal-oggett ikkonsenjat, liema uzu divers madanakollu jrid ikun sar b'mod intenzjonali mill-agent bl-ghan li jaghmel profit minnu ghalih innifsu. Dana l-agir min-naha tieghu ma jridx jammonta ghal semplicement uzu tal-oggett, izda l-agent irid iqis illi dak l-oggett sar proprjeta' tieghu u ghalhekk jaghmel uzu minnu bhala sid tieghu u dana bi profitt ghalih.*

Having listed in detail the jurisprudential teachings on the elements of the crime of misappropriation, the Court will now proceed to examine all the circumstances revolving around this case.

**Having considered that:**

According to the memorandum and articles of the company Market Handle, it is Celine Lee Bentley who was registered as the sole director of the company Market Handle and further more to the testimony of than employees of Market Handel, that is Clive Pickard in his testimony at fol

228 and also Cherrieanne Vassallo at fol 225, everyone confirms that Donald Micallef used to man the company and his position was of a CEO. This once again was confirmed by accused himself after he decided to give evidence on the 11<sup>th</sup> of May 2015 at fol 293. In fact he stated that he was employed as a freelance chief executive officer for the company (fol 293), and he continues by saying “ *I was the person in charge to find suppliers, find clients make sure that everything was running smoothly basically*”. In fact in his testimony one could easily notice the language used by Micallef that is “we” when he makes reference to the persons in charge of the company.

According to the Interpretation Act , Chapter 249 of the Laws of Malta, article 13 states that; “*Where any offence under or against any provision contained in any Act, whether passed before or after this Act, is committed by a body or other association of persons, be it corporate or unincorporate, every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of such body or association, or was purporting to act in any such capacity, shall be guilty of that offence unless he proves that the offence was committed without his knowledge and that he exercised all due diligence to prevent the commission of the offence:*”

On the basis of the above mentioned article 13 of the Interpretation Act, both Celine Lee Bentley and Donald Micallef are to be held accountable for the wrongdoings and shortcomings of the company. Celine Lee Bentley must prove that she had no knowledge of the offences in question and that

she had exercised all due diligence to prevent the same offence from taking place.

### **In regards to Celine Lee Bentley**

From a reading of the acts the Court concludes that Celine Lee Bentley was not involved in the transactions merit of this court case.

Neither Adrian Galea of YAL Home and Electronics nor Marouska Pisani Bugeja or any other representative of WE Advertise Limited never had any communication of any kind and in manner whatsoever with Celine Lee Bentley. Asked whether they ever discussed, spoke or even met with Celine Lee Bentley, the only reply that was forthcoming in this regard is that maybe they saw her on one occasion each one of them with co-accused Donald Micallef and that they never had any discussions or dealings of any sort with her.

The payments made and forming the subject matter of this case were not made unto Celine Lee Bentley.

The prosecution and the *parte civile* failed altogether to prove that Celine Lee Bentley was in any way aware of the facts leading to this court case.

The criminal complaint made by WE Advertise Limited and exhibited at fol. 42 of the records of the case is only directed against co-accused Donald Micallef and Celine Lee Bentley is not mentioned in any way whatsoever.

Adrian Galea testified as follows during the sitting held on the 18<sup>th</sup> June, 2012 at fol. 50 of the records of the proceedings:

*Qorti: Int lil Celine Lee Bentley qatt iltqajt magħha?*

*Xhud: Le.*

This was also confirmed by Adrian Galea during his cross-examination held during the sitting of the 24<sup>th</sup> February, 2014 at fol. 270 of the records of the case where he replied thus to the questions put to him by counsel to defense:

*Dif: Ngħid sew li inti fin-negozju tiegħek, x'hin kont qed tagħmel in-negozju ma kontx qed tithaddet ma' Celine Bentley, fl-ebda hin?*

