Court of Appeal

HON. CHIEF JUSTICE MARK CHETCUTI
HON. JUSTICE GIANNINO CARUANA DEMAJO
HON. JUSTICE ANTHONY ELLUL

Sitting of Wednesday, 30th June, 2021.

Number 6

Sworn application no 482/2011/1 JPG

***Eurosupplies Limited* (C-17473)**

***v*.**

Paul Tihn and by means of a decree dated 12th May 2017 the Court appointed Advocate Patrick Valentino and Legal Procurator Liliana Buhagiar as curators to act on behalf of Paul Tihn

1. Defendant appealed a judgment delivered by the first instance court on 9 March 2016 whereby he was found in breach of his obligations in terms of a contract of employment with plaintiff company and was ordered to pay ten thousand euro (€10,000) by way of damages. Plaintiff company entered a cross-appeal claiming that the damages awarded by the first instance court are insufficient and should be increased. The relevant facts are as follows:

2. Defendant was employed with plaintiff company in terms of a contract of employment dated 15 June 2009; he resigned his employment on the 8 October 2010. The contract of employment provided *inter alia* as follows:

> »3. CONDITIONS OF EMPLOYMENT
>
> »The employee undertakes to:
>
> »a. diligently and appropriately carry out the duties given to him by the employer in terms of this agreement;
>
> »b. uphold confidentiality of all the affairs of the employer, its brands, its suppliers and its clients, both during the term of employment as well as thereafter;
>
> »c. treat in a proper manner any property in his care being property of the employer or that of its suppliers or clients, including the company mobile provided for the sole use by the employee in the carrying out of his duties;
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> »d. represent and state accurately the policies of the employer to all potential and present customers and to make or give no other representations or warranties other than those contained in any standard terms of the employer;
>
> »e. immediately inform the employer of any problems concerning any supplier or customer of the employer, as well as to immediately inform the employer of any other problem/s which he might come across and which interfere in his work or in the smooth running of the employer's work;
>
> »f. faithfully serve the employer and to use his best endeavour to promote its interests and will obey the reasonable and lawful directions of the employer;
>
> »g. refrain, during he term of this employment, to work in any other occupation without the written permission of the employer;
>
> »h. at all times when carrying out the duties under this agreement use his best endeavour to develop and extend the business of the employer and shall act loyally and faithfully towards the same employer;
>
> »i. refrain, during the term of this employment or after the termination thereof, from soliciting, interfering with, or endeavour to entice away from the employer any person or firm, who at any time during the period of employment were suppliers or clients of or in the habit of dealing with the employer;
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> »j. maintain a high standard of dress and personal appearance compatible with the working job and as considered adequate by the employer;
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> »k. make use of his personal vehicle when carrying out his duties in Malta.

»4. DUTIES

»The duties of the employee shall include:

»- representing the employer when dealing with present and potential clients, in particular, but not limited to, clients in the United Kingdom;

»- to promote the business of the employer to the best of his abilities ;

»- to service the requirements of present and potential clients at all times, in particular, but not limited to, clients in the United Kingdom;

»- to endeavour to increase the sales of the employer;

» to collect monies from clients.

»The above listed duties shall not be interpreted restrictively and shall in no way be read to mean that the employer may not from time to time confer further duties to the employee which should however be directly or indirectly related to his employment.

»… … …

»8. CONFIDENTIAL INFORMATION

»The employee shall at all times, during and after the termination of this employment, keep in strict confidence all information and take all reasonable steps to ensure that all such confidential information which is disclosed to him or obtained by him during the term of employment will not be disclosed to third parties whomsoever.

»9. TERMINATION OF EMPLOYMENT

»… … …

»The employee cannot, directly or indirectly, take up employment in Malta, for a minimum period of five years after the date of termination of employment with the employer, with any person, firm or other employer or become self-employed in the same industry as that in which the employer conducts its activities. Should the employee contravene this condition, he shall be liable to pay to the employer the equivalent of the gross salary plus the commission received during the twelve months period prior to the termination of his employment, this without prejudice to any other action contemplated by law that the employer may be entitled to take.«

3. Alleging that defendant was in breach of the above conditions, plaintiff commenced these proceedings and requested the court to:

»1 declare that by virtue of his behaviour, the respondent has breached obligations in terms of the employment contract entered into between parties, dated the 15th June 2009;

»2. declare and decide that the defendant is responsible for the damages incurred by the applicant company as a result of his malicious behaviour and of the breach of his contractual obligations;

