



**COURT OF MAGISTRATES (MALTA)  
AS A COURT OF CRIMINAL JUDICATURE**

**MAGISTRATE DR.  
LAURENCE QUINTANO**

Sitting of the 15<sup>th</sup> July, 2009

Number 1002/2005

**The Police**

**(Inspector Angelo Gafa)**

**Versus**

**Albert Leonhardt Sigl.**

The Court

Having seen the charge made against Albert Leonhardt Sigl, 42 years old, son of Albert Franz and Rosina nee Mertl, born in Germany on the 25<sup>th</sup> October 1963 and holder of ID card number 29301(A) and German Passport Number 95096556589

For having in these Islands **in May 2002 and in previous months**, by means of several acts, even if at different times, that constituted violations of the same previous provision of the law, and committed in pursuance of the

same design, misapplied, converting to his own benefit or to the benefit of any other person, the amount of money exceeding one thousand Maltese Liri (Lm1000) to the prejudice of Allan Diamond of Canadian nationality and /or Express Tours Ltd which money had been entrusted or delivered to him under a title which implies an obligation to return such money or to make use thereof for a specific purpose, and which money had been entrusted or delivered to him by reason of his profession, trade, business, management, office or service or in consequence of a necessary deposit.

Having seen all the acts in the file including a copy of the Passport of the Defendant, a copy of the Conviction Sheet, the letter of complaint sent to the Commissioner of Police (page 41), the statements of the defendant (Doc AG 1 and AG 2), a list of cheques (excel sheet), a receipt corresponding to a letter dated 3<sup>rd</sup> November 2005 (Doc AG 4), a copy of a letter seized dated 12<sup>th</sup> March 2002 (Doc AG 5), a copy of a letter (Doc AG 6), Bank statements retrieved from HSBC (Doc AG 7), documentation relating to opening of HSBC Bank Accounts (Doc AG 8), deposit slip of Lm1200(Doc AG 9), Memorandum and Article of Association –Express Tours (Doc AG 10), Memorandum and Articles of Association of Express Tours and Packages Limited (Doc AG 11), Brown envelope containing documentation from Bank of Valletta (Doc AG 12), A list of several cheques delivered to the Prosecution by Dr Norval Desira(Doc AG 13), Doc AM exhibited by PS 824 Arthur Mercieca, which has the documentation contained in Volume III of the Court file namely File number PG 13 presented during the sitting of the 16<sup>th</sup> November 2005 (Thake Desira Advocates), file marked as Inspector Joseph Gafa with a covering e-mail from Dr Norval Desira indicating a list of persons who had been contacted asking them for copies of cheques with green indicating that the persons had received their copy cheque and lilac indicating the persons who had received their authorisation form, Police File Express Cheques Number 2 (blue colour), white envelope with various authorities to provide a copy cheque to European

Informal Copy of Judgement

Vacations Limited, another white envelope with the words written in pencil 'Impossible to trace'

Having heard the witnesses on oath;

Having seen the Note of Submissions filed by the Prosecutor and the Defendant.

Considers

The facts of the case are as follows. The Economic Crimes Unit received a letter dated 15<sup>th</sup> January 2003 alleging that the defendant had misappropriated money between March 2001 and August 2002. The money belonged to Express Tours Limited. (Page 25). Defendant was the sole director of Express Tours and Packages Limited and the defendant converted the money to his own use or to that of Express Tours and Packages Limited. This company was registered in March 1999 while Express Tours Limited was registered on the 12<sup>th</sup> February 2002.

Express Tours Limited was a joint venture between European Vacations Limited and Express Tours and Packages Limited. The first company was responsible for the advertising while the second company was to pay for hotel bookings, coaches, excursions and so on. (Vide page 26).

A Bank account was opened with HSBC. Payments received by Mr Diamond were to be deposited in the Express Tours Limited Bank Account.

Baker Coaches informed Mr.Diamond that they had not been paid for services rendered. Apart from other suppliers, the defendant was to pay for the coaches. (Vide page 27).

Mr Diamond declared that he had never authorised the defendant to deposit Express Tours cheques into an Express Tours and Packages Account.

During the investigation, it was discovered that 9 accounts pertaining to Express Tours and Packages Limited were opened at BOV while 3 Accounts were opened at HSBC. (Vide page 28). Two of the HSBC accounts contained NIL balances while the other one was dormant. (Vide page 29). All HSBC accounts in the name of Express Tours and Packages Limited were closed on the 25<sup>th</sup> January 2002.

Mr Diamond had informed the investigating officer that he had transferred the money to Malta since the defendant had contacts with the coach operators.