*Xhud: Le.*

*Dif: Jigifieri Celine Bentley jekk ngħidlek li qatt ma ltqajt magħha xi tghid?*

*Xhud: Le, qalli darba qed tistennieni l-għarusa fil-karozza, jien magħha qatt ma tkellimt.*

The representative of WE Advertise Limited, Marouska Pisani Bugeja, during the sitting of the 24<sup>th</sup> February, 2014 at fol. 267 of the records of the

case when she replied to the questions put to her by counsel to defense confirmed:

*Def: Am I correct to state that your company We Advertise Limited was in no way involved with Celine Bentley? With the second accused.*

*Wit: No, but he had mentioned her a several times that she is his girlfriend. But I never met her before.*

The prosecution also failed to prove the formal element of the crime of misappropriation on the part of Celine Lee Bentley.

As held in the case above referred to *Irid ikun hemm ukoll l-intenzjoni tas-suggett attiv tar-reat li japproprja ruhu mill-oggett li jkun jaf li huwa ta' haddiehor"* (*Il-Pulizija vs Marbeck Cremona - Qorti tal-Magistrati (Ghawdex) - 15/02/2007*);

No such intention was proved by the prosecution with reference to Celine Lee Bentley.

Celine Lee Bentley cannot but be acquitted of the charge of misappropriation brought against her.

## In regards to Donald Micallef

With reference to the charges attributed to Donald Micallef;

Regarding the first charge the Court makes reference to a judgment given in the names Il-Pulizija vs Camilleri Francis delivered on the 25th June, 2011 but the Criminal Court of Appeal (Inferior Jurisdiction application number 247/2000 VDG) whereby it was held that :-

*“Huwa veru li r-reat ta’ approprjazzjoni indebita (Art. 293) huwa normalment prosegwibbli biss fuq il-kwerela tal-parti, pero` fil-kaz in dizamina qed jigi ipotizzat ukoll l-aggravju kontemplat fl-Artikolu 294 tal-Kodici Kriminali li jirrendi dak ir-reat prosegwibbli ex officio”*

It was also held in the judgment delivered by the Criminal Court of Appeal on the 6<sup>th</sup> March, 1954 in the names Il-Pulizija vs Salvo Depares that:-

*“F'kaz ta' akkuza dwar approprjazzjoni indebita, il-kwerela tal-parti leza hija prezunta, jekk l-imputat ma jkunx talabha u l-Qorti ma tkunx ordnat il-produzzjoni taghha.”*

With regards to what constitutes the aggravation at law according to Article 294 in the sense of the aggravation due to the trade or profession of the accused the Court makes reference to the judgment



given in the names **Il-Pulizija vs Maria Bezzina** delivered on the 19th April, 1958 by the Criminal Court of Appeal wherein it was held that:-

*“L-appropriazzjoni ndebita ssir aggravata, jew kwalifikata, jekk l-oggett ikun gie fdat lil min approprja ruhu minnu in raguni tas-servizz tieghu; u ma hemmx bzonn li dan is-servizz ikun jikkonsisti fl-impjeg regolari bi hlas, imma hu bizzejjed li dan is-servizz kien jinaghata kulltant, u anki b'kumpensi ohra li ma humiex flus. Meta l-appropriazzjoni ndebita hi aggravata, mhix mehtiega l-kwerela, imma r-reat hu persegwibbli "ex officio".”*

**Carminiani** in his book entitled **Elementi Iuris Criminali** - (page 1020) defines this crime and explains that:-

*“il fatto de quo liu, che avendo ricevuto dal proprietario mediante contratto non transiattivo di dominio, una cosa immobile, questa contro i patti e contro la volonta del proprietario stesso e converta in uzo proprio con animo di appropriarsela o la distrugge e a proprio lucro e commodo.”*

**Carrara** in his book **Diritto Penale** entitled *Esposizione dei delitti inspecie* (vol 4. para 284) gives a more synthetic definition to this crime under review and states that:-

*“la dolosa appropriazione di una cosa altrui che si e’ ricevuto del proprietario per una convenzione non translattiva di domino e da uzo determinato.”*

