MALTA

CIVIL COURT
FIRST HALL

THE HON. MR. JUSTICE
ANTHONY ELLUL

Sitting of the 18 th April, 2013

Citation Number. 382/2012

Elanguest Limited

Vs

Maltalingua Limited and Mark Bentley Holland *in solidum*

The judgment deals with preliminary pleas raised by defendants:

Maltalingua Limited.

The defendant is not the legitimate opponent as regards to the plaintiff's claims.

Mark Bentley Holland.

1. The Maltese courts do not have jurisdiction.
2. As far as the claims of the plaintiff company are based on the breach of the representation agreement, the defendant is not the legitimate opponent as the agreement is between Elanguest Limited and the German company Sprachdirekt Gmbh.

The plaintiff company stated that:

Since 1991 Elanguest has been providing teaching services to foreigners (TEFL – Teaching of English as a Foreign Language), and has managed to establish itself as one of the leading schools in Malta.

Elanguest is a registered trademark with the European Union, owned by the plaintiff company (registration number 004514048 in classes 35, 41 and 43).

Defendant Holland was entrusted to represent the company in the German market, in order to attract more students to follow English courses in the school run by the company. The agreement provided that: *"The school agrees to enter into a business relationship with the representative on a basis of mutual trust"*, and that the defendant works exclusively for the plaintiff company.

The plaintiff company provided funds, promotional material, and training to Holland, and his agency in Germany (Sprachdirekt) was successful. The plaintiff company, on the basis of the agreement between the parties, agreed not to work with another German agency.

In 2004 the defendant Holland requested authorization to register the domain name 'elanguest.de' with the German authorities, and that the German website (www.elanguest.com) is transferred on servers based in Germany. Holland claimed that this would mean higher profits for both parties. By means of an agreement entered into October 2004 the plaintiff company

authorized the defendant to register in his name, on behalf of plaintiff company, the domain ‘elanguest.de’. Increased profits were registered for Holland who was making 60% of all bookings of Elanguest. The agreement was signed in 2004, and was tacitly renewed in September of each year.

As a result of this relationship it is evident that the defendant had a fiduciary relationship with the plaintiff company (Article 1124A of the Civil Code).

During 2011, without informing the plaintiff company, defendant Holland applied with the Ministry of Education in Malta to open a school of English. A licence was issued (275/MB36), and the school started to be advertised as “Maltalingua”. The defendant also registered the domain name “maltalingua.com”. The plaintiff company was unaware of this.

After the defendant developed his own website, at some point in time during 2011 he started using promotional material, owned by the plaintiff company and without its approval, on his website. The defendant started changing links that were originally directed to elanguest.de to his own website. He therefore enjoyed, in a deceitful and clandestine manner, from the goodwill of the plaintiff company for his own personal interest. At the same time he started to reduce the promotion of the domain name elanguest.de and increased the promotion of his website, by using search engines.

All this happened whilst the contracts were still in force.

On the 1st December 2011 a company was registered (number C54574) in which Holland is the sole director, shareholder and company secretary.

During February 2012 the defendant started to transfer internet traffic from the domain elanguest.de onto his website and used the name, the goodwill, brand and promotional material of the plaintiff company. This until he disconnected the domain elanguest.de, and the plaintiff

company lost all contact with its clients and goodwill which it had in Germany. The defendant channelled all this to his personal interest and that of the defendant company.

Due to this illegal and deceitful behaviour by the defendants the plaintiff company incurred considerable damages as it started to receive a large number of cancellations by German students (including Dutch and Austrians). This has had an effect on the income of the plaintiff company.

Although the defendant was requested to return the domain name to the plaintiff company, he failed to do so. In April 2012 he opened the school Maltalingua in St Julian's, in a building that some time before had been used by the plaintiff company.

The defendant is in breach of Article 1124A of the Civil Code of the Laws of Malta, and has not acted in good faith. He did not avoid the conflict of interest between himself and the company he represented, and he failed to return property that was in his possession on behalf of the plaintiff company.

Therefore, the plaintiff company requests the Court to:-

1. Declare that through his actions defendant Holland is in breach of the existing agreements and Article 1124A of the Civil Code, and/or any other provision of law, and he is responsible for damages suffered by the plaintiff company.
2. Liquidate the damages suffered by the plaintiff company.
3. Condemn the defendants, in solidum, to pay the plaintiff company the liquidated damages.