»3. liquidate the damages suffered by the applicant company as a result of the malicious behaviour and breach of the contractual obligations of the respondent, if necessary by nominating an expert for the purpose;

»4. condemn the respondent to pay to the applicant company the resulting amount of damages so determined … … …«

4. The first instance court decided as follows:

»… … … the court … … …

»1. declares that defendant breached his contractual obligations voluntarily assumed by him in the contract of employment dated 15th June 2009;

»2. declares that, due to this breach, defendant is responsible for damages incurred by plaintiff company;

»3. liquidates damages suffered by plaintiff company in the amount of ten thousand Euro (€10,000);

»4. orders defendant to pay plaintiff company the liquated sum of ten thousand Euro (€10,000), with interest from the date of this judgment until the amount due is fully settled.

»All expenses shall be borne by defendant.«

5. The reasons for this judgment were set out as follows:

»In its note of submissions, plaintiff company specifically cited article 3(b) of the contract of employment as one of the contractual obligations violated by defendant. Article 3(b) reads as follows:

> »"The employee undertakes to uphold confidentiality of all affairs of the employer, its brands, its suppliers and its clients both during the term of employment as well as thereafter."

»After careful consideration of all the evidence produced, the court finds that it has been satisfactorily proven that defendant breached this contractual obligation, and this during the period of his employment. In this respect the court makes reference to defendant's affidavit wherein he stated that he told Bolam not only that he resigned, but also complained about the quality and pricing of plaintiff's company products. The court considers this to be a clear breach of the duty of confidentiality which he voluntarily undertook, a breach made all the more serious by the fact that he knowingly divulged such information to a competitor or at least a potential competitor of plaintiff company.

»The court also considers it unlikely that, from all the manufacturers in China, defendant and Bolam just so happened to conveniently choose plaintiff company's supplier. It is also relevant in this respect that in his affidavit defendant also stated that he went to China with Bolam specifically to search for a manufacturer who would produce better quality products than plaintiff company's, thereby betraying a certain sense of competitive connection which defendant harboured against

plaintiff company when he resigned. The defendant stated that he and Bolam went to China to try to source better quality products than those sold by plaintiff company, which further corroborates the idea that he had divulged to Bolam information about the quality of the products sold by plaintiff company.

»The quality and prices of the products sold by plaintiff company are clearly affairs of the company within the meaning of the contract of the employment, and defendant was contractually bound to keep such matters confidential, especially *vis-à-vis* competitors or potential competitors of plaintiff company.

The court fully agrees with plaintiff company's erudite submissions regarding the duty of fidelity that permeates the relationship between employer and employee, especially when the employee holds the position of trust expected in a managerial post, as was the case with defendant. The court observes that the fact that defendant was working his notice period when he went to China with Bolam did not signify that he was no longer in the employ of plaintiff company. Until the very last day of his notice period, defendant remained an employee of the company, thereby bound by all the duties that such employment entailed, including the duty of fidelity. Defendant was in particular still bound by another article of the contract of employment, cited in plaintiff company's note of submissions, that is article 3(f) … … … which provides that :

> »"The employee undertakes to faithfully serve the employer and to use his best endevour to promote its interests and will obey the reasonable and lawful directions of the employer."

»Its this court's considered opinion that by accompanying Bolam to China, with the intention of procuring products of better quality and price than plaintiff company's, and by visiting *Univolt*'s offices as the sales manager of a company other than plaintiff company, trying to secure *Univolt*'s business, the defendant was surely breaching his contractual obligation to faithfully serve plaintiff company and to promote its interests during his period of employment, which period naturally includes the notice period that he was working.

»… … …

»The court recognises that free and fair competition is a vital part of the market which contributes to ensuring that consumers are provided with better quality goods and services at lower prices, encourages enterprise and efficiency, and creates a wider choice for consumers. Furthermore, upon entry into the European Union, Malta undertook to ensure that anti-competitive practices are curbed, since competition policy is deemed to be a vital part of the internal market.

»It is this court's considered opinion therefore, that clause 3(i) of employment contract, in so far as it relates to the period following defendant's term of employment, raises a matter of public policy due to its anti-competitive effects. As such, the validity of the clause may be scrutinised by this court, notwithstanding the absence of a contestation as to its validity by the defendant, since according to the consistent jurisprudence of the Maltese Courts issues relating to public order may be raised by the court *ex officio*. … … …

»The court considers that since the part of clause 3(i) pertaining to the period following defendant's termination of employment affects not only the present parties, but also other players on the market who are not a party to it, in particular consumers who are those most vulnerable to anti-competitive practices, the matter is serious enough to warrant that it be raised *ex officio* by the court.