Essentially thus the crime of misappropriation is nothing more than an abuse of trust that as a result of such abuse such person makes a profit for himself by changing the use of the thing entrusted to him for a specific purpose even though such thing would have been entrusted to such person freely (vide **Il-Pulizija vs Joseph Mifsud** decided on the 2<sup>nd</sup> December, 1992 by the Criminal Court of Appeal; **Il-Pulizija vs Joseph Richmond et** decided on the 14<sup>th</sup> January , 1993; **Il-Pulizija vs Capt. Albert Mallia** decided on the 25<sup>th</sup> April, 1949 and **Il-Pulizija vs Emanuel Cassar** decided on the 20<sup>th</sup> October, 1997.)

**Thus the Court makes it clear that there must be a conversion and this conversion happens inter alia when the guilty person who would have received the thing for a specific purpose changes its destination to a different use and takes advantage of such use or disposes of such thing contrary to what had been stipulated by the parties in buona fede.**

**Luigi Maino** in his book *Commento al Codice Penale Italiano Vol. V* pg. 347 states:

*“L’appropriazione indebita si consuma col disporre delle cose contro la legge del patto stipulato a buona fede.”*

The Court here makes reference to another Court Judgment delivered on the 17<sup>th</sup> April, 1998 in the names **‘Il-Pulizija vs Raymond Falzon’** and makes reference to a quotation therein mentioned:-

*‘Il dolo speciale nel reato di appropriazione indebita e’ (come nel furto e nella truffa) l’animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell’inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai devianti della pratica giuudiziale, che diedero spesse volte l’esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale.’*

**The Court analysed all the evidence of the case and it transpires clearly that the mastermind of this misappropriation of money undoubtedly was Donald Micallef as all witnesses indicated him in their transactions and moreover some witnesses excluded the co-accused simultaneously.**

The second and third charge relates to fraud. The provisions relating to fraud in our Criminal Code are sections 308, 309 and 310 which sections read as follows:-

*“308. Whosoever, by means of any unlawful practice, or by the use of any fictitious name, or the assumption of any false designation, or by means of any other deceit, device or pretence calculated to lead to the belief in the existence of any fictitious enterprise or of any imaginary power, influence or credit, or to create the expectation or apprehension of any chimerical event, shall make any gain to the prejudice of another person, shall, on conviction, be liable to imprisonment for a term from seven months to two years.*

*309. Whosoever shall make, to the prejudice of any other person, any other fraudulent gain not specified in the preceding articles of this sub-title, shall, on conviction, be liable to imprisonment for a term from one to six months or to a fine(multa).*

*310. (1) In the cases referred to in this sub-title -*

*(a) when the amount of the damage caused by the offender exceeds two thousand and three hundred and twenty-nine euro and thirty-seven cents (2,329.37) the punishment shall be that of imprisonment from thirteen months to seven years;*

*(b) when the amount of the damage caused by the offender exceeds two hundred and thirty-two euro and ninety-four cents (232.94) but does not exceed two thousand and three hundred and*

*twenty-nine euro and thirty-seven cents (2,329.37), the punishment shall be that of imprisonment from five months to three years: Provided that if the punishment laid down for the relevant offence in the preceding articles of this subtitle is higher than the punishment laid down in this paragraph the former punishment shall apply increased by one degree and in the case of the offence under article 294 the punishment so increased shall not be awarded in its minimum;*

*(c) when the amount of the damage caused by the offender does not exceed twenty-three euro and twenty-nine cents (23.29), the offender shall be liable to imprisonment for a term not exceeding three months;*

*(d) when the amount of the damage caused by the offender does not exceed eleven euro and sixty-five cents (11.65), the offender shall be liable to imprisonment for a term not exceeding twenty days or to a fine (multa) or to the punishments established for contraventions.*

*(2) The provisions of subarticle (1)(c) and (d) shall not apply in the case of any of the crimes referred to in articles 296 and 298.*