Eventually the Prosecution received several cheque images issued in favour of Express Tours Limited which cheques were alleged to have been misappropriated by the defendant. The rubber stamp of Express Tours and Packages Limited were used to endorse the cheques. These cheques were encashed at Eurochange Exchange Bureau in Paceville and some others at the bank of BOV.

The defendant or his staff used to deposit foreign cheques in the name of Express Tours Limited at Eurochange and Eurochange would convert it to local currency. Then it would issue an APS cheque in the name of Express Tours and Packages Limited. Eurochange was asked to focus on transactions carried out on February 2nd 2002, March 21<sup>st</sup> 2002, 18<sup>th</sup> April 2002 and 19<sup>th</sup> April 2002. This would total about 9,183.50 sterling. The cheques in favour of Express Tours and Packages Account were deposited in a BOV account. (Account 40010638095).

Another BOV Account in the name of Express Tours and Packages Limited bearing number 40010638079 was scrutinised. Hundreds of cheques payable to Express Tours Limited worth thousands of pounds Sterling were deposited in this account.

The Prosecution made a search of the premises of Express Tours and Packages Limited where a letter dated **12<sup>th</sup> March 2002** was discovered. In the letter Mr Diamond insists that as had been agreed prior to the 1<sup>st</sup>

January 2002, Express Tours Limited would conduct its business through its own HSBC account.

The Prosecution presented many documents and (Vide page 39), it scrutinised two particular dates (22<sup>nd</sup> January 2002 and 31<sup>st</sup> January 2002) in a bank account in the name of Express Tours and Packages. The deposits consisted chiefly of cheques issued mainly in the name of Express Tours Limited and deposited into the bank account of Express Tours and Packages Limited. (Vide page 40).

### **The Two Statements by the Defendant – Page 42 et**

In his first statement made on the 3<sup>rd</sup> November 2005, the defendant explained that in the new company of Express Tours Limited Mr Diamond's role was to find clients ready to travel to Paris. The defendant's role **was to book coaches**, hotels, tour guides, river tours cabaret, Disney et.. The payments were received first by European Vacations and then these sent the cheques and other payments to the defendant's office in Malta. The money was sent to pay the suppliers, namely hotels, coaches, excursions and so on. (Vide page 43). **The defendant had paid everybody except Baker's Coaches.** He had not honoured the payment to Baker's Coaches because Mr Diamond had informed him (date unknown) that he (Mr Diamond) had already paid them. (Vide page 43).

**The defendant then added that he had problems with a cruise liner which Express Tours and Packages Limited had chartered on the 21<sup>st</sup> November 2001 and which operated from the second week of March 2002 until the 8<sup>th</sup> of May 2002.**

The defendant also stated that 100 beds had been blocked exclusively for Express Tours Limited.

He also stated that in 2001 Mr Diamond had authorised the defendant to deposit the cheques in accounts of Express Tours and Packages Limited but that such cheques were to be deposited in the Bank Account of

Express Tours Limited as from the 1<sup>st</sup> January 2002 (see correction on page 45 in the second statement about the date).

In the second statement the defendant stated Between January and May 2002, the cheques were deposited at the Bank of Valletta Msida Branch and at Eurochange in Paceville. (Vide page 45). **He was aware of this but he did not know why.** He thought that Mr Diamond was aware that the cheques were being deposited at BOV and Eurochange because otherwise he would not have sent him the cheques.

The defendant stated that by depositing the cheques coming from Mr Diamond in these Accounts no proper records were being kept. He denied having turned any of this money to his own benefit. The benefit went to Express Tours and Packages Limited to cover losses 'which losses had been created by Express Tours Limited as the 100 persons had not turned up.'

**The ship had been chartered by Express Tours and Packages Limited.**

**Document AG 5 page 54**

This document is a letter (fax) from European Vacations to the defendant and is dated 12<sup>th</sup> March 2002. (Vide also date on the fax). It is addressed to the defendant  
And the first paragraph reads as follows:

**'Before the new year we agreed that as of January 1<sup>st</sup> 2002, Express Tours Limited would conduct its business through the ETI bank account in Malta. The account at HSBC Malta is now open according to Michel Refalo.**

**Could you please confirm that you will start making deposits of the cheques sent to you from the UK into this account.....**

**Omissis**

**It is very important that all funds generated by Express Tours Limited are accounted for in the ETL company and proper records are kept regarding all financial aspects of the business including refunds to customers.'**

Doc AG 7 reveals that there was an HSBC Account in the name of Express Tours Limited at least on the 4<sup>th</sup> June 2001 with a balance of Lm1200.

