# BORD LI JIRREGOLA L-KERA

**Magistrate**
**DR. JOSEPH GATT LL.D.**

**Sitting of Friday, 25th of October 2024**

**Application Number: 205/2019**
**Number on the list: 9**

**Benjamin Diacono (I.D 249090M)**

**vs**

**Gergely Kaposvari (I.D 166581A)**

**The Board;**

Having seen the initial application dated the 20th of September 2019[1], together with the documents attached thereto, wherein, in Maltese, *ad litteram*, it was held that:

> *Illi r-rikorrenti huwa operatur tal-istabbilimient sportiv Studio Fifteen li jinsab ġewwa Topline Centre, Triq Santa Andrija, Swieqi;*

[1] Page 1 *et seq* of the file.

*Illi fi Frar tas-sena elfejn u dsatax (2019) ir-rikorrenti permezz ta' laqgħat u korrispondenza eletronika bejn ir-rikorrent u bejn il-konvenut waslu għal ftehim ta' sub-kirja, li bih il-konvenut setgħa juża spazju mikri lilu fl-istess stabbiliment għal kera ta' elf u mitejn ewro (€1,200) fix-xahar;*

*Illi l-kundizzjonijiet ta' din il-kirja ġew imnizzla f'korrispondenza eletronika datata 30 ta' Jannar 2019 u 4 ta' Frar 2019 (annessa u mmarkata Dok A);*

*Illi fost dawn il-kundizzjonijiet, ġie miftiehem li l-kirja hija għal terminu ta' sena. Fil-bidu tal-kirja s-sid żamm depozitu ta' elf u mitejn ewro (€1,200) ekwivalenti għal kera ta' xahar biex f'każ li l-inkwilin jittermina l-kirja qabel sena, dan l-ammont jinżamm mis-sid, u f'każ li r-rikorrent jittermina l-kirja qabel sena dan l-ammont jingħata lura lill-inkwilin;*

*Illi l-partijiet qablu wkoll li l-perjodu ta' 'notice' qabel mal-kirja tiġi terminata minn parti jew oħra għandha tkun ta' xahrejn hekk kif jidher mill-korrispondenza eletronika datata 4 ta' Frar 2019;*

*Illi f'Mejju 2019 permezz ta' ftehim bil-fomm ġie varjat l-ammont ta' kera dovuta fejn minn elf u mitejn ewro (€1,200) sar ftehim li l-kera ser tibda tkun ta' elf ewro (€1,000) u dan minħabba li l-business tal-inkwilin ma kienx sejjer tajjeb;*

*Illi permezz ta' ittra legali (annessa u mmarkata Dok B) l-inkwilin informa lir-rikorrenti li kif diġa kien avża nhar it-tlieta u għoxrin ta' Awwissu 2019, l-inkwilin ser jittermina s-sub-kirja u ser jivvaka mill-istabbiliment hekk kif jgħaddi l-perjodu ta' notice ta' xahar u cioe fit-tnejn u għoxrin (22) ta' Settembru 2019;*

*Illi b'din it-terminazzjoni unilaterali l-inkwilini qiegħed jikser il-ftehim li kien hemm bejn il-partijiet billi l-inkwilin ma rikonoxxiex li l-perjodu ta' notice huwa dak ta' xahrejn u mhux xahar kif wara kollox kien propost*

*minnu stess. Apparti minn hekk r-rikorrenti għadu ma rċeviex il-pagament tal-kirja dovuta għax-xahar ta' Awwissu 2019;*

*Illi fid-19 ta' Settembru l-inkwilin ivvaka l-istabbiliment mingħajr ma onora l-obbligi tieghu għal hlas tal-kera skont il-ftehim;*

*Illi tenut kont il-perjodu ta' notice huwa ta' xahrejn, l-inkwilin għandu jħallas l-ammont ta' tlett t'elef ewro (€3,000) għal Awwissu, u x-xahrejn notice li fadal, filwaqt li r-rikorrenti jżomm l-elf u mitejn ewro (€1,200) depozitu li l-inkwilin kien ħallas inizjalment u dan talli l-inkwilin ser jittermina l-kirja qabel sena;*

*Għal dawn ir-raġunijiet ir-rikorrenti umilment jitlob lil dan il-Bord jogħġbu;*

1. *Jordna lill-inkwilin iħallas is-somma ta' tlett elef ewro (€3,000) bħala kera dovuta għax-xahar ta' Awwissu u għax-xahrejn notice kif miftiehem;*

2. *Jawtorizza lir-rikorrenti jżomm id-depożitu inizjali ta' elf u mitejn ewro (€1,200) minħabba li l-kirja giet terminata da parti tal-inkwilin qabel sena kif miftiehem;*

*Bl-ispejjez.*

Having seen the decree of this Board as was previously presided, of the 8th of October 2019[2], wherein this application was appointed for hearing.

Having seen the reply of the respondent dated the 25th of November 2019[3], as well as the counter-claim[4].