*310A. The provisions of articles 121C, 121D and 248E(4) shall apply to offences under this sub-title.*

*Jurisdiction.*

*310B. The offences under this sub-title shall be deemed to be offences even when committed outside Malta and, without prejudice to the provisions of article 5, the criminal action therefore may also be prosecuted in Malta according to the laws thereof against any person who commits or participates in the offence as provided in this Code -*

*(a) when the offence took place, even if only in part, in Malta or on the sea in any place within the territorial jurisdiction of Malta; or*

*(b) when the gain to the prejudice of another person has been received in Malta; or*

*(c) when a person in Malta knowingly assisted or induced another person to commit the offence; or*

*(d) when the offender is a Maltese citizen or a permanent resident in Malta and the fact also constitutes an offence according to the laws of the country where it took place:*

*Provided that for the purposes of this paragraph "permanent resident" shall have the same meaning assigned to it by article 5(1)(d)."*

The elements of the crime of fraud are the patrimonial loss of the victim and the consequential gain in favour of the accused. In a judgement dated 12<sup>th</sup> February 1999 the Court of Criminal Appeal (inferior jurisdiction) gave the following definition of the elements of the crime of fraud:-

*“Fil-ligi taghna biex ikun hemm it-truffa jew il-frodi innominata irid ikun gie perpetrat mill-agent xi forma ta’ ingann jew qerq, liema ingann jew qerq ikun wassal lill-vittma sabiex taghmel jew tonqos milli taghmel xi haga li ggibilha telf partimonjali bil-konsegwenti qligh ghall-agent (Il-Pulizija v. Emmanuele Ellul, App. Krim., 20/6/97; ara wkoll Il-Pulizija v. Daniel Frendo, App. Krim., 25/3/94). Dan it-telf hafna drabi jkun jikkonsisti filli l-vittma, proprju ghax tkun giet ingannata, volontarjament taghti xi haga lill-agent (Il-Pulizija v. Carmel Cassar Parnis, App. Krim., 12/12/59, Vol. XLIII.iv.1140). Jekk l-ingann jew qerq ikun jikkonsisti f’ “raggiri o artifizi” – dak li fid-dottrina jissejjah ukoll mise en scene – ikun hemm it-truffa; jekk le, ikun hemm ir-reat minuri ta’ frodi innominata (jew lukru frawdolent innominat) (ara, fost ohrajn, Il-Pulizija v. Carmelo Cassar Parnis, App. Krim., 31/10/59, Vol. XLIII.iv.1137; Il-Pulizija v. Francesca Caruana, App. Krim., 25/7/53, Vol. XXXVII.iv.1127; ara wkoll Il-Pulizija v. Giuseppe Schrainer, App. Krim., 3/3/56).”*

## **Forgery**

The Maltese Criminal Code does not define “forgery”. It mentions the different manners in which a forgery may be committed. Forgery can take place :-

- (a) when a person counterfeits a document – that is to say makes a false document in whole or in part;
- (b) or when he alters a genuine document.

Maltese case law has established the distinction between material falsehood and ideological falsehood, much in line with principles of Italian Law. In fact, in the judgment delivered by the Court of Criminal Appeal in the case “**Il-Pulizija vs Paul Galea**” on the 17th October 1997, Chief Justice Emeritus Vincent de Gaetano decided that : -