There was a cash deposit of Lm100 on the day the company was officially registered – 12<sup>th</sup> February 2002 but otherwise this Account remained dormant till the 3<sup>rd</sup> July 2004. (pages 56 et).

### **The Letter of Complaint**

Dr.Norval Desira confirmed that he had written the letter of complaint to the Commissioner of Police which appears on page 41. He also confirmed sending a number of documents. (Vide fol 121 et seq). He also confirmed that at the time of testifying the refund allegedly due by the defendant was in the region of 107,000 sterling. (Fol 123) The witness also said that this client had had a number of meetings with the defendant who never admitted criminal liability (fol 122). According to an unsigned agreement Mr Sigl was to pay 5000 sterling per month but the exact amount due had still to be established.

### **Witnesses for the Prosecution**

Dr Norval Desira also took the witness stand on the 17<sup>th</sup> August 2006 and he stated that the total sum of money paid to Mr Diamond was £58,000 (fol 317)

Audrey Ghigo, a representative of the HSBC Bank stated that Express Tours Limited – registration number C29296 had held a number of accounts since the 24<sup>th</sup> January 2001. (Vide fol 131). (See Documents from page 133 to 166).

Joseph Borg Cardona, representative of the BOV, stated that two cheques were deposited on the 27<sup>th</sup> February (Vide fol 167). The amounts were 15480.67 and 1226.93. The cheques are indicated on the BOV statements dated from the 24<sup>th</sup> February 2002 up to the 20<sup>th</sup> April 2002. They were deposited in Account number 40010638095. He also gave the dates when the cheques were deposited.

Joseph Anthony Muscat, Manager APS Bank, also exhibited authenticated images of 10 APS cheques. (Vide fol 170 - 182).

Joseph Lagana, Director of Eurochange Financial Services, confirmed that the images of 10 APS cheques had been issued by himself. (Vide fol 230). These were issued to Express Tours and Packages (Vide fol 231) in exchange of transactions on foreign exchange. The same witness took the witness stand once again on the 30<sup>th</sup> May 2006 (Vide fol 242) and he stated that the relevant cheques of fifteen thousand and so on were payments affected against bulk sterling cheques on particular days. He confirmed that the ten APS cheques were issued against 'those transactions' (fol 243).

### **The Complainant**

The complainant Alan Diamond took the witness stand on the 30<sup>th</sup> May 2006. He stated that he had agreed with the defendant to start a business together. They were to promote holidays from the UK to several European destinations. The defendant already had a company 'Express Tours and Packages Limited.' The witness said that he started promoting the business and clients were paying for their holidays. (Vide Fol 248). The defendant insisted that the witness send him the money from his clients as **the defendant was paying for the accommodation and the coaches.** They started sending the defendant money and they were told that he was depositing the money into this account. They were actually sending the original customers' cheques. They



were not endorsed at the back by the witness. The cheques were most of them made out to Express Tours and Packages Limited. They went on doing this during the spring and summer of 2001. They were to be deposited in the neutral account of 'our' company and to pay the coach company. The witness stated that he was unaware that the defendant was not paying the company Baker Coaches. (Vide fol 250).

In the meantime the defendant had embarked on another business venture by hiring a cruise liner but this line of business proved disastrous. The defendant started paying for this ship with the money that belonged to the complainant. He stated that the cheques that his company had received totalled 254,581.85 sterling. (Vide fol 253). These cheques were sent to Express Tours or Express Tours Limited. The defendant paid £68,000 on behalf of the company's coach travellers and that left a balance of 186,000. (Vide fol 255). After the defendant had been arrested, he started paying the witness. In fact he paid £58,000 (Vide fol 255). The witness mentioned an outstanding balance of £128,245.26. (Vide also page 260) The witness also explained that the company European Vacations was a company he owned and that Express Tours was a joint venture between two companies – European Vacations and Express Tours and Packages. **The complainant was to pay for the coaches while the defendant had to pay for the hotels.** He finished paying for the coaches twice because he did not let down the travellers. The witness said that he had never made any profit out of Express Tours Limited.

Another witness for the Prosecution was Andrew James Brown (Vide fol 304), a company director of European Central Banking. He used to work for the defendant for Express Tours and Packages Limited. The logistics of the project were handled by his department. The back office operations of Express Tours Limited was done in Malta with the staff of Express Tours and Packages. The actual handling of the cheques was done by the Accounts Department. He was in charge of inputting the data and then would pass the cheques to the accounts. The

cheques were sent by European Vacations. The witness was referring to the first six months of 2002. The revenue was to go to a special account in the name of Express Tours Limited. Malta was slow in paying Baker Coaches. **Malta was responsible for the payment.** The payments from the UK were coming in regularly. The money was being spent elsewhere (Vide fol 311). 'Malta' should also have paid for guide and hotel services in Paris.. Eventually the witness and Mr Diamond informed Baker coaches that from a particular date the money for the coaches was no longer going to be paid by Express Tours Limited as the revenue was going to remain in the UK.