[2] Page 9 of the file.
[3] Page 19 *et seq* of the file.
[4] Page 22 *et seq* of the file.

Having seen the reply of the plaintiff to the counterclaim of the respondent, dated the 9th December 2019[5].

Having seen the affidavit of the plaintiff presented on the 11th of June 2020 together with the documents attached thereto[6].

Having seen the affidavit of Christopher Mamo and Matthew Towns presented on the 23rd September 2020[7].

Having seen the affidavits of Nikita Ellul, Katya Chetcuti, Michelle Zahra, Anna Malyarova and Elena Borg filed on the 14th of June 2021[8].

Having seen the affidavits of the respondent filed on the 7th of February 2022[9].

Having seen the testimony in cross-examination of the plaintiff of the 7th of February 2022[10].

Having seen the testimony in cross-examination of the respondent of the 28th of April 2022[11].

[5] Page 44 *et seq* of the file.
[6] Page 52 *et seq* of the file.
[7] Page 64 *et seq* of the file.
[8] Page 72 *et seq* of the file.
[9] Page 189 *et seq* of the file.
[10] Page 216 *et seq* of the file.
[11] Page 222 *et seq* of the file.

Having seen that the plaintiff's lawyers renounced to the cross-examination of Nikita Ellul and Katya Chetcuti on the 3rd of November 2022[12].

Having seen the cross-examination of Michelle Zahra on the 3rd of November 2022[13].

Having seen the appointment of the President of Malta of the 5th of March 2023[14].

Having seen the assignment of the 9th of March 2023 of the Chief Justice, whereby the cases decided by this Board presided by the now Judge Dr Josette Demicoli have been assigned to this Board as now presided[15].

Having seen the cross-examination of Anna Malyarova on the 29th of May 2023[16].

Having seen the cross-examination of Matthew Towns on the 12th of July 2023[17].

Having seen the cross-examination of Christopher Mamo on the 27th of October 2023[18].

Having seen the note of submissions filed by the plaintiff on the 15th of January 2024[19].

[12] Page 234 *et seq* of the file.
[13] Page 235 *et seq* of the file.
[14] Page 243 *et seq* of the file.
[15] Page 244 *et seq* of the file.
[16] Page 252 *et seq* of the file.
[17] Page 263 *et seq* of the file.
[18] Page 279 *et seq* of the file.
[19] Page 287 *et seq* of the file.

Having seen the note of Dr Mariah Mula as filed on the 11th of March 2024 who renounced respondent's brief [20].

Having seen the note of Dr Jacques Farrugia as filed on the 18th of September 2024 who renounced respondent's brief [21].

Having seen that the respondent did not present any written submissions.

Having seen the minutes of the sitting of the 26th of June 2024[22], whereby this case was put off for judgment.

Having seen all the acts of the case.

**Considers;**

That first and foremost, as has been explained in the details of the acts of the case as reproduced above, this decision is being made by this Board as now presided and not as presided throughout most of the hearing of these proceedings. This fact alone is not of any detriment to this Board to give judgment. In fact, arguments where the judicial process has been attacked because of a change in the presiding adjudicator were denied several times[23]. In this case, there was nothing missing

[20] Page 306 *et seq* of the file.
[21] Page 311 *et seq* of the file.
[22] Page 310 *et seq* of the file.
[23] In this sense see what was stated in the judgment in the names **George Galea vs Maria Carmela *sive* Marica Baldwin,** (App Ċiv Nru: 90/14/1) handed by the Court of Appeal (Superior Jurisdiction) on the 11th October 2022 where it was stated: *"Din il-Qorti titlaq billi tgħid illi l-fatt waħdu li l-Imħallef li ddeċieda ssentenza fl-ewwel istanza ma kienx l-Imħallef li sema' l-provi ma jġibx b'daqshekk in-nullita` tas-sentenza appellata".* Issir referenza wkoll għal dak li kien ġie awtorevolment deċiż fis-sentenza fl-ismijiet **Anthony Mifsud *et* vs Victor Calleja,** (Appell Ċivili Numru. 354/2003/1) mogħtija mill-Qorti tal-Appell (Sede Inferjuri)

in the acts and everything was transcribed. A note of submissions was filed by the plaintiff and cross-examinations were conducted mostly before this Board as now presided. When this Board felt the need to re-hear any aspect of the procedure before giving judgment, the Board did so[24].

That nonetheless, the Board views it necessary to summarise, even if briefly, the testimony collected in these proceedings, even to provide peace of mind to the parties that all testimony has been duly considered.