*filwaqt li fil-każ tal-falz materjali d-dokument jiġi ffalsifikat fl-essenza materjali tiegħu, fil-falz ideologiku d-dokument ikun iffalsifikat biss fis-sustanza u cioè` fil-kontenut ideali tiegħu (ara Antolisei, F., Manuale di Diritto Penale – Parte Speciale II (Giuffre`, Milano, 1986) p. 604). Fi kliem Manzini (Trattato, v. VI, n. 2296, p.829) ikun hemm falsità` materjali meta d-dokument ikun wieħed mhux ġenwin (jiġifieri jew meta l-awtur apparenti ma jkunx l-awtur reali tad-dokument jew meta d-dokument ikun issubixxa alterazzjonijiet wara l-formazzjoni definittiva tiegħu), mentri fil-falz ideologiku, għalkemm id-dokument ikun ġenwin ‘non e` veridico, perche` colui che lo ha formato gli fa dire cose contrarie al vero’. Għall-finijiet tad-dottrina in tema ta’ falsità` ikun hemm dokument kull fejn hemm kitba, attribwibbli għal persuna identifikabbli, liema kitba tkun tikkontjeni esposizzjoni ta’ fatti jew dikjarazzjoni ta’ volonta` (Antolisei, F., op. cit., p. 594). S’intendi, b’kitba wieħed ma jifhimx biss is-sinjali alfabetiċi, iżda tinkludi dawk*



*numerici, stenografici u anke kriptografici, basta li dik il-kitba tesprimi  
hsieb li jkun jiftiehem minn kulhadd jew minn certu numru ta' nies. Il-  
kitba f'dan is-sens tista' ssir kemm bl-id kif ukoll b'mezzi mekkaniċi,  
b'mezz indelibbli jew li jista' jithassar, u fuq kwalsiasi mezz li jista'  
jiehu, imqar temporaneament, il-messaġġ - karta, parċmina, injam,  
ġebel, ħadid, plastik, ecc.*

This crime hits at the public trust, at the institutions giving rise to such documents and which are meant to guarantee public trust.

As a crime, the Prosecution has to prove beyond a reasonable doubt the existence of *dolus*. At common law for the crime of forgery to exist, the intent to defraud was always required. However developments in statute law made specific kinds of forgery - of public documents in particular - subject to the requisite intention to deceive. In continental jurisdictions, once that a person is proved to have wilfully altered the truth by the production of a false or altered document, then the fraudulent intention may be deemed to be presumed, without the need to produce further evidence of it.

Proof of actual prejudice suffered by third parties as a consequence of the production of the false document is not necessary to secure conviction. Actual prejudice or the possibility of causing harm may be required to be proved when the falsity relates to a private writing. But not so when the falsity relates to public documents.

In the case of forgery of public documents the law aims at punishing the violation of public trust – irrespective of the harm – actual or potential. Public documents are intrinsically apt to create rights or to transfer rights and therefore their forgery is presumed always to cause harm (given the breach of trust that the public attaches to public documents) whether this harm materialised or not. The potential of causing harm is therefore not an essential ingredient of the crime of forgery that has to be proved by the prosecution. In the case of public documents, the crime of forgery exists even where the forged document is null on account of a defect in its form, or because of the non observance of a *sine qua non* formality.

However while the possibility of causing harm or fraud is not a constituent element of the crime of forgery of public documents, the possibility to deceive is deemed to be an essential ingredient in the crime of forgery whether in relation to both private and public documents.

According to Professor Anthony Mamo in his “Notes on Criminal Law”<sup>2</sup> page 160 : “A perfect imitation is not, of course, necessary. But if the manner of executing the forgery is so clumsy that the forgery itself is obvious almost ‘ictu oculi’, then the crime of forgery is negated, although there may be another kind of offence (fraud) (cfr. “Rex vs. L. Cassar”, C.C. 18.11.1941). He quotes from Maino adding that :

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<sup>2</sup> Volume 2, Page 160, Revised Edition 1954-1955.

*La falsita' per essere incriminabile, deve avere attitudine ad ingannare: non sara' necessaria l'imitazione perfetta: ma quando il falso sia cosi' grossolano e tale da dovere essere facilmente riconosciuto, non potra', per mancanza di vera e propria lesione delle fede pubblica, applicarsi il titolo di falso, ma soltanto (nei congrui casi) quello della truffa, se per l'ignoranza o l'incuria della persona presso la quale fu adoperata la scrittura goffamente falsificata l'uso di questo abbia prodotto un danno.*

Mamo adds that the document, though made to appear to resemble the true instrument – and though not being an exact replica – must still “be capable of deceiving persons using ordinary observation, according to their means of knowledge”.