The court heard the witnesses produced by the parties.

Mark Holland's first plea.

As regards to a plea of jurisdiction, Article 742(6) of Chapter 12 provides that where provision is made in any regulation of the European Union which is different from what is stated in Article 742, *"the provisions of this article shall not apply with regard to the matters covered by such other provision and shall only apply to matters to which such other provision does not apply."*.

In terms of Article 2 of Regulation 44/2001:-

"Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.".

For the purposes of this plea the court has to consider the claims of the plaintiff company as proposed in the sworn application.

The plaintiff company claims that *"… it is relatively impossible to pin-point Mr Holland's domicile to one particular state."*. The court has no doubt that defendant Holland's domicile of choice is in Germany, after taking into account that:-

i. He has been living in Germany since 2002. There is no evidence that during all these years he has resided in any other country.
ii. He works in Munich and is the director of a German company, Spractdireckt GmbH.
iii. He is married a German national who also works in Germany, and has two young children. The family is settled in Germany.
iv. He has a bank account with Deutsche Bank.
v. Plaintiff company appointed Sprackdirekt as its representative in Germany, on whose behalf appeared Mark Holland, with the knowledge that Holland was residing in Germany and therefore its interests would be taken care of within the German market.
vi. The domain name elanguest.de was registered in Germany in Holland's name since he resides in Germany.

The fact that defendant:-

i. has a Maltese passaport;
ii. has an apartment in Malta which is rented;
iii. lived in Malta when still a child;
iv. has a bank account in Malta;
v. has a Maltese identity card;
vi. has business interests in Malta since he runs his company Maltalingua Limited;

does not mean that he is domiciled in Malta. Defendant confirmed that he only visits Malta occassionally and stays in a hotel.

As regards to the contracts exhibited by the plaintiff company:-

i. Document EL2 is an unsigned version of the contract of representation. Ursula West, a director of the plaintiff company, confirmed that she signed the contract but is unaware whether Mark Holland signed. On his part Mark Holland in an application filed on the 22nd June 2012 declared: *"Ir-relazzjoni bejn il-partijiet hija regolata minn ftehim ta' rapprezentazzjoni (contract and terms of representation) illi Elanguest Limited u Sprachdirekt GmbH dahlu fih nhar l-1 ta' Ottubru 2004 (kuntratt ga ezebit mar-rikors mahluf ta' Elanguest Limited, izda qed jerga jigi anness ghall-pratticita bhala Dok. MH1)."* (application no 638/2012). It is evident that the contractual relationship was between Elanguest Limited and Sprachdirekt GmbH. The latter company was to market and sell English language courses (including accomodation) mainly in the German market, trading under the name Elanguest de. The courses are held in Malta by Elanguest Limited.

Simon Bonaci an employee of Elanguest Limited said:

"I am aware that Mark Holland has a company in Germany. The name of the company is Sprachdirekt. I am aware that Holland's company was marketing the local school in Germany. In fact this is why we contribute to the

marketing expenses. I can confirm that invoices issued by plaintiff company were issued in the name of Sprachdirekt." (7th November 2013).

Ursula West, a director of Elanguest Limited, said:-

"In fact he established Sprachdirekt GmbH, which was intended to service not only Elanguest, but also other language schools based in other countries – and would also fall in line with the requirements of German law. I must stress that it was clearly understood by all parties, that Sprachdirekt was bound to represent Elanguest as the only Maltese school he was representing for students aged 18 and over.".

Statements which confirm that the continue to confirm that the parties to the contract of representation were Elanguest Limited and Sprachdirekt GmbH.

ii. Document EL3 relates to the agreement whereby Elanguest Limited granted Mark Holland *"the sole rights and use of these Domain names and associated email addresses"*/. This included the domain name elanguest.de. From the evidence presented by both parties it is evident that the domain names were used by Sprachdirekt GmbH for its business. The company was making use of the website elanguest.de to market and sell the English language courses. It was certainly not carrying out any business activity in Malta, as the scope of its business was to attract foreigners to book an English language course in Malta.