The **plaintiff** testified by means of an affidavit in which he explains that he is the owner and director of Studio Fifteen sports complex in Swieqi. He states that in January 2019, the respondent had spoken to the then manager of Studio Fifteen on a possible working partnership, and the manager of the time approached him and a meeting was set up with respondent to discuss. He explains how the meeting

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nhar ild-9 ta' Jannar 2008 u ċioé: *"...l-appellanti jitilqu mill-punt li jiccensuraw lillewwel Qorti talli din ma semghatx il-provi viva voce iżda qaghdet fuq it-traskrizzjonijiet tax-xhieda gja kompilati flatti. Huma, b' dan, jikkontendu illi l-Qorti ma kellhiex l-"ahjar prova" ghal liema jirreferi l-Artikolu 559 tal-Kapitolu 12. Bir-rispett dovut dan l-argoment hu ghal kollox fallaci, guridikament. Ibda biex, kieku kellu jigi accettat dak sottomess mill-appellanti jkun ifisser illi kull darba li gudikant jissostitwixxi gudikant iehor il-provi jridu jinstemghu ex novo, b' hela ta' energija, dilungar u spejjez zejda. Barra minn hekk, tali deduzzjoni tirrifletti negattivament fuq id-dehen tal-gudikant sostitut ghax ikun ifisser li dan, gjaladarba ma jkunx sema' hu l-provi viva voce, ma jkunx jista' jaghmel gudizzju ghaqli ta' l-ezami u l-valutazzjoni tax-xhieda li tkun traskritta. Tali ragonament, jekk accettat, certament jinnewtralizza ghal kollox il-htiega tar-rakkoljiment tal-provi permezz ta' Affidavits jew permezz ta' l-Assistenti Gudizzjarji, u dan kontra l-volonta tal-legislatur li kkreja d-disposizzjonijiet relattivi dwarhom."* For completeness, the Board also refers to the case in the names **Albert Noel Portelli *et* vs Paola Developments Limited *et,*** (Civil Appeal No. 1466/2001/1) given by the Court of Appeal (Superior Jurisdiction) on the 3rd November 2006 where it was strongly held that: *"Bil-fatt wahdu li, minhabba esigenzi ta' tqassim ta' doveri, il-kawza ghaddiet minn gudikat ghal iehor, ma ghandux necessarjament iwassal ghal dak li donnhom qeghdin jinsinwaw l-appellanti, bla ma pero` jispecifikaw xejn utli jew ta' sostanza. Bl-istess argument, li kieku wiehed kellu jabbraccjah, lanqas din il-Qorti ma jmissha allura tiddeciedi dwaru! Riflessjonijiet bla bazi ta' din ix-xorta ftit jaghmlu gieh lil min jasserihom u certament, ma jghinu xejn ghar-rizoluzzjoni gusta u serena ta' procedura gudizzjarja bhal dik in kawza."*

[24] This happened when the final submissions were made orally and not transcribed. Reference is made to a decree by this Board in the names **Anthony Borg *et* vs Carmelo Buhagiar *et,*** (Rik Nru: 232/2022) given on the 3rd of May 2023.

was held on the 24th of January 2019 in the presence of himself, respondent and manager Chris Mamo. The idea discussed was such that the respondent rents floor space of the studio for classes for his clients, whereby he would use some of the equipment in the studio already and also bring over some of his own equipment. The floor space was sectioned-off as an area of approximately 40sqm. He explains how after this meeting, the respondent sent over his offer, offering €25 per day paid monthly regardless of circumstances. He explains that he had sent him his counter-proposal on the 30th of January 2019 via email, and respondent had replied that it was a promising start and wanted to discuss further. The plaintiff further states that they continued to discuss the terms and conditions until the agreement was finalised. The agreement was of €1200 per month together with five percent of the profits over €2000. Consequently, he states that the respondent had paid the first rent payment for April in the sum of €1200 and €1200 as a deposit. He explains that there were never any sales reports provided so the 5% on sales over €2000 was never received. The plaintiff continues to explain that he was then in contact with a lawyer friend so that an agreement would be formally drawn up. He states that he had given the lawyer the terms agreed upon between them as based on the email correspondence, including the €1200 rent monthly, including VAT, and a two-month notice given to either party who wishes to terminate. He explains that he also listed a list of all equipment transferred at the approximate value of €6000. He explains that at the time unfortunately, his lawyer's father passed away suddenly and so he did not chase him for the contract out of respect. He explains that some of the arrangements with respondent regarding use of the studio included that he could make use of gym after his classes without any charge, that he could use equipment and gym floor areas during his classes for his clients and therefore was not restricted to use just the area being leased. He explains that the lease was a good thing for plaintiff's cash flow but there was tension between respondent's clients and his own clients and this was impacting his business. He explains that during the lease,

respondent was struggling as his clients did not seem happy in the space provided and his classes were not that popular. He explains that in fact, on the 9th May 2019, respondent had contacted him requesting that the rent be negotiated and they agreed on a flat rate of €1000 per month which included classes and personal training and to be reviewed after six months. He states that this remained so until the 23rd of August 2019, when he received a message from the respondent on Whatsapp that he intended to terminate the contract and he agreed to termination without the agreed exit terms in front of him. He states that he told him that there was a two month notice, being September and October and he also explains how by mistake he told him that the deposit of €1200 was to be deducted from the balance. However, then he states to have remembered that the agreement was that if respondent terminates prematurely the deposit was to be lost. Therefore, he amended balance to be €1800 or €1000 if respondent were to leave the black rubber mat in the studio. He explains how a meeting was held on the 4th September 2019 in which respondent's wife had said that notice was of one month and plaintiff had noted that respondent had agreed to two months and to which plaintiff states that respondent nodded. He states that in this meeting he even offered respondent to buy the equipment from him and asked him to make a list and give a value so he can make a realistic offer. He explains that in the meeting they agreed to this but then they never sent him any list. He explains how then he received a legal letter from respondent's lawyer stating that the 23rd August 2019 was the termination date and since the notice was of one month he was to vacate on the 22nd September 2019. He explains how respondent came to remove the equipment on the 19th September 2019 despite having exchanged messages that it would be best to remove equipment on the 21st September 2019 as it would have been a public holiday. He explains how the removal was done during gym hours, causing disruption to his business. Rubber flooring was removed so his members could not use the area and he had to incur additional charges to have the area leased to respondent operational. He explains how he had no other option

but to present these proceedings as respondent had terminated before one yea and so he is to retain the deposit and is still due €3000 in rent between August and October 2019, as well expenses of the proceedings.

In his testimony, **Christopher Mamo** explains how he worked as a manager with Studio Fifteen until September 2019 and how in January 2019 he was approached by the respondent as he wanted to work at Studio Fifteen. He states how a meeting was held between them and the plaintiff and how a few weeks later he was informed that respondent would be renting an area of the gym to run classes and personal training sessions for his clients. He explains that respondent's classes were not very popular. He explains how the studio received complaints from respondent's clients such that classes were cancelled last minute or that the classes were held late. He states how he had to explain that respondent's classes were private and the studio was not managing them. He states that sometimes there would be clients of respondent training alone who when asked by him what they were doing in the gym they would says that they are respondent's clients and that he was running late or did not show up. He states how respondent had come in rushed with his wife and a third person he did not know on the 19th of September 2019 to take his things. He explains how the gym was very busy at that time and respondent knew that was a busy time for the gym. He explains how things were moved aggressively, with no respect to members of the gym over there and how he had to explain to gym members what was going on.

In his testimony, Matthew Towns explains how he is a gym instructor at Studio Fifteen and has been even at the time of respondent's involvement. He explains how he was involved to remove existing floor mats to make space for respondent's mats as he was to lease the space for classes Monday to Friday 07:00-08:00 and 17:30-20:30 and Saturday 09:00-12:00. He explains how respondent introduced himself to him as wanting to be partners with plaintiffs and

that he was to teach him to make stuff better. He states how he then realised that respondent had limited and short experience in the field. For the gym respondent was an external trainer. He explains how respondent would turn up late or not show up for his clients at times. He explains how he felt this was giving Studio Fifteen a negative image as respondent was associated to the studio. He explains how respondent's business was not going well and this is why he terminated. He states that he was informed that respondent had walked in to take all his stuff at around 7pm when there were still clients of the studio training.

Having seen the testimony of **Nikita Ellul** who explains how she discovered about respondent's classes via a Facebook group and started personal training sessions with him on 1st August 2019. She explains how during her sessions at Studio Fifteen with respondent, she was never in a closed-off area and anyone at the gym could use equipment in that part leased to respondent. She explains how clients of the gym would also ask respondent for advice on how to use certain equipment. She confirms how she moved to attend respondent's sessions like many other clients of respondent, to a new gym in San Gwann when he left Studio Fifteen. She explains how the gym equipment used during his sessions were his own and in fact they kept using them in San Gwann.

In her testimony, **Katya Chetucti** explains how she started classes with respondent in 2018 through a facebook group and she was going four to five times a week and was happy with her results. She states that respondent then started offering classes at Studio Fifteen Swieqi and she started going there but was shocked to see that they had zero privacy during training sessions. She explains that respondent had to take actions like speak to gym clients or attach signs so that his area would not also have non clients of his present. She states that she remembers other trainers using the area leased to respondent to give out sessions on his same mat at times when respondent had his own sessions with his clients.

She explains that when respondent moved to Studio Fifteen around four of his clients stopped because they were unhappy with the lack of privacy and how the equipment was crammed in the area. She explains how she continued her sessions with respondent when he moved back to San Gwann.

In her testimony **Michelle Zahra** explains how she started with respondent in 2018 in San Gwann and used to go daily. She explains how when he moved to Studio Fifteen she was not impressed, the gym was small and equipment besides that brought by respondent was basic. She states that the gym was not so busy at first but then more members came to the gym after summer and it got busy. She explains how once she had a dissatisfying experience as equipment was changed in the interim between one exercise and the other she was doing and she could have hurt herself badly. She states that there were constant interruptions during the sessions with clients of the gym interfering. She explains that she still remained a client of respondent but because she likes his attitude during training sessions and his knowledge in the area as otherwise she would have stopped.