**The Attorney General sent a Note on the 12<sup>th</sup> September 2006 with the following articles: 18, 293, 294, 310, 31, 20, 23, 30, and 533 of the Criminal Code which were read out on the 23<sup>rd</sup> October 2006.**

The defendant stated that he had no objection to have his case heard by the Court of Magistrates sitting as a Court of Criminal Judicature.

### **Witnesses for the Defence**

On the 20<sup>th</sup> February 2008, the defence cross-examined the Prosecutor. The latter stated that he had only pressed charges for a shorter time than that indicated in the letter of complaint because the investigations had only yielded evidence which covered the period in the charge. **He also explained that cheques which were meant to be deposited in a particular bank account were being deposited in another bank account**

Inspector Gafa' went on to explain that the company for the joint venture was already *de facto* in operation before the date of registration. (fol 432). The Prosecutor also stated that the letter that the lawyer for the defendant was referring to showed quite clearly that the venture between the defendant and Mr Diamond had already been in operation before the date of the letter in question because it states:

'Before the new year we agreed that as from January 1<sup>st</sup> 2002.' (page 438).

The company was definitely *de facto* in operation in 2001. (fol 440). The Inspector referred to what Mr Diamond had stated, that is, that the defendant had never opened the account that he had been asked to open. (Vide fol 441). Moreover, the defendant was using a rubber stamp of Express Tours and Packages Limited on the back of the cheques. (Vide fol 442). In fact, this shows the intention of the defendant to misappropriate the money. (Vide fol 442). Euro Exchange was issuing cheques into Maltes Lira in the name of Express Tours and Packages Limited as a result of this rubber stamp. (Vide fol 443). **The cheques were clearly payable to Express Tours Limited** and NOT to Express Tours and Packages Limited. (Vide fol 444) The rubber stamp may have misled Euro exchange bureau.

The Prosecution focused on the transactions of the 25<sup>th</sup> February 2002, 21<sup>st</sup> March, 2002, 18<sup>th</sup> April, 2002 and 19<sup>th</sup> April 2002 to make things easier for Euro Exchange. The defendant used to send his employees to the Exchange Bureau. (Vide fol 445).

### **The Defendant**

On the 12<sup>th</sup> September 2008, the defendant stated that he had been functioning as a tour operator since 1999. He is the sole director of Express Tours and Packages Limited. His partners are also other companies. He had met Mr Diamond in the year 2000 and not in the year 2001. The Company with Mr Diamond was formed on the 12<sup>th</sup> February 2002. The name Express Tours Limited was chosen by Mr.Diamond. (Vide fol 697). The defendant also stated that Mr Alan Diamond was already using the name 'Express Tours' on the 30<sup>th</sup> December 2001 while Express Tours Limited was formed on the 12<sup>th</sup> February 2002.

Cheques were being sent by European Vacation in England, a company operated by Alan Diamond. (Vide fol 701). Mr Diamond sent the cheques to the defendant's employee James Brown under the company name Express Tours and Packages Limited.

The defendant stated that he put the money on the Express Tours and Package Limited Account and they used the BOV and Eurochange because they were obtaining a better exchange rate. Everything was official including the rubber stamp at the back. The defendant said that Mr Diamond was sending him money that belonged to Express Tours Limited when the company had not as yet been formed. He was paying the suppliers of Express Tours and Packages Limited because at this time

*'there not a single contract with one of the suppliers between 'Express Tours and the supplier.'* (Vide fol 703)

The defendant needed the money to 'travel' the passengers. Alan Diamond was making contracts with suppliers of Express Tours and Packages Limited as the client and these were billing Express Tours and Packages Limited. (Vide fol 704). At the time he had to pay his employees and for office expenses. (Vide fol 705). Baker's coaches were still owed money because the defendant had financial problems. It was not true that Mr Diamond had paid Baker's coaches twice. **It was the defendant who had been paying Baker's coaches.**

The defendant also stated that there was not a single booking confirmation from Express Tours Limited.(fol 706). The defendant said that 'if you read between the lines, before 2002, money had to be deposited in Express Tours Limited. He said that he had opened the HSBC account but not with the address shown.

