Civil Court
First Hall

THE HON. JUDGE
JACQUELINE PADOVANI GRIMA LL.D. LL.M. (IMLI)

Court Hearing of Wednesday, 9th March 2016

Case Number: 15
Application Number: 482/2011 JPG

EUROSUPPLIES LIMITED (C-17473)

VS

PAUL TIHN (I.D. CARD NO:18650A)

The Court

Having seen the sworn application of Eurosupplies Limited of 13th May 2011, reads as follows:

1. *"That the respondent was employed with the applicant company according to the terms of his employment contract, dated 15th June 2009 herein attached and marked Doc. A;*

2. *That the employment of the respondent was terminated on the 8th October 2010 following the resignation of the same;*

3. *That after the termination of his employment, it resulted that the respondent had breached a number of clauses contained within his employnent contract.*

This concerned amongst other things, the use by the respondent of confidential information and contacts which he had made exclusively by virtue of his employment with the applicant company, in order to conduct personal business to the detriment of the applicant;

4. *That the behaviour of the respondent is contrary to a number of clauses contained within his employment contract, amongst others, clauses 3,4,8 and 10;*

5. *That this abusive and illegal behaviour on the part of the respondant results in a breach of his contractual obligations;*

6. *That as a consequence of this illegal behaviour and of the breach of the respondent's employment contract, the applicant company has suffered considerable business-related damages;*

7. *That notwithstanding numerous calls for the respondent to appear for the purpose of liquidation and payment of the damages suffered by the applicant, including a call by virtue of a judicial letter dated 3rd January 2011 (Doc. B), the respondent has not appeared and has remained in default of his obligations;*

The applicant company is therefore asking this Honourable Court, if it so pleases to:

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

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

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

4. *Condemn the respondent to pay to the applicant company, the resulting amount of damages so determined by this Honourable Court;*

With all expenses, including those related to the judicial letter dated the 3rd January 2011 (Doc. B) and with interest according to law, against the respondent who is from this time called upon for the purposes of reference to his oath, and without prejudice to any other action which may be instituted according to law by the applicant company."

Having seen the sworn reply of Paul Tihn of 19th December 2012, (at page 25) and as translated (at page 77) which reads as follows:

1. *"On the merits, the plaintiff's claims are unfounded both legally as well factually, and are to be rejected with costs to be borne by plaintiff Company;*

2. *It is untrue to allege that defendant used confidential information accessible to him, throughout his term of employment with plaintiff Company to his personal benefit or moreover, to the detriment of the plaintiff Company;*

3. *In no way has the defendant breached the contractual obligations he undertook as shall be proven throughout the course of these proceedings;*

4. *The plaintiff Company did not suffer any damages which could in any way be imputable to any alleged irregular behaviour resulting from defendant's contractual breach;*

Defendant reserves the right to further statements of defence."

Having heard the evidence on oath;

Having seen the final note of submissions of applicant company Eurosupplies Limited of 26th August 2015 (at page 78);

Having seen the note of submissions of defendant Paul Tihn of 11th November 2015 (at page 93);

Having seen the decision of the 30th January 2011 and of the 3rd October 2013 to the effect that the proceedings are to be conducted in the English language;

Having examined all exhibited documents and the record of these proceedings;

Deliberates:

Anton Borg, testified by means of a sworn affidavit exhibited at page 32 - 36 of the record of the proceedings that the defendant starting working with the plaintiff company on the 15th of June 2009, after having worked for a cables manufacturing company in the United Kingdom for seven years. His job with the plaintiff company was to promote the company's products in the United Kingdom. A measure of flexibility was implemented regarding the conditions stipulated in the contract: i.e. the postponement of reduction of remuneration and the introduction of commission under clause 2 in order that the defendant's income would not decrease, or his employment terminated as per Clause 9 (which gave the plaintiff company the right to terminate defendant's employment should the project not succeed). The defendant's employment has some limited success, in that the plaintiff company managed to secure two agreements, one with Simon Collins to set up an operation in Tamworth and one with Curtis Holt, a company in Norwich, for the supply of products.

During the term of his employment, the defendant was in the United Kingdom for at least two weeks of every month, and he also attended Toolbank fairs in order to promote the project. This explains the substantial expenses incurred by plaintiff company, which can be seen in the prospectus of damages found at page 38. He also accompanied Toolbank when visiting clients; however Toolbank's feedback was rather negative in that since the company's products were of very low value compared to Toolbank's main range of products, and were not given much importance by clients.