In her testimony, **Anna Malyarova**, explains how she is respondent's wife anf she is also involved in fitness. She explained how her husband was looking for a better place than San Gwann to provide classes and he had met with plaintiff and Chris Mamo. She says that initially it was discussed that respondent would take over the business of the gym but plaintiff and Chris wanted to test the waters first. She explains how there was no cooperation from Studio Fifteen from when respondent started his classes. She states that he did not have a closed-off area in the gym as should have been and explains how he had brought his own equipment to Studio Fifteen and this was used by any client of the studio not just of respondent. She states that they would often find his gym equipment all over the gym and would have to go round to collect it again. This would happen often and since clients of the studio were not aware of this situation of equipment,

respondent had to repeat often the same things to Studio Fifteen's clients. She states that her husband intended on increasing his clientele when he moved to Studio Fifteen but this did not happen and he decreased his clientele because there was no cooperation such that he had to move to another gym in San Gwann in September 2019 and his clientele increased again immediately with clients returning because he stopped sessions at Studio Fifteen specifically.

In her testimony, **Elena Borg** explains how respondent is her son-in law and married to her daughter Anna Malyarova. She states how she herself used to attend sessions with respondent in 2017 at his garage in Swieqi and then in San Gwann at his own gym. She explains how he then informed her that he was moving to Studio Fifteen in Swieqi and she started attending there. She explains how she used to attend the 9am class with circa five trainees. She states that the gym part where they trained was not a closed-off area and this created issues. She explains how other trainers like a certain Zsofia used to conduct classes at the same time as respondent in the studio. She explains that she kept on attending due to respondent's efforts and not because of the gym. She states that respondent had to stay cleaning the mat due to footprints of other gym members.

In his testimony, the **respondent** explains how in 2017 he started giving training sessions outdoors next to Swieqi Tennis Club twice a week and once the clientele started to increase, he rented a gym in San Gwann 'The Korriban – Force Training Academy' and he had around sixty clients each week Monday to Saturday. He states that the San Gwann place needed a gym permit which would have costed around sixteen thousand Euro as per his engaged architect and so since this was too expensive he chose to look for a gym with a permit to continue sessions for his clients there. He explains how in January 2019 Chris Mamo had put him in contact with Ben Diacono to discuss renting a sectioned-off area in Studio Fifteen. He had discussed with Diacono and he explains how he had informed his

clients of the move and how his clients accepted to move with him as they were happy with their training sessions. He explains how a lease agreement was not signed between them but they had agreed to the terms and conditions by emails and Whatsapp messages. He states that the main conditions included the €1200 monthly rent from April 2019 for a sectioned-off area in the Studio Fifteen gym, that he would bring his own equipment for his classes, payment of €1200 as a deposit in April 2019 which would be lost if he were to terminate before one year and he explains how Ben had suggested a one month notice period and he had counter-proposed a two month notice period but Ben never confirmed this agreement to this counter-proposal of the respondent. He explains how plaintiff never held his end of the deal, in providing a sectioned-off area for his classes. He states that he spoke to plaintiff several times and the plaintiff had promised him he will section it off but never did. He explains the issues he encountered with not having a sectioned-off area with his clients and clients of Studio Fifteen. He states that the gym lacked hygiene and basic cleanliness and also security stating that there were times equipment of his disappeared. He explains how plaintiff did not adhere to their agreement to promote and market each other and how as a result he encountered issues with marketing his classes. He claims that plaintiff had asked him to not post anything with Studio Fifteen brand. He explains how all of this lead to him losing clients and how as a result he could not continue renting from plaintiff. He explains how on the 19th of September 2019 when he went to collect his equipment between 8 and 9pm there were only two to three gym members and he had asked them if he would disturb them to take out his equipment and they had no issue. He explains how the following day, 20th September 2019, plaintiff filed a warrant in his regard on his own equipment in Studio Fifteen and he lists such equipment. He explains the income losses he made presenting income tax statements. He explains how plaintiff never gave him a VAT receipt or invoice for the €5600 paid in rent such that this was not deducted

from his gross income. He explains how in 2020 he still did much better than 2019 despite lockdown and the pandemic.

In cross-examination, **plaintiff** explains how all conditions agreed to should be honoured. When questioned what does he understand by a sectioned-off area, he explains that this was a dedicated area in the gym where one can host classes, free from equipment. He claims that respondent saw the space before leasing it out. He explains how ropes were bought and installed later on in the agreement but by the time this happened respondent had already terminated the lease. He explains that a sign was placed so other gym members do not use the area leased to respondent. He admits that respondent had brought around €6000 worth of equipment into his gym but he never saw any invoices so he cannot confirm the value exactly. He explains that the agreement was for both parties to use the equipment and if he had a class he gets preference and vice versa. He states that verbally respondent had agreed to give the space to him when not in use by him. He states that this depended on the number of clients he had per class and how often he had two clients only so he would not use the whole space. When asked regarding VAT receipts, he states that he is not sure he issued any to respondent but might have not done so. When asked if he was present daily, he says he has a team and if someone from the studio's clientele would be in respondent's area during his classes, someone from studio's team would ask them to move.

In cross-examination, respondent states that he does not recall the amount of rent paid for the gym in San Gwann but approximately €1200 plus bills. When asked if in his turnover of 2018 he included the rent paid, he explains how his accountant would be able to answer that. He confirms that on the return of 2018 no rent is mentioned. He explains how he would pay off expenses of gym in cash monthly as well as the architect. He explains how he had a good quality of life that year and also bought a motor cycle. When asked if it could be that his actual profit was

between €6000 and €7000 he states that if you deduct the numbers you do get a figure round that amount. He explains how rent was not deducted from his tax returns in 2019 since he had no invoice or receipt from plaintiff. When asked how he would have paid him, he states that he would pay him in cash mostly. He confirms he had the covid wage supplement of z27938 in 2020. He says he did better in 2020 considering they were only open for three months due to restrictions. He confirms that he had agreed with plaintiff to allow three to five months transition before renaming and cross linking both brands. He confirms that plaintiff only told him not to advertise Studio Fifteen as Coreyban. He confirms that he never sent a sales report to plaintiff for the 5% on sales to be enforced as there was no actual signed agreement yet. He confirms that he had asked for a reduction in rent due to business decreasing. When asked if he has a list of clients he confirms he does and back to 2018 too. He confirms that they had agreed that clients of Studio Fifteen could use the leased area too and that he could use the gym free of charge when he did not have classes and it was not too busy. He confirms he trained there five times a week as if he had a gym membership.

In cross-examination, **Michelle Zahra** confirms she never read the details of the agreement between the parties. She confirms she was able to use other areas of the gym and that she had access to everything. She says that respondent decided to move back to San Gwann because people were using their equipment yet she confirms she was not involved in any decisions taken.

In cross-examination, **Anna Malyatrova** confirms she is respondent's wife but she was not really involved just attended a few meetings with plaintiff and his sister was present too but it was never finalised, it was an ongoing draft as there was no signed agreement. She confirms most communication regarding the terms was done on Whatsapp. She states that her husband's clients were also using other

parts of the gym and had access to enter bathroom and common areas. She states that her husband brought his own equipment and the other clients of the studio could walk with his equipment across the gym. She says at the time he started at studio fifteen her husband had around 25 to 30 clients and when he left he had around six clients or five. She states her husband keeps a list of clients but she has no access to it.

In cross-examination, **Matthew Townes**, confirms it was plaintiff who had asked him to remove the mat from an area which was to be leased out and confirms that the external instructor he speaks of in his affidavit was the respondent. He confirms that during class time of respondent, the area rented was to be sectioned-off. He explains that he knows certain information because of what plaintiff had told him. He states to not have seen any rental agreement between the parties. He explains that he was an employee, acting manager on a part-time basis. He would be there working mornings and early afternoons mostly. He confirms that respondent had told him verbally that he does not mind other gym members using his stuff whilst he has no classes. He confirms there was a sign against the wall during his class times so others do not enter. Sign was at eye-level and clear. He states that the space leased was always available to respondent during class times and it would have been easy to ask people to move if it is a reserved area. He confirms that respondent's equipment brought to the studio was functional training stuff like dumb bells. Regarding the 19th of September 2019 he confirms that respondent's arrangement was with plaintiff not with him but plaintiff kept him informed.

In cross-examination, **Christopher Mamo** confirms that the initial meeting was just an introduction meeting between him and the parties. He confirms he was manager and was employed with plaintiff. He confirms that a specific area of Studio Fifteen was leased to respondent to run his classes. He states that during

the classes the area would be sectioned off by means of something like a rope. He confirms he never received complaints by respondent or his clients. He states that he would be at the gym daily depending on his shift. He explains that the studio's clients were told not to use that part of the gym during respondent's classes. He confirms he never stopped the respondent from using other parts of the gym. He confirms that on the 19th of September 2019 he only took his equipment.

**Legal Considerations**

That now that the evidence has been considered, the Board will proceed to make the relative legal considerations.

That primarily the Board remarks that this case is made up of both a claim and a counter-claim. Consequently, the Board will first consider the claim of the plaintiff and then proceed to consider the counter-claim filed by the respondent as a reaction to this plaintiff's claim.

That the plaintiff's claim is two-fold and consists mainly of the request for payment from respondent of three months' rent i.e. August, September and October 2019, and for plaintiff to maintain the deposit as initially paid by the respondent in the sum of one thousand two hundred Euro (€1200).

That the Board notes that there is the sum of one thousand seven hundred and fifty Euro (€1,750) which is uncontested by the respondent as indicated in his reply, covering the rent for the month of August 2019 and one month's notice till the 23rd September 2019[25]. The contested amount is essentially the second month's notice.

[25] Page 19, paragraph 2.

That the Board notes that the main contestation from the respondent's side is two-fold. Firstly, that he does not accept that the plaintiff retains the deposit since it was the plaintiff's failure to provide a closed-off area in the gym which forced the respondent to terminate the lease, and for these reasons in fact, the respondent also filed a counter-claim for damages. Secondly, because the respondent states that although it was he himself who had suggested a two month notice, the plaintiff had never confirmed this and therefore, he emphasises that the termination notice is that of one month, as initially suggested by plaintiff himself and not two.

That from the evidence provided, the Board notes that the two month notice period was accepted from plaintiff's end, so much so that when he sent the email to his lawyer with the terms and conditions agreed upon, so that a contract may be drawn up formally, amongst the terms he passed on to him, he also included a two months notice period and not one month[26]. This email as presented by the plaintiff, has not been contested by the respondent, nor was any other evidence brought forward by the respondent to prove otherwise. This acceptance of the two month's notice, also emanates from the plaintiff's testimony via his affidavit as well as in cross-examination.

That the Board reiterates that the fact that it was the respondent's idea himself to extend the notice period to two months instead of two, cannot be disregarded, and consequently, this is nothing but a case of '*imputet sibi*'. He cannot now try to argue otherwise just because he needed to terminate early and this condition was in fact enforced. An agreement constitutes the law between the parties and the

[26] Page 58 *"a two month notice period is to be given to either party should either party wish to terminate."*

respondent cannot now try to bend what has been agreed upon as he pleases, in an attempt to avoid the obligation he agreed to and even suggested himself.

That consequently, the Board upholds the plaintiff's first request.

That with regards to the retention of the deposit, the Board views that from all the evidence presented with respect to this point, it was clear between the parties that the deposit will be kept by the plaintiff in case of early termination before the lapse of one year. According to the evidence in the acts of the case, the one year would have lapsed in April 2020, as the lease commenced in April 2019, but the respondent chose to unilaterally terminate the lease in August 2019 i.e. less than four (4) months from commencement date.

That the wording of the condition agreed upon between the parties was quite clear and rather straight forward i.e. should the lease be terminated before one year the lessee forfeits the deposit[27]. The condition did not provide for any specific circumstance in which it would not be applicable and so, there isn't much room left for any other possible interpretation.

That the termination date is not contested by the parties and neither is the fact that the lease was terminated by the respondent. It is well established in law and in our jurisprudence that a contract constitutes law between the parties[28]. There is also the pacific principle of *pacta sunt servanda*[29] and several jurisprudence

[27] Page 58
[28] Article 992 of Chapter 16 of the laws of Malta.
[29] In the case of **Grace Spiteri vs Carmel sive Lino Camilleri et,** decided by the First Hall Civil Court on the 30th of May 2002, the Court held that; *"Il-prinċipju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali għandu jigi rispettat u li hi l-volonta' tal-kontraenti kif espressa ... li kellha tipprevali u trid tiġi osservata. Pacta sunt servanda".*

which has dealt with the importance of interpreting a contract in line with the will of the contracting parties[30].

That the Board notes that irrespective of the reason as to why the respondent had to terminate, it is still an uncontested fact that it was the respondent who terminated the lease before the lapse of one year. Consequently, the contracted condition for the retention of the deposit in the amount of €1,200 is satisfied and the Board views that the plaintiff's second request is justified and merits to be upheld.

**The counter-claim**

That the Board will now consider the second part of this case i.e. the respondent's counter-claim in response to the plaintiff's claim, which counter-claim is essentially two-fold. Firstly, that the deposit should be refunded back to him as he was forced to terminate the lease prematurely, and secondly, a claim for damages because of the defaults from plaintiff's end, primarily because of the loss of clientele and inability to operate his classes from the leased area within Studio Fifteen due to not having a closed-off space as agreed between the parties.

That the Board, due to what has already been explained above, denies the part of the counter-claim which concerns the refund of the deposit. The Board deems that the reason for termination is irrelevant as the clause regarding the deposit

[30] In the case of **Onor. Edgar Cuschieri nomine vs. Perit Gustavo R. Vincenti,** decided by the Court of Appeal (Superior) jurisdiction on the 13th of February 1950, the Court held that; *"Il-prinċipju kardinali li jirregola l-istatut tal-kuntratti jibqa' dejjem dak li l-vinkolu kontrattwali għandu jigi rispettat u li hi l-volonta' tal-kontraenti kif espressa ... li kellha tipprevali u trid tiġi osservata. Pacta sunt servanda".*

retention came into force merely because of an early termination by the respondent himself.

That in relation to this part of the counter-claim, the Board also notes that the principle of '*Inadempjenti non est inademplentus'* also finds its application, mainly because the respondent cannot terminate the lease agreement prematurely, after just four months and then expect to be refunded the deposit in the sum of €1,200. It was the respondent who *in primis*, failed to adhere to the agreement *de quo agitur*[31].

That with regards to the second part of the counter-claim, the Board, after having seen all the acts of the case, notes that the respondent proposing the counter-claim failed to bring forward any evidence to prove that he has in fact suffered damages due to not having a closed-off area within the gym. It is well established that he who alleges must prove[32].

That for this claim to be successful, the respondent had to prove the causal link between the default of the plaintiff and the losses he claims to have incurred in terms of loss of money and also loss of clientele[33]. What the respondent did present were a few tax returns which were contested in cross-examination, to the

[31] Reference is made to the judgment in the names **AX Construction Limited vs Tony Mallia Bonello**, decided by the Court of Appeal (Superior Jurisdiction) on the 10th of October 2005.
[32] Article 562 of Chapter 12 of the Laws of Malta states that; *"Saving any other provision of the law, the burden ofproving a fact shall, in all cases, rest on the party alleging it."* Reference is also made to the case in the names **Martin Mifsud et vs Marika Almerigo** decided on the 16th April 2013 (confirmed on appeal) by the where it was held that: *"Min jallega jrid jipprova – qui allegat probat. L-obbligu tal-prova ta' fatt imiss dejjem lil min jallegah a tenur ta' l-artikolu 562 tal-Kap 12. Lartikolu 559 ukoll jipprovdi li l-Qorti gahndha fil-kazijiet kollha tordna li ssirilha l-ahjar prova li l-parti tista' ggib."*
[33] Reference is made to the judgment of the First Hall Civil Court of the 24th January 2014, in the names **Korporazzjoni Enemalta vs Charles Bonnici**, (not appealed), whereby it was held that *"Illi sabiex ikun hemm ir-responsabilita' tal-konvenut ghaddanni, jeħtieġ illi jiġi ippruvat in-ness ta' kawzalita' bejn ilfatti kolpevoli u l-konsegwenza dannuza."*

extent that it resulted that the so called higher declared income in 2020 consisted of over €7,000 in Covid-wage supplement and was therefore, not from his additional clients as the respondent made it seem in his affidavit.

That the Board also notes that the respondent had also mentioned that he had a list of all his clients along the years, including what they would have paid him as well as the dates and times when they would have attended his classes. Despite testifying that he will present these, no such lists were presented by him nor by his wife.

That the Board also notes that from the tax returns presented by respondent, there were also doubts as to the amounts he declared as net income prior and post operating his classes from Studio Fifteen, and whether this deducted or not the amount of rent paid by the respondent at the gym in San Gwann from where he operated classes before leasing the space from plaintiff and where he returned to host his classes when he terminated the lease with plaintiff. No accountant was brought forward to confirm the numbers in this regard and the clients who presented their affidavit as produced by the respondent himself, confirmed that they had not seen any contract nor any accounts per se.

That the Board also notes that it is bound by the rule of the best evidence and as explained above, no such evidence was presented to this Board. In the absence of the adequate evidence to substantiate the claim, the claim in the counter-claim of the defendant remains but a mere claim and nothing more. Consequently, the counter-claim of the respondent cannot be acceeded to.

**Decision**

Therefore, in view of the above and for the above mentioned reasons, the Board, decides as follows:

1. Accedes to all the requests of the plaintiff and consequently, authorises the plaintiff to retain the deposit the sum of one thousand two hundred Euro (€1,200) and condemns the respondent Gergely Kaposvari, to pay the sum of three thousand Euro (€3,000) to the plaintiff;

2. Denies the counter-claim of Gergely Kaposvari in its entirety.

All the costs for these proceedings are to be borne by the respondent Gergely Kaposvari, with interests to start running from the date of the initial application[34] up to the date of effective payment[35].

[34] 20th September 2019.

[35] The Board notes that the plaintiff made no specific request for this Board to also order that the respondent pays the amount requested with legal interests and nor did the plaintiff request that the legal interest commence from a specific date. That in this regard, the Board notes that in previous judgments as handed down by our Courts, the fact alone that no specific request was made with regards to legal interest, did not stop the Courts from ordering such interests and this on the premise that whilst the respondent is not paying the amount due to the plaintiff, he is utilising the plaintiff's money and so he is to make good for such use and delay in payment as otherwise, he would be unjustly benefitting from this default. On these lines, reference is made to the judgment in the names **Jeffrey Farrugia vs Melvyn Mifsud** (Appeal No. 684/2016/1) decided by the Court of Appeal (Superior Jurisdiction) on the 8th of January 2024 as well as to the case decided by the Court of Appeal (Superior Jurisdiction) on the 30th of November 2022, in the names, **Abela Crocefissa sive Christine Pen vs Valletta Gateway Terminals Ltd et,** whereby it was held that; "*għalkemm huwa minnu li l-atturi ma talbux imgħaxijiet fir-rikors promotur tagħhom, indubjament l-atturi jistgħu jitqiesu kredituri tas-soċjetajiet konvenuti millmument li ngħatat l-ewwel sentenza li stabbiliet ir-responsabbiltà tassoċjetajiet konvenuti. Ġudikant għandu jipprovdi rimedju mhux biss fejn ikun ġie espressament mitlub mill-atturi, iżda wkoll meta jkun każ ta' ex necessaria consequentia.*"

**Dr Joseph Gatt LL.D.**

Magistrate

**Annalise Spiteri**
Deputy Registrar