**The defendant added that it was not true that Mr Diamond was not involved in the cruise liner business because he had booked 100 cabins. (Fol 709). This**

**charter was** made with Express Tours. Mr Diamond had agreed with the defendant that he would be taking 100 couples per departing route. He only referred 773 passengers but when testifying Mr Diamond said that he had only referred about 6 or 7 passengers. Express Tours paid for the charter of these cruises. **The defendant used the money that Diamond sent him for the cruise liner.**

The defendant denied that there was any agreement to reimburse Mr Diamond 160,000 sterling. The corporation came to an end on the 30<sup>th</sup> June 2002. The defendant affirmed that he had never taken a cent for his own private use (fol 717). The Cruise Liner had been paid by Express Tours and Packages Limited (fol 717). The defendant was now asking Diamond for the overpayment.

During the cross examination, the defendant confirmed his statements AG1 and AG2 on pages 42 to 46. He stated that the charter cruise was operated by Express Tours and Packages Limited of which he was the sole owner. He had sub-contracted 100 cabins to Mr. Diamond who had failed to honour his obligations.

**He confirmed that this was why he had taken money from Express Tours Limited and denied directing them to make good for the losses connected with the cruise liner business.**

**[However, in the statement the details are slightly different. The question in the statement was: 'Am I right to say that you used funds pertaining to Express Tours Limited for Express Tours and Packages Limited? The answer was: But only to cover the loss of the part of the curise. Not more.]**

The defendant went on to say that the cruise was a full charter agreement operated by Express Tours and Packages Limited. Mr Diamond was not involved in this at all but Express Tours had made an agreement with

Express Tours and Packages for 100 cabins on the cruise. (See page 721).

Then, on further questioning the witness replied that it was Mr Diamond who had made the agreement as a director of Express Tours. (Fol 721).

The Prosecution underlined the legal difference between Mr Diamond and a company. The defendant replied that:

‘This was, of course, a verbal agreement.’

The other partner who had not fulfilled his part of the deal had paid 100,000 Euros. (Page 722).

The defendant said that they had opened a bank account but it had never been used. (Fol 723). **This could not be used once the company had not been registered. He also said that Mr Diamond tried to ‘blackmail’ him by telling the defendant that he had one option: either to admit being a debtor to the tune of 160,000 sterling or else that he would remain in court. The defendant said that he had overpaid Mr Alan Diamond. (Page 724).**

**He confirmed that all the cheques presented in court had to be paid to Express Tours Limited. (Fol 725).**

The defendant also said that had he paid the money into the bank account of Express Tours Limited he would not have been able to pay the suppliers. Mr Diamond should have advised the clients to issue cheques on Express Tours and Packages Limited.

*He had not deposited any money into the account of Express Tours Limited on or after the 12<sup>th</sup> February 2002 because he had not as yet been appointed as a Managing Director. He was also not aware that a bank account had been opened with HSBC. Mr Diamond had referred his clients to a company which had not as yet been registered. (Page 732).*

**On further questioning the defendant confirmed that all the cheques exchanged at Euro change, payable to Express Tours were paid to Express Tours and Packages Limited. (Vide page 733).**

The Prosecution here made reference to the second statement (AG 2), (See page 734) There the defendant had stated that he had not converted the money to his own use but to Express Tours and Packages to cover the losses which resulted from the failure of Express Tours to honour its commitment on the cruise line. Mr Diamond had sub-chartered 100 cabins. (Vide page 735). The defendant also stated that it was not true that Mr Diamond had paid twice and the defendant only owed him £85,581.49.

The defendant produced a leaflet advertising Mediterranean Cruises for two issued by **European vacation** (Mr Diamond's company) and Express Tours Ltd. (Dok AG 12). This was sent by Alan Diamond to the defendant on the 21<sup>st</sup> September 2001.

### **Considerations of the Court**

There is no doubt that the company Express Tours Limited was officially registered on the 12<sup>th</sup> February 2002. The Memorandum and Articles of Association issued by MFSA give this date and hence as from the 12<sup>th</sup> February 2002, there should have been no difficulty to deposit the cheques coming from the UK into the HSBC bank Account which had been opened for the purpose.

The Court was surprised to hear that the defendant was unaware of this Bank Account. He himself had gone through the same procedure when registering his company a short time before in 1999. He should have been aware that these bank accounts are opened while the company is 'in formation'. They are necessary for registration with MFSA and the Account becomes active once the formalities of registration are over.