In terms of Article 5(1) of the EU regulation 44/2001, although Mark Holland is domiciled in Germany, in matters relating to the contract he may be sued in Malta if the place of performance of the contract is in Malta. Plaintiff company is claiming damages from Mark Holland for breach of contract and fiduciary obligations in terms of Article 1124A of the Civil Code.

The court is of the opinion that with regards to:-

i. **The contract of representation**: the place of performance of the contractual obligation by the representative, irrespective of whether he is Mark Holland or Sprachdirekt GmbH, was certainly not Malta.
ii. **The license contract for use of the domain names**: the place of performance of the contractual obligation by the licensee, was certainly not Malta.

In the sworn application the plaintiff company declared:-

"Huma fdaw u nkarigaw lill-intimat Holland u addirittura dahlu fi ftehim mieghu sabiex jirraprezenta lis-socjeta rikorrenti barra minn Malta partikolarment fis-suq Germaniz.".
This confirms that the representative had to perform his obligations in foreign countries, principally Germany. Although the language courses are held in Malta their marketing and sale under the trade name elanguest.de by Sprachdirekt GmbH was certainly not Malta. The same reasoning applies to the license contract for the use of domain names.

The lawsuit is based on the alleged breach of the contractual obligations which plaintiff claims were undertaken by Mark Holland (vide paragraphs 3-5 of the sworn application). The plaintiff also claims that as a result of the contractual relationship between the parties, in terms of Article 1124A of the Civil Code Mark Holland was a fiduciary of the plaintiff company (vide paragraph 6 of the sworn application). In a reply filed on the 16th July 2012 (application number 638/2012) Elanguest Limited this is confirmed by the plaintiff:

"Mill-kontenut tar-rikors mahluf, u minn dak diga' espost fil-paragrafu 3. supra ghandu jirrizulta pacifikament illi l-azzjoni fil-konfront ta' l-intimat hija primarjament (izda mhux esklussivament) bbazata ex contractu in vista tal-ftehim kuntrattwali illi kien vigenti bejn il-partijiet tul dawn l-ahhar snin, u liema ftehim ir-rikorrent Holland – b'serje ta' azzjonijiet illi illum jistghu jitqiesu biss bhala doluzi stante illi setghu saru biss b'intenzjoni cara illi jqarrqu u jittradixxu l-koppja West bhala d-dirigenti tas-socjeta

esponenti – kiser unilateralment. L-azzjoni attrici hija wkoll diretta fil-konfront tar-rikorrent Holland ai termini ta' l-Art. 1124 tal-Kap. 16 tal-Ligijiet ta' Malta stante illi r-rikorrent Holland kien igwadi minn posizzjoni fejn gie fdat bit-tmexxija ta' parti min-negozju ta' l-esponenti u huwa dawwar dik il-fiducja ghall-beneficcju esklussiv tieghu u tas-socjeta Maltaingua Limited, li taghha huwa l-uniku azzjonist u l-uniku direttur.".

The law stipulates that *"Fiduciary obligations arise in virtue of law, **contract**, quasi-contract, trusts, assumption of office or behaviour…."*. Since the claim as to the fiduciary obligation is related to the contracts which, according to the plaintiff, bind Mark Holland, the court agrees with defendant's argument that this claim also falls under Article 5(1) of EU regulation 44/2001.

In the note filed on the 31st January 2013, plaintiff claimed that if the court determines that the juridical relationship that exists between Elanguest Limited and Holland is based on fraud and bad faith, *"…this in turn means that the action is one of damages arising out of delict or quasi-delict, and therefore the provisions of Article 5(3) of Reg EC44/2001 are to apply."*. Without prejudice to what has been stated in the previous paragraph, as regards to the alleged breach of fiduciary obligations by Mark Holland, in terms of Article 1033:

*"Any person who, with or without intent to injure, **voluntarily** or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting **a breach of the duty imposed by law**, shall be liable for any damage resulting therefrom."*.
The plaintiff's referred to Article 5(3) of EU Regulation 44/2001 which states that *"in matters relating to tort, delict or quasi-delict"* a defendant domiciled in a Member State may be sued in the courts for the place where the harmful event occurred or may occur. The plaintiff claims that *"there is little doubt"* that the harmful event occurred in Malta. There is no doubt that Mark Holland was acting in Germany. If as claimed by the plaintiff company Mark Holland has fiduciary obligations and breached them, his

actions were peformed in Germany. Therefore the court concludes that the events that brought about the alleged damages, took place in Germany. In **Antonio Marinari vs Lloyds Bank et** the European Court of Justice, in a judgment delivered on the 19th September 1995, held:-