If through the use of such forged document the victim is deceived, then it is not possible for the defendant to raise the “question of the manner of execution of the falsity”. Such that if the false document – even though it were a bad imitation or a gross counterfeit – deceives the intended victim, then the final juridical aim behind the production of this false document would have been reached – and it is futile to analyse further the potential of deceit posed by such a false document.

The object of the falsification has to be material to the public or private writing itself in its external conditions as a document.

From the evidence produced it results that the accused Donald Micallef gave Adrian Galea a cheque (fol 36) when he had no rights to issue company cheques as the sole signatory for company cheques was Celine Lee Bentley. This was confirmed by the bank official Ms. Audrey Ghigo and with the Appointment of Bankers-Companies which document is attached at fol 139. As part of the mise en scene Donald Micallef gave the impression to Adrian Galea that he was the person in charge of Market Handle, and in fact he never mentioned Celine Bentley with him. The accused's testimony gives the impression that he was the person who managed and co-ordinated everything within the company.

At fol 304 the prosecution asked *"you agree that you issued and you signed for cheques issued by the company?"* to which Donald Micallef answers *"yes and most of them came back because there was my signature and not that of Celine"*. This shows clearly that although he knew that he was not a signatory for the company cheques he still issued and paid others with these cheques.

With reference to the first charge being aggravated misappropriation of funds, Market Handle was appointed by YAL in order to provide advertisements, which advertisements were then presented by We Advertise Ltd, which was then approached by Donald Micallef on behalf of Market Handle. Adrian Galea states that he had paid the full amount to Market Handle for the advertisement which was produced by We Advertise, and this is confirmed by invoice which is exhibited at fol 32 of

these acts. It clearly shows that the balance was 0 at the end and the signature of Donald Micallef next to said balance.

Instead the payments that were affected by Adrian Galea for that specific service, were used elsewhere by the company, amongst which Donald Micallef confirms that he paid his car instalments to Dr. Malcolm Cassar by means of cheque no. 827 issued by Bank of Valletta with the amount of €3273. Celine Lee Bentley had signed on the back part of the cheque since it was payable to Market Handle Ltd (vide fol 37 and fol 38) before handing the cheque to Dr. Cassar LL.D. One has to note that although accused Donald Micallef, whilst giving testimony in Court at the end of fol 299, he states that Dr. Malcolm Cassar *“used to produce all our legal paper work like employee the employee contracts, recruitment contracts and whatever else...”* which version was not corroborated by the testimony of Dr. Malcolm Cassar himself at fol 251. Not even the defence never cross examined or produced Dr. Cassar as their witness and confirmed on oath that he used to work for Market Handle as well!

As regards to the defence brought up by the accused which concerns a cheque exhibited at fol 39 made payable to Cherianne Farrugia, the prosecution pointed out that the defence of taking the money for herself as she pretended it was her wage, does not stand at all. If one examines the invoice at fol 32, one can note that the cheque in question is listed under the balance due, also with the signature of Cherianne Farrugia and that of

Donald Micallef underneath. Hence the accused can never say that they did not receive said amount since it was deducted from the invoice itself. Furthermore, Donald Micallef in his testimony at fol 304 confirmed that he had garnishee orders issued in his name hence he couldn't have a cheque in his name and deposit same. Which makes the version of Cherianne Vassallo nee' Farrugia more credible.

**DECIDE:**

Consequently, this Court finds Celine Lee Bently not guilty of the charges brought against her and is therefore acquitting her therefrom.

In regards of Donald Micallef the Court after having seen articles, 293, 294, 308, 309, 189 and 190 of Chapter 9 of the Laws of Malta, finds the accused Donald Micallef guilty as charged and condemns him for **a term of imprisonment of nine months.**

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**Dr. Joseph Mifsud**  
**Magistrate**