»Clause 3(i) of defendant's employment contract reads:

> »"refrain, during the term of this employment or after the termination thereof, from soliciting, interfering with, or endeavour to entice away from the employer any person or firm who at any time during the period of employment were suppliers or clients of or in the habit of dealing with the employer."

»On examination, the restraint on trade clause shows that it is unlimited in time, thus purporting to remain applicable indefinitely, perpetually barring the defendant from seeking to establish a commercial relationship with "any person or firm who at any time during the period of employment were suppliers or clients of or in the habit of dealing with the employer". Furthermore, the scope of the clause is also broad and unlimited in geographic scope, such that it restricts the defendant from seeking to establish a commercial relationship with "any person or firm who at any time during the period of employment were suppliers or clients of or in the habit of dealing with the employer" even where the business between the client or supplier and defendant is to be conducted in countries or areas other than the plaintiff company's normal operations.

»The court recognises that non-contact clauses/clauses in restraint of trade are not to be considered automatically invalid. Indeed the purpose of such clause serve the legitimate protection [of] an employer's business interest by preventing an employer to become the victim of a trusted employee. However, such clauses may also breach competition policy both by their object and their effect, and thus they need to be tempered in order to ensure that the public interest in general is protected from the effects of anti-competitive practices.

»It is clear that clause 3(i) is meant to limit competition between the parties to this case for clients and suppliers. Such restrictions may be necessary; however they must be limited in scope and duration in order to be valid, … … … The court finds that clause 3(i), in so far as it relates to the period following defendant's termination of employment, is unreasonable due to its lack of temporal and geographical limitation. This constitutes an unreasonable and unjustified restriction of competition, which is in flagrant violation of Maltese public policy that endeavours to promote free and fair competition for the benefit of the economy and of consumers.

»For these reasons, the court *ex officio* finds this part of clause 3(i) to be invalid and therefore unenforceable.

»The court shall examine whether the defendant breached clause 3(i) during his period of employment, as this part of the clause is still valid and therefore enforceable. It has not been contested by defendant that during his period of employment he went to *Univolt*'s office with Bolam, trying to secure their business for a joint venture which he and Bolam were planning. Defendant argues that he cannot be held in

breach of his contractual obligations for visiting *Univolt* because the agreement between plaintiff company and *Univolt* had fallen through. However, in GW Plowman & Sons Ltd vs Ash (1964 – 2 All ER 10 - 1964 1WLR 568 - 108 Sol Jo 216, CA), wherein it was argued that the anti-compete clause was invalid also because it could apply to those customers that had ceased doing business with the firm, the Court of Appeal had rejected this argument, holding that an employer is entitled not to abandon hope that such customers would return to the business once again. In the present case in fact plaintiff company was still endeavouring to secure *Univolt*'s business when defendant visited their office with Bolam, when still in employment with plaintiff company. On his part, defendant went completely against plaintiff company's interests when he sought to solicit *Univolt*'s business, at a time when he was still in employment with plaintiff company, which was still trying to secure *Univolt*'s business, following the original unsuccessful business deal. This is a clear breach of the duty voluntarily undertaken by defendant to refrain from soliciting with a (potential) client of plaintiff company during his term of employment.

»The court considers also that defendant breached this contractual obligation when he visited plaintiff company's Chinese supplier with Bolam, in a bid to obtain better quality products at a cheaper price than those sold by plaintiff company.

»Plaintiff company is also seeking to recover damages that it alleges it suffered as a consequence of defendant's illegal behaviour and breach of employment contract. Defendant argues on the other hand that plaintiff company suffered no damages from his behaviour.

»Plaintiff company argued that, during defendant's period of employment, it lost clients and potential clients due to defendant's behaviour. The court considers that insufficient evidence has been brought in this regard to show a proper nexus between the abandonment of business with plaintiff company by these clients and defendant.

»The court observes that the contract did not stipulate a minimum number of clients which defendant was bound to procure for plaintiff company, nor the extent of business which such clients would bring to plaintiff company. The court finds that insufficient evidence was been produced by plaintiff company to show that defendant performed so badly in his job so as to be considered to have breached his contractual obligations as regards his job performance.