A number of cheques dated 13<sup>th</sup> February or afterwards were presented. The Court here gives some examples: (a) cheque dated 4<sup>th</sup> March 2002 by Mr J Mason, (b) Cheque dated 13<sup>th</sup> February 2002 paid by PG&EW Watson; (c) Cheque dated 17<sup>th</sup> February 2002 paid by Mrs Gunn; (d) cheque dated 26<sup>th</sup> March 2002 by Mss M Pods; (e) cheque dated 13<sup>th</sup> April, 2002 by E Cory King; (e) cheque dated 8<sup>th</sup> April 2002 by Mrs A. Lamont and Mr R G Lamont; (f) Cheque dated 15<sup>th</sup> February 2002 paid by Mr W J Mackenzie. (Vide Police Blue File for images of these cheques and for others)

Yet, these were not deposited in the HSBC Bank Account though there were no longer any legal obstacles to surmount once the company had been registered and Lm100 were deposited on the Registration Date.

As to the cheques sent before the official establishment of this company, these could have been deposited in a 'neutral' account rather than being stamped at the back with the words Express Tours and Packages Limited and then being exchanged into Maltese Lira and finishing in this company's bank account. The defendant stated that the rubber stamp in itself should be considered as evidence of his good faith and that everything was being done above board. The Court concludes that the stamp could easily have been confused with the name 'Express Tours' written by the clients in the blank left for the payee's name. The Court does not consider the use of the defendant's company stamp as a sign of good faith. The rubber stamp was a device by which was being deliberately used to exchange the cheques and deposit the proceeds in the account of the defendant's own company.

The Court is not convinced that the defendant had no other way prior to the registration of Express Tours Limited except to deposit the cheque received from Mr Aland Diamond in the defendant's company's own bank account. The defendant argues that these were the instructions of Mr Diamond. (See page 2 of the Note of submissions). These were definitely not the instructions



given in the letter cited above and were definitely not followed after the 12<sup>th</sup> February 2002. Moreover, once the company Express Tours Limited was 'de facto' operating, there was a greater duty on the defendant not to mix proceeds due to Express Tours Limited in the same account of his company.

As to the chartering of the cruise ship, the defendant himself stated that he was responsible for the Charter. The defence has submitted that there was a verbal agreement between Mr Diamond and the defendant that the chartering should be done by Express Tours and Packages Limited as Express Tours had not as yet come into existence. The Court notes that this assertion has only been made in the note of submissions. It is true that the defendant presented a brochure in which the name 'European Vacations' appears on the upper left hand side of the brochure. However, promoting a cruise is one thing, chartering the vessel is a totally different matter.

In fact, what the defendant had insisted on was that Mr Diamond had failed to send in the number of clients that Mr Diamond had promised. Hence as there was a shortfall in the income and some of the proceeds from the cheques destined for Express Tours Limited had to be used to cover the expenses incurred.

As to the extent of Mr Diamond's involvement in the cruise liner business, the Court concludes that Mr Diamond was really involved in the cruise business. It believes the account given by the defendant that Mr Diamond had in fact booked (either for himself or on behalf of Express Tours) a number of cabins on the cruise ship. So the Court is accepting the submission made by the defence in lines 2, 3 and 4 of point 10 in the Note of Submissions.

When one considers all this, the conclusions are:

(a) The defendant was solely responsible for the chartering of the cruise ship (see his statement);

(b) Mr Diamond had indeed made a number of bookings on the cruise ship and hence his testimony about his connection with the cruise ship is **unreliable**.

The defence submits that the coaches were to be paid by Mr Diamond. On the other hand, the defendant himself in his statement said that while Mr Diamond was responsible for the logistics, the defendant was responsible for the payment of hotels, guides, **and coaches**. (See the accused's own statement)

According to the defence:

- (a) the amount due to Baker's Coaches was much less than that stated;
- (b) that Mr Diamond had **not** in fact paid it;
- (c) that the defendant refused to go on refunding the complainant before audited accounts were produced.

From the evidence produced in Court the main point is the failure of the defendant to pay the sum due to Baker's coaches. The second point is the channelling of proceeds due to Express Tours into the account of Express Tours and Packages Limited.

In its Note of Submissions the defence refers time and again to the fact that the company Express Tours Limited had not been established prior to the 12<sup>th</sup> February 2002 and hence one could not misappropriate the funds of a company which did not exist. However, the charge also refers to Mr Alan Diamond as an alleged victim, and evidence shows that cheques payable to Express Tours had been sent **before** this date (12<sup>th</sup> February 2002) and **after** this date and though the company had not been registered as yet there was a verbal agreement about what to do with the money. The principle 'Pacta sunt servanda' applies to both verbal and written agreements.