Gareth Bolam approached plaintiff company through the defendant, who was a good friend of his, to become its agent for the East Anglia region. He made a number of promises which he never saw through, including making an order for three containers

of merchandise, for which he never even paid the deposit owed of GBP 20,000. Bolam set up his own company, "Eco Plastics" and an agreement was signed between the two companies on the 9th of April 2010.

Between April and June 2010 plaintiff company started receiving a number of complaints from UK Conduit about the quality of their products. Plaintiff company acknowledges that there were some initial problems, however the feedback received was somewhat conflicting. Indeed they would first be told that there were problems with the products and on the following day they would be praised for the products. Defendant simply relayed the messages without ever counter-arguing the comments. Dr. Anton Borg stated that at this stage he started suspecting the defendant, and he asked him why he had not defended plaintiff company's products. Dr. Borg reiterated that he had spoken to Malcolm, from UK Conduit, who praised the products considerably, however thereafter he had started saying that he was "losing faith" in the products.

There were other distributors that he and defendant, or the defendant alone, had been visiting and working to obtain orders that suddenly informed them, (through defendant), that they were no longer interested in their products.

Around June 2010 plaintiff company was about to enter into an agreement with Univolt UK, however this fell through because Univolt was looking for an exclusivity agreement without however, committing to any minimum quantity per annum. Notwithstanding, the fact that the warehouse at UK Conduit was already setup, enabling the plaintiff company carry on with the UK project, the defendant handed in his notice. Dr Anton Borg stated this confirmed his suspicions in defendant. One month into the notice period. Dr. Borg asked defendant if he would reconsider but he refused stating that he planned on spending six month at home doing nothing.

Dr. Borg stated that in the course of his employment, defendant was privy to certain confidential information, such as the company's client and suppliers list. Indeed no client was unknown to the defendant.

On Wedneday 27th October 2010, that is twenty days after defendant's termination, Dr. Borg received an sms from defendant who wanted to set up a meeting with him which would be beneficial to both of them. The following day, they met at a hotel near Cambridge. Dr. Borg's wife Karen Borg was present at this meeting. Defendant informed him that after he left plaintiff company he was working on the same line of products and had visited two suppliers in China with Bolam.

Defendant said he did not want to have further commercial relations with Bolam and that after they promised plaintiff company's supplier at least twelve containers of merchandise in the first year, he had quoted better prices than the prices obtaining in plaintiff 's company. Defendant also showed him samples that he had brought back with him, insisting that they were of better quality. When defendant showed him a sample of compartment trunking, Dr.Borg realised that this product was based on plaintiff company's drawings, previously developed with the Chinese supplier, but which, according to the same Chinese supplier had never been manufactured.

Defendant also asked for his job back. Dr.Borg that he had immediately refused this request as he had already employed someone else. Defendant insisted he had sufficient orders at hand to cover his salary for the first six months, which orders came from the same clients who had told the plaintiff company that they were not interested. Dr. Borg asked defendant if UK Conduit were involved, but defendant denied this, which statement was in fact untrue. Defendant kept insisting that he had done all this for the benefit of Dr.Borg.

After discussing the matter, with the Company's other director Joseph Borg, they met defendant again on Tuesday 2nd November 2010 in the outskirts of Birmingham and compared prices of trunking. It resulted that the prices the defendant quoted were around 10% lower than the company's. Dr. Borg stated that he offered defendant the post of an agent for the East Anglia region, working solely on commission but defendant refused as he wanted a fixed salary with no commission and also complained that it was unfair that they had made him an unacceptable proposal after comparing prices.

On the following day Dr. Borg stated that he had a meeting, with Terrence Jeffries, and David Martin of Univolt. Since David Martin was late, the director of the plaintiff company were shown to the boardroom, where they saw two business cards of Eco Plastics, one bearing defendant's name, described as holding the post of Sales Director and the other bearing Bolam's name. They left Univolt since Martin was running very late, with the intention of returning within an hour. In the mean time, Jeffries called Bolam to enquire about their products, and was told that they should contact defendant as he no longer worked for Eco Plastics. When Dr. Borg called Martin to reschedule the meeting, he asked him about the business cards and Martin informed him that he had been approached by the defendant who wanted to introduce him to Bolam, they had visited the office for this purpose, but that he had no intention of sourcing products from them.