"10 As the Court has held on several occasions (in Mines de Potasse d' Alsace, cited above, paragraph 11, Dumez France and Tracoba, cited above, paragraph 17, and Case C-68/93 Shevill and Others v Presse Alliance [1995] ECR I-415, paragraph 19), that rule of special jurisdiction, the choice of which is a matter for the plaintiff, is based on the existence of a particularly close connecting factor between the dispute and courts other than those of the State of the defendant' s domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings.
11 In Mines de Potasse d'Alsace (paragraphs 24 and 25) and Shevill (paragraph 20), the Court held that where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression "place where the harmful event occurred" in Article 5(3) of the Convention must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, so that the defendant may be sued, at the option of the plaintiff, in the courts for either of those places.
12 In those two judgments, the Court considered that the place of the event giving rise to the damage no less than the place where the damage occurred could constitute a significant connecting factor from the point of view of jurisdiction. It added that to decide in favour only of the place of the event giving rise to the damage would, in an appreciable number of cases, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the Convention, so that the latter provision would, to that extent, lose its effectiveness.
13 The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it. Such extension would

negate the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction. It would lead, in cases other than those expressly provided for, to recognition of the jurisdiction of the courts of the plaintiff' s domicile, a solution which the Convention does not favour since, in the second paragraph of Article 3, it excludes application of national provisions which make such jurisdiction available for proceedings against defendants domiciled in the territory of a Contracting State.
14 Whilst it has thus been recognized that the term "place where the harmful event occurred" within the meaning of Article 5(3) of the Convention may cover both the place where the damage occurred and the place of the event giving rise to it, that term cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.
15 Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.*"* .

If what the plaintiff alleges is true, the damage was initially suffered in Germany, the place where Sprachtdirekt GmbH was representing Elanguest Limited by marketing and selling English language courses to be held in Germany.

Mark Holland's second plea.

On the basis of the evidence produced by all parties, the court has no doubt that the parties to the contract of representation are Elanguest Limited and Sprachdirekt GmbH. Therefore a claim for damages based on the breach of the contract by the representative, cannot be made against defendant Holland.

Maltalingua Limited's plea.

In its statement of defence Maltalingua declared:-

"1.2 Anke l-ewwel talba attrici hija fis-sens illi qed tintalab dikjarazzjoni illi l-intimat Holland (u mhux il-konvenuta Maltalingua Limited) 'irrenda ruhu hati ghad-danni.'.
1.3 Huwa biss fit-tielet talba, illi hija konsegwenzjali ghall-ewwel talba, illi l-Qorti qed tintalab sabiex tikkundanna lill-intimati in solidum u bejniethom ghall-hlas ta' danni lill-attrici u dan minghajr ma qed jigi allegat xi nuqqas minn Maltalingua Limited.".

Plaintiff company has requested that:-

1. Holland is declared to be in breach of the provisions of the agreements, and of Article 1124A of the Civil Code and is responsible for the damages suffered by the plaintiff.
2. Liquidation of damages suffered by the plaintiff.
3. Condemn the defendants, *in solidum*, to pay the liquidated damages to the plaintiff.

The third claim is consequential to the first and second claims. In the note filed on the 31st January 2013 plaintiff argued that Maltalingua Limited *"consciously and deliberately made use of intellectual property, and the business goodwill of Elanguest Limited while fully aware of the fact that it was unlawful and illegal to do so. It therefore acted in bad faith, and derived a profit or gain that was based exclusively on bad faith – to the detriment and loss of the plaintiff company."*. However, the first claim is only referring to defendant Holland. Therefore, the third claim can never be upheld and consequently defendant company is not a legitimate opponent in the judicial proceedings as proposed by the plaintiff.

For these reasons the court:-

i. Upholds Mark Bentley Hollands' first plea.
ii. Upholds Mark Bentley Holland's second plea.
iii. Upholds Maltalingua Limited's plea.

Costs are to be paid by the plaintiff.

< Final Judgement >

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