»What has to be considered therefore are the damages caused by defendant due to the breaches of contractual obligations discussed further above.

»Plaintiff company is seeking to be reimbursed with the wages it paid to the defendant. The court considers that this plea is unfounded, as this eventuality does not result from the contract of employment entered into between the parties. On the contrary, the contract of employment stipulates that defendant would be obliged to refund his wages should he breach the non-compete clause found in clause 9. The question of reimbursement of wages is not mentioned anywhere else in the contract, so it does not appear to have been the intention of the parties that defendant refund his wages to plaintiff company in the event of any breach of the employment contract. Therefore, the court cannot holds the plaintiff company's request for the reimbursement of

> the wages it paid defendant during his term of employment, is untenable.
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> »The plaintiff company is also seeking damages from defendant with regards to the value of stock that went missing. The court has examined the defendant's contract of employment, and has noted that his duties as per contract do not include responsibility for overseeing stock left in clients' warehouses. The court considers also that plaintiff company produced no evidence in order to support its claim that this stock in fact went missing. Indeed no stock taking had been effected, no police report was lodged and no insurance claim was made. None of these documents were exhibited in these proceedings. In fact, whereas Borg testified under cross-examination that the final stock take could be compared with the shipping documents in order to ascertain the amount of stock that went missing, no documents were produced before this court to enable it to determine the veracity of plaintiff company's claims. Since this court may only make determinations based on the evidence brought before it, the court is precluded from finding defendant liable for the value of stock that allegedly went missing while defendant was in employment with plaintiff company.
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> »Plaintiff company is also seeking the reimbursement of all expenses paid for defendant's numerous trips abroad during his term of employment. The court considered that it would be unjust to order defendant to reimburse all these expenses, considering that defendant did in fact procure business contacts for plaintiff company, some of whom entered into business agreements with plaintiff company. As has been held above, the contract of employment did not stipulate a minimum amount of clients that defendant was obliged to procure for plaintiff company, and furthermore plaintiff company did not successfully prove that these clients turned away from plaintiff company because of defendant's actions.
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> The court does however consider that an amount of damages is due to plaintiff company by defendant because of the breaches of contractual obligations committed by him. Faced with damages that are inherently difficult in nature to prove, as in this case, the court determines *arbitrio boni viri* that the amount of damages due to plaintiff company by defendant is ten thousand Euro (€10,000).«

6. Defendant filed an appeal by an application of the 21 March 2016. Plaintiff replied, with a cross-appeal, on the 22 April 2016. Defendant replied to the cross-appeal on the 2 June 2017.

7. In effect, defendant's ground of appeal is that there is no evidence that plaintiff suffered any actual loss imputable to him, or that any orders or clients were lost because of any acts or omissions on his

part. Defendant argues that the first instance court itself asserts that there is no evidence of any such loss.

8. What the first instance court did actually state is that, in cases like the present one, “damages … … … are inherently difficult in nature to prove”. The evidence amply shows that defendant did breach his contractual obligations towards plaintiff by disclosing confidential information such as product design and sourcing to a potential competitor with whom he was planning to do business himself. Plaintiff succintly and accurately describes these breaches as follows:

> »… … … whilst in the employ of applicant company respondent Paul Tihn formed a business venture with a competitor (*Eco Plastics*) operating within the same market, divulged confidential information to the said competitor regarding the applicant company’s suppliers, physically visited such suppliers and obtained samples based upon a prototype which the applicant company had developed together with such supplier. When the venture turned sour the respondent approached the applicant company to request re-instatement attempting to demonstrate his personal success within such market by listing various orders for the samples in question – samples taken from companies which had been potential customers of the applicant company and had suddenly declared to have lost interest in doing business with the same.«

9. Particularly serious is the fact that defendant actively sought to do business with undertakings whose identity he was aware of due to his access to confidential information by virtue of his employment, that he disclosed the identity of plaintiff’s suppliers, and that he proposed to avail himself of plaintiff’s industial designs to which he had access by virtue of his employment. Also significant is the suggestion that potential clients who had apparently lost interest in plaintiff’s products would reacquire such interest if defendant were to be reinstated in his employment. Taken singly and even more so if taken together these

episodes are ample evidence of defendant's breach of his obligations towards plaintiff and that such breach did indeed have a detrimental effect on plaintiff because they made it lose potential clients and gave a competitive advantage to its competitors.