Some clients also informed him that Malcolm was acting as a sales representative of the same products they were sourcing in the Northern part of the UK, and that there seemed to be no further issues as to quality that has previously been raised. Martin was also selling compartment trunking that defendant and Bolam has obtained from China.

As a result of defendant's disclosure of plaintiff's company confidential information Eco Plastics was operating on their market, visiting their clients and potential clients and supplying them with identical products, all this to plaintiff company's detriment. In the meantime, plaintiff company had to start a new operation, and had lost a lot of business through defendant's disclosure of information. Furthermore, when plaintiff company collected the stock from UK Conduit after defendant's termination of employment, they found a value of €6,434.58 missing, which loss they were attributing to defendant since the control of stock was his responsibility.

Under cross-examination, at page 66 – 75, with reference to what he stated in his affidavit regarding plaintiff company's products being given less importance at the Toolbank shows, Dr. Borg clarified that this was because their products were of a lesser value than Toolbank's, but that this did not mean that the products were of poor quality. He disagreed that UK Conduit had expressed concern about the quality of the products, saying that they had been trying to market their products in the UK for years

and that Malcolm Davies had seen their products and confirmed that they were of a high quality. However, after defendant introduced them to Bolam they started getting complaints from clients.

Regarding the Ecoplastic business card bearing defendant's name that he saw at Univolt, he denied that he had ever issued a business card for the defendant, as one of his employeers, or under another company's name and denied that he ever intended to set a joint venture with Bolam clarfying that plaintiff company's involvement with Bolam was going to be simply as a supplier and appointing him as agent for East Anglia. Defendant was to be involved in this business since he was plaintiff company's representantive in the United Kingdom.

Asked why plaintiff company was claiming defendant's wages back, he replied that this was because they had started their projects in the UK market relying on the employment of the defendant who had asserted his experience in this line of business for many years, having many contacts in the UK. His suddenly departure however left plaintiff company high and dry with no one else to replace him. Then he took a client of theirs to their supplier, three or four weeks after he left and they felt that their project had gone down the drain.

Questioned about the stock value of €6,434 that was found missing Dr. Borg stated that **he <u>believed</u> it was defendant's responsibility to ensure that no stock was missing,** that no stock take was ever done before it was transferred to Manchester and that the only document that could be relied upon for the purpose of stock comparison was the shipping document when the stock was transferred from Malta to Tamworth.

Julian Vassallo, testified by means of an affidavit exhibited at page 40 of the record of the proceedings that he occupies the post of Group Accountant, responsible for preparation of the accounts of JAB Investments Group of Companies, of which plaintiff company is a part. Defendant was employed with plaintiff company from the 15th of June 2009 until 8th October 2010, as a Sales Manager tasked with the developing plaintiff company's share of the UK market.

During his employment, defendant earned €9, 47.65 as a salary for 2009 and €13,458.20 as a salary for 2010. During the same period an additional €35,815.65 was incurred as expense by plaintiff company in an attempt to develop its market share in the UK, as shown in the prospectus drawn up by him in the document marked JV3 exhibited at page 43 *et seq*. At the end of defendant's employment, when plaintiff company took over its stock from UK Conduit at Tamworth warehouse to its own warehouse in Manchester a value of €6,434.58 was found missing from stocks as highlighted in the prospect exhibited as Dok JV4. The control and supervision of this stock was defendant's responsibility.

Terrence Jeffries testified by means of an affidavit exhibited at page 48 of the record of the proceedings that he has been involved with plaintiff company since October 2010, providing consultancy services and taking over the work that defendant should have been doing for plaintiff company. On Wednesday 3rd November 2010, together with Anton Borg, he had a meeting with David Martin of Univolt. Since Martin was going to be late they were invited to wait in the boardroom where they noticed that there were two visiting cards of Eco Plastics, one showing Gareth Bolam's name and the other defendant's name, the latter holding the post of Sales Director. He called Bolam without disclosing his name, to make a general inquiry for their products, telling him that he had gotten his name from the defendant and at that point Bolam stated that he should contact him and not defendant since the latter was not involved in Eco Plastics anymore.

As soon as he took over defendant's work he pointed out to Anton Borg that something was not right, since when he took over defendant's computer he found out that defendant’s work over the previous two year period had been removed and there was no information on the system. Moreover, whenever he spoke to any of his contacts, he realised that there had been a friendly relationship rather than a serious working relationship.

Paul Tihn testified by means of an affidavit filed in the acts of the proceedings at page 52 – 57 that he started working for plaintiff company on the 15th June 2009, with the first year consisting mostly of travelling to the United Kingdom trying to establish contacts, obtaining new business and promoting the product.

In 2009 he managed to successfully set up contact and operations with Simon Collins of CEW Electricals later known as UK Conduit based in Tamworth as an agent and distributor, with a final agreement being signed between Collins and Anton Borg in October 2009.

In the same year he also managed to achieve a new contact by the name of Curtis Holt Ltd known as Toolbank, something Borg was very pleased with since they have eleven branches spread across the United Kingdom and thus had great potential. They agreed to consider Norwich branch as a pilot project which could have proven to be a great achievement if successful. Consequently he was invited to present samples at a tool show held in Norwich and feedback from the customers was very positive. Subsequently an additional meeting was set up with Toolbank which agreed to go ahead with the project, subject to new packaging being designed which would be suitable for the DIY sector. He designed and repackaged the samples himself manually, and the new packaging was approved by both Anton Borg and Toolbank, leading to a final agreement being entered into between Borg and Toolbank for the purchase of a container. The bulk of the stock was produced by a company based in China, the name of which he did not know. The rest was produced by a Maltese company owned by Borg's brother of which Borg was also a partner.

When the stock arrived from China, he pointed out to Borg that there were some differences in colouring compares to the Maltese samples, to which Borg simply responsed that they looked closed enough and that he did not see an issue, so they carried on loading two containers. The first full container was delivered to UK Conduit and the second to Toolbank, but with half of this latter container containing stock belonging to UK Conduit due to cost cutting. Toolbank Norwich agreed to this and agreed to store the stock in a relatively safe location for a maximum period of three days whilst awaiting collection from UK Conduit.

Shortly after consignment of stock to Collins, he was contacted and informed of various complaints about the quality of the stock, in particular discrepancies in colour, which he denied knowledge of out of loyalty towards plaintiff company. He reported back to Borg who refused to listen and act upon these complaints. However Malcolm

Davis contacted him confirming their concerns after having receiving complaints from customers, prompting him and Borg to visit their offices in Tamworth where Borg was informed that they were no longer going to proceed further with the project and an arrangement for the collection of stock was put in place.

Since Borg was delaying picking up the stock, there were further complaints from Collins and Davis. Borg only arranged collection for delivery to Manchester when he had left, after Collins threatened that he would be placing the stock outside. He had informed Borg that Collins had told him he would be moving the stock into a portable container outside his warehouse, but stock was eventually collected sometime around late October 2010.

He attended a second tool show of Toolbank in Norwich with a set of new samples and took orders from Toolbank's clients at an approximate order value of GBP 7,000. During the following months he started receiving complaints from Toolbank's customers, via Toolbank, regarding the poor quality of the products, prompting Toolbank to ask Borg to enforce their verbal agreement that he would take the stock back if it was not selling. Borg denied this agreement and ignored their contacts thereafter, causing Toolbank to sever all commercial contact with Borg.

In the meantime contact was being made with other distributors across the United Kingdom and Ireland. Initially, feedback from these potential clients, including QVS Crawley, Electric Centre, N.E.W. Ireland and Edmundson's Electrical, however after several follow up meetings, these all declined further proceedings because they deemed that the plaintiff company was not price competitive and that they could source the product themselves directly or from other competitors via United Kingdom, at a better price for the UK market.

He also put plaintiff company in contact with a good friend of his, Gareth Bolam and his then business partner David Zachary to discuss potential business for the plaintiff company as a distributor/agent from the East Anglia region electrical sector. This meeting was successful and proceeded to the ordering of three containers upon a deposit of GBP 20,000. Borg told him that such a transfer was never made and that therefore the deal did not go through, however Bolam told him that he did indeed

make the transfer. Since he was never involved in the financial side of the business he had no way of ascertaining what the truth was.

He was later contacted by a representative of Univolt in Malta as requested by Borg which led him to manage to make contact with David Martin, General Manager of Univolt UK, which in turn led him to secure a meeting in Vienna with the Managing Director for Europe. There was an exchange of draft agreements whereby Borg refused to grant Univolt exclusivity because Univolt would not commit to a minimum quantity of order of stock. Borg informed him that had they been given a minimum order of twenty containers he would have dropped the UK Conduit project in order to support Univolt. However, due to this disagreement, Univolt refused to take the project with plaintiff company further.

He handed in his notice to plaintiff company after a long line of failures due to poor quality products, pricing issues and disagreements. He left behind his laptop containing all the data he gathered and obtained during his employment, including the client database. He was asked to travel to the UK to try to salvage the situation with UK Conduit and Toolbank in September 2010, however these meetings turned out to be fruitless because Borg would not listen to his advice about the quality of the products. Upon his return to Malta he handed in a final report of all clients he visited during the term of his employment. Borg offered him to stay in employment however he declined, feeling that plaintiff company had no future due to Borg's choices.

Since Bolam was a good friend of his he told him he had resigned, telling him that he could not agree on the quality of the products being sold when they could have found materials at a cheaper rate. These materials were chosen by Borg alone when he went to China, with Borg never asking him to accompany him even though he was responsible for sales and had expertise in this area. Weeks later Bolam asked him whether he would consider entering into a new joint venture with him that he wanted to set up in the United Kingdom. He accepted after examining his contract and finding that it only prohibited him from taking up employment in Malta.

During his notice period, he was entitled to three weeks vacation leave during which he went to China with Bolam to search for a potential manufacturer to

produce a better quality product than Borg's. Bolam identified a manufacturer whom he felt could meet his demands, including good quality products and competitive pricing. They were not aware that this manufacturer was also the one used by plaintiff company.

This joint venture with Bolam never happened, because Bolam never contacted him again. Therefore he went back to Borg to try get his job back, who told him that he first had to discuss it with his brother, since they had already employed someone else. **He admitted that he had business card of Ecoplastics**, explaining however that Borg had agreed to have these printed when he was consider a business venture with Bolam. **Bolam told him they would be using them when their venture commenced**, however it never did. During his meeting with Borg he showed him the product range that he and Bolam had brought back from China to distribute in the UK market, whereby Jeffries praised the products and Borg agreed that these products were of better quality and 10% cheaper. Borg offered him his job back, but solely on a commission basis, however he decline this offer.

He stated that the products in question fall under a specific sector and therefore the market is limited to only a few potential clients. Being so relatively small, these clients are all aware of each other. He denied disclosing who plaintiff company's clients were to Bolam, insisting that he got to know of them himself due to the small size of the market. He also emphasised that he was never employed with Bolam, as the so called venture lasted only three weeks during their trip to China, and that after terminating employment with plaintiff company he went on to take a position with Allied Consultants in Malta.

Under cross-examination at page 84 – 101, he denied that whilst in the UK, he was responsible for overseeing the stock which was left over there, since his job was that of finding clients and it was Borg who had the stock put in place. He also denied being the person overseeing the stock shipment documentation, saying that this was done via Borg's office. He agreed that he was present when the stock was bring transferred from Malta's side and could see what was being shipped and explained that if everything appeared correct on the Maltese side he handed in the documents to accounts, although this latter part solely related to the shipments coming in from

China. He check that the stock was being shipped correctly based on a print out of the order given to him by Borg.

Asked what happened about the concern he voiced with Borg that there colour discrepancies in the products, he answered that as far as he knows nothing was done because Borg denied this discrepancies and the container left with the stock of different colours. He explained that the complaints raised by Davies and Collin were raised during verbal conversations and there was nothing on paper. He denied being told by Borg that he has told them that he had informed the supplier and was waiting for an answer. He also denied knowledge that eventually all stock was sold by plaintiff company. Asked whether he knew that Collins had a pending debt with Borg, he denied knowledge stating that he was not involved in the financial side of the business.

He agreed that he had shown QVS etc the same samples, but explained that their issues were not with the colour, but with the price.. He said that he was not aware that these companies stopped communicating with plaintiff company after he left, saying "*Well, very strange, however I was the point of contact, not Anton...the business, my phone was turned off...Anton that has to find his details.*" He denied ever making contact with this companies after he left defendant company.

Asked about the meeting with the Chinese supplier, he once again stated that he was not aware that this was plaintiff company's supplier. He agreed that he knew that Bolam intended to set up a joint venture. Asked about how he did not know who the Chinese supplier was when he would have seen the labels on the boxes, he said that first of all he didn't remember, and secondly he could not read Chinese. He said that while in China with Bolam they visited six different suppliers but Bolam said that this particular one used by plaintiff company was the best one around. He maintained that it was just a coincidence that out of a thousand suppliers they went to the same supplier as plaintiff company, because he was not the one who set up the meetings with suppliers. He agreed that he acted as a consultant for Bolam on products during his notice period, even know he knew that his intention was that of a setting up a business that would be in competition with plaintiff company.

He also agreed that he visited David Martin in connection with this business venture with Bolam, agreeing also that he left a business card on the table. He said however that Martin had rejected doing business with plaintiff in June.

He said he was aware that Borg was developed a product to be manufactured by the Chinese supplier who happened to be the same one he visited, but he could not guarantee that the product he shown Borg was the same one he had developed as the supplier had a range of various products.

Deliberates;

The Court finds itself faced with two conflicting versions of the case, as is after all normal in contentious proceedings. It has been consistently stated in our jurisprudence that since the court is to expect to be presented with diametrically opposite versions of the case by the parties, that this cannot reduce the Court to a state of undecision but that:

> *"mhux kwalunkwe' tip ta' konflitt (fil-verzjonijiet moghtija tal-partijiet) ghandu jhalli lill-Qorti f'dak l-istat ta' perplessita' li minhabba fih ma tkunx tista' tiddeciedi b'kuxjenza kwieta u jkollha taqa' fuq ir-regola ta' l-in dubio pro reo. Il-konflitt fil-provi, sakemm il-bniedem jibqa' soggett ghall-izbalji tal-percezzjonijiet tieghu u ghall-passjoni, huma haga li l-Qrati jridu jkunu dejjem lesti ghaliha .... Meta l-kaz ikun hekk, il-Qorti m'ghandhiex taqa' comb fuq l-iskappatoja tad-dubju, imma ghandha tezamina bl-akbar reqqa jekk xi wahda miz-zewg verzjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita' u specjalment dwar il-konsistenza u verosomiljanza, ghandhiex teskludi lill-ohra, anke' fuq il-bilanc tal-probabilita' u tal-preponderanza tal-provi, ghax dawn, f'kawza civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant (...) anzi', f'kazijiet bhal dawn, aktar ma jkun il-konflitt bejn*

> *verzjoni u ohra, aktar tidher il-possibilita' tal-qerq da parti ta' xi wiehed mill-kontendenti."*[1]

Furthermore, the Court of Appeal in its judgement on the names of **Joseph Borg vs Joseph Bartolo** decided on the 25th of June 1980, observed that:

> "*fi kwistjoni ta' kredibilita' u apprezzament ta' provi l-kriterju ma huwiex jekk il-gudikant assolutament jemminx l-ispjegazzjoni imma jekk l-ispjegazzjoni hix possibbli u minn awl id-dinja fic-cirkostanzi zvarjati tal-hajja*."

On a similar note, it has been held that:

> *Fil-kamp civili ghal dak li hu apprezzament tal-provi, il-kritrju ma huwiex dak jekk il-gudikant assolutament jemminx l-ispjegazzjonijet forniti lilu, imma jekk dawn listess spjegazzjonijiet humiex, fic-cirkostanzi zvarjati tal-hajja, verosimili. Dan fuq il-bilanc tal-probabilitajiet, sostrat baziku ta' azzjoni civili, in kwantu huma dawn, flimkien mal-proponderanza tal-provi, generalment bastanti ghallkonvinciment. Ghax kif inhu pacifikament akkolt, iccertezza morali hi ndotta mill-preponderanza talprobabilitajiet. Dan ghad-differenza ta' dak li japplika fil-kamp kriminali fejn il-htija trid tirrizulta minghajr ma thalli dubju ragjonevoli.*[2]

A perusal of our court's jurisprudence shows that in cases of conflicting evidence, the court must be guided by two principles when evaluating the evidence that would have