The defence submitted that Mr Diamond was misleading the Court when he said that he had been conducting business with the defendant since the Spring of 2001 (see

page 10 of the Note). The Court, however, holds that Mr Diamond was giving a reliable account of how the business was being conducted in practice. For all intents and purposes the complainant and the defendant were aware that business was already under way though officially the company had still to come into existence. This is not lying under oath. This is a description of things as they were. Why were the cheques sent by clients to Express Tours limited exchanged and deposited by the defendant? Hence the Court is dismissing this submission by the defence as totally unfounded.

The defence also questions the amount of money allegedly misappropriated. There is a difference from the figure which appears in the letter of complaint and what results from the Police investigation as to the Express Tours' cheques which were exchanged and then deposited in defendant's company's account. The defence worked this out as a total of £20,023.50. **The Prosecution submitted that as far as it was concerned, once the amount superseded the Lm1000 limit, then it could issue the charge with the words used therein.**

The Court considers that up to the very end of the proceedings, no clear amount as to the extent of the alleged misappropriation had been established. This was an accounting exercise and complainant and defendant had squared some of their bills to the extent that

- (a) a lower figure owing to Mr Diamond was given during the proceedings and
- (b) the defendant started claiming that he had overpaid Mr Diamond.

There is a further point to consider (also raised by the defence). If all the suppliers had been paid, barring Baker's coaches, how can the defendant be found guilty of misappropriation?

This question can be answered. The money which was passed on to the defendant, not only included the

suppliers, but also some profits. If the cruise was a failure, it does not follow that the Parisian tours also registered a loss. **Indeed the question of losses never arose in connection with the business of the Paris tours.**

**The defendant channelled all the proceeds one way in spite of (i) a fax reminding him not to do so, (ii) the official birth of the company on the 12<sup>th</sup> February 2002, and (iii) having practical ways of acting in a transparent manner even before the official registration of Express Tours Limited.<sup>1</sup> There was at least one outstanding claim against Baker's coaches which he failed to honour though, according to his own statement, he was bound to do so.**

However, the defence queried whether it was the duty of the defendant or that of Mr Diamond to pay for the coaches. They refer to what was stated by Mr Diamond when he took the witness stand (Vide pages 12 and 13 of the Note of Submissions). The Court actually referred to the words as well in summarising what Mr. Diamond said. The Court has taken into consideration what the defendant himself said in the statement and what Mr Diamond has stated on oath. The whole thing boiled down to who shoulders the responsibility for the **expenses with the risks this may involve. In fact, what Mr Diamond said was 'from the revenue I (Mr Diamond) generated had to pay for the coaches while the defendant had to pay for hotels, and to tour the people on the destination.'** In other words once the cheques for Express Tours were being sent to Malta **the actual payment for the coaches had to be made by the defendant though the payment for the coaches would be an expense** which would have to be borne by Mr Diamond.

Considers

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<sup>1</sup> The banks would definitely have advised the defendant about the right type of account.

That of the 30 cheque images in the Police Blue file, payable to Express Tours, 28 have dates which fall after the 12<sup>th</sup> February 2002 when the company was officially registered.

It is significant that on the 12<sup>th</sup> February 2002, the HSBC Account in the name of Express Tours was credited with Lm100. However, in spite of the fax urging the defendant to use this Account, none of these cheques was deposited in the HSBC Account. The total of these cheques is £3081.

The defendant himself says that he used part of the funds to offset the losses suffered by Express Tours and Packages Limited because Mr Diamond had failed to honour his commitment.

### **As to the Law.**

Both the Prosecution and the Defence referred to a number of Maltese judgments (Il-Pulizija vs Jospheh Mifsud 2<sup>nd</sup> December 1992, Il-Pulizija vs Joseph Richmond et 14<sup>th</sup> January 1993, il-Pulizija vs Captain Albert Mallia 25<sup>th</sup> April 1949 and il-Pulizija vs Emmanuel Cassar 20<sup>th</sup> October 1997, Il-Pulizija versus John Gauci 14<sup>th</sup> February 1997 and Il-Pulizija versus Alfred Siegfried Borg Cole LL.D. 23<sup>rd</sup> December 2003) from which emanate the following elements of the crime of misappropriation.

### **The Active Subject**

The defence submitted that the defendant was accused in his personal capacity though he had not handled any money. The Court considers that the defendant is the sole director of Express Tours and Packages Limited and in accordance with Article 13 of the Interpretation Act he is presumed to know what is happening and the onus of proving otherwise falls upon him. (About this point see Attard versus Malta).The Court considers that it is true that the company has a distinct legal personality but the defendant was the sole director and knew what was happening to the extent that he even admitted that some

of the funds were used to offset losses incurred by Express Tours and Packages Limited. Moreover, the defendant knew what was happening to the cheques issued in the name of Express Tours both **before** and **after** the 12<sup>th</sup> February 2002. The defendant also acted in his own capacity. So the Court concludes that the defendant was properly summoned.

### **A Thing Entrusted or Delivered to the Accused**

There is no contestation about the fact that cheques were delivered to the defendant. The Prosecution refers to the cheques which were exchanged into Maltese Lira and eventually found their way in the account of Express Tours and Packages Limited, a company with which Mr Alan Diamond had no connection. The defence submits that all the suppliers had been paid. The Court, after a thorough perusal of the file, concludes that a number of cheques payable to Express Tours Limited were communicated to the defendant. Hence the Prosecution has proved the second element.

### **A Specific Purpose for which the Thing was entrusted or Delivered to the Accused.**

The defence devoted a page and half about this element. From the records of the case it is clear that all the cheques forwarded to the defendant were meant to be used in connection with Express Tours Limited only. Hence these funds could not be used for any other purpose. The Court concludes that the Prosecution has proved the third element.

### **Converting to his own use or of any other person**

This is the real bone of contention as the defence submits that all the suppliers were being paid and that the defendant could not have used an account in the name of a company which had not as yet been registered. The Court has focussed on the 28 cheques bearing dates after

the 12<sup>th</sup> February 2002 – the day the company was registered. These cheques should have been deposited in the HSBC account opened for the purpose and yet there is no trace of them. Moreover, the defendant himself declared in his statement that he had used some of these proceeds to make up for the Mr Diamond's failure to send the number of passengers agreed on for the cruises. The Court has also considered the fax sent to the defendant reminding him of the agreement made before the 1<sup>st</sup> January 2002 that all transactions had to be reflected in the Account of Express Tours Limited. The Court concludes that when the defendant failed to abide by these clear instructions as from the 12<sup>th</sup> February 2002, there is no doubt that, as he said, he was converting this money to the benefit of Express Tours and Packages Limited which is a third party. He had no right to do this with the money advanced in the name of Express Tours. Hence the Court concludes that the Prosecution has proved the fourth element of this crime.

### **Mens Rea or Criminal Intention.**

The defence argues and quotes from the judgment 'Il-Pulizija versus Avukat Dr Siegfried Borg Cole' that the defendant was so much in good faith that he rubber-stamped the cheques with the rubber-stamp of Express Tours and Packages Limited. (Vide page 21 of the note of submissions). The Court, however, thinks that the use of this rubber stamp could easily mislead a bank or an Exchange Office as the cheques were made payable to Express Tours. Hence one could think that the payee was the same person as the company whose rubber stamp appeared at the back. However, even if the Court were to accept this argument, there is one point which shows that the 'mens rea' of the defendant: when he failed, at least, to deposit these cheques in the bank account of Express Tours Limited **once the company had been registered**. This is not a question of a cheque or two but of twenty eight with nine of them falling even after the date of the fax sent to the defendant. In other words, he had been put on guard and yet, he went on. The defendant's words in the statement that he was

aware that 'the cheques were being deposited at the Bank of Valletta and at Eurochange in Paceville between January and May 2002 but did not know why' reveal full knowledge of what was actually happening with the money which belonged to a different entity. He was aware that the funds were being channelled into an account which belonged to a company of which he was the sole director. Even if the complainant had failed to honour his commitments regarding the cruise liner business, the defendant was not entitled to take the law in his hands. Hence the Court concludes that the Prosecution has also proved this fifth element of the crime.

The defendant was a businessman and hence section 294 definitely applies. Moreover, even though the Court has focussed on the cheques with dates falling after the 12<sup>th</sup> February 2002, the total amount still exceeds Lm1000 (the currency used at the time), the limit indicated by section 310(1)(a) of Chapter 9..

### **Conclusion.**

**The Court, after considering all the evidence (including the defendant's statement to the Police), after perusing the cheques bearing dates which fell after the 12<sup>th</sup> February 2002 and after reading sections 18, 293, 294, 310(1)(a), 31, 20, 23, 28A, 30 and 533 of the Criminal Code<sup>2</sup>, Chapter 9 of the Laws of Malta finds the defendant guilty of the charge laid against him. The Court notes that the defendant has a clean sheet and so the Court is condemning the defendant to 13 months imprisonment, which penalty shall not come into force unless the defendant commits another crime within the coming two years. The Court explained the implications of section 28A to the defendant.**

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<sup>2</sup> See Note sent by the Attorney General of the 12<sup>th</sup> September 2006



Informal Copy of Judgement

**< Final Judgement >**

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