10. It is true that, as the first instance court correctly states, it is difficult to prove the actual loss suffered by plaintiff as a direct result of this breach; however, as shall be pointed out below, this difficulty is obviated in the present case because the contract of employment provides for pre-liquidated damages.

11. In so far therefore as it is based on the argument that there is no evidence of loss directly imputable to him, defendant's appeal is dismissed.

12. Turning now to plaintiff's cross-appeal this court states at the outset that it does not share the first instance court's view that clause 3(i) of the employment contract (the non-compete clause) is limited in effect to the time during which defendant was in plaintiff's employ. The first instance court considered the clause invalid in so far as it refers to time when defendant is no longer in plaintiff's employ because the clause is "unlimited in time". Although such a clause may indeed not validly be unlimited in time, nevertheless it may validly prohibit certain activities for a reasonable time after termination of employment. The clause can therefore only be considered as invalid to the extent that it prohibits those activities beyond a reasonable time.

13. In the present case defendent was already in breach of his obligations while he was still in plaintiff's employ, and the episodes complained of which did not occur during defendant's period of employment were a continuation of his breach of obligations and occurred within a matter of weeks after termination, and such time cannot under the circumstances be considered as unreasonable.

14. Nor does this court agree with the first instance court that clause 9 (the penalty clause) is not applicable to the present case. That clause prohibits the employee from setting up in the same line of business on his own behalf or as an employee of third parties within five years of termination. The breaches committed by defendant were the result of his engaging in the same line of business, either on his own behalf or in employment or partnership with others, when he was still employed with plaintiff or a short time thereafter, so that the clause in question is indeed applicable in the present case.

15. In the light of the above the court will now examine the grounds of the cross-appeal which, in effect, are (i) that there is sufficient evidence that the loss of interest by former and potential clients in plaintiff's products is attributable to defendant, and (ii) that taking this fact into account the damages assessed by the first instance court are low.

16. As evidence of the actual loss of clients plaintiff adduces the following: (i) that the time when former clients started complaining about the quality of plaintiff's products coincided with the time when defendant handed in his notice of resignation, whereas previously they were

satisfied with the quality of the products; (ii) that at the same time clients who had expressed an interest in doing business with plaintiff withdrew their interest; and (iii) that when defendant was seeking re-employment with plaintiff he supplied a list of potential clients who were the same clients who had previously withdrawn their interest.

17. Although indeed it may have happened that a client may have lost its interest in plaintiff's products due to causes unrelated to defendant, the coincidence of time and persons does create a strong suspicion, which satisfies the burden of evidence incumbent on plaintiff, that there was indeed a relationship of cause and effect. Coupled with the fact that defendant was actually in breach of his contractual obligations in a way which was tantamount to his engaging in the same line of business, either on his own behalf or in employment or partnership with others, this is sufficient to invoke the application of the penalty or pre-liquidated damages clause which is intended to obviate the difficulty of proving the *quantum* of damages in cases such as this.

18. Clause 9 provides that the pre-liquidated damages are "the equivalent of the gross salary plus the commission received during the twelve months period prior to the termination of his employment". Employment was terminated on the 8 October 2010, so that the damages are equivelent to defendant's earnings between 9 October 2009 and 8 October 2010. Defendant's earnings between the commencement of employment on the 15 June 2009 and 31 December 2009 (199 days)

amounted to eight thousand, four hundred and eleven euro (€8,411)[1]. His earnings between the 9 October 2009 and 31 December 2009 (83 days) therefore amounted to three thousand, five hundred and eight euro (€3,508). His earnings between 1 January 2010 and 8 October 2010 amounted to twelve thousand, two hundred and eighty-one euro (€12,281)[2]. His earnings between 9 October 2009 and 8 October 2010 therefore amounted to fifteen thousand, seven hundred and eighty-nine euro (€15,789 = €3,508 + €12,281).

19. For the above reasons the court dismisses defendant's appeal and allows plaintiff's cross-appeal by increasing to fifteen thousand, seven hundred and eighty-nine euro (€15,789) the damages to be paid by defendant to plaintiff.

20. Interest on the first ten thousand euro (€10,000) is to run from the date of the first instance judgment and interest on the balance is to run from today. All costs are to be paid by defendant.

Mark Chetcuti Chief Justice	Giannino Caruana Demajo Judge	Anthony Ellul Judge

Deputy Registrar
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[1] *Fol.* 41.
[2] *Fol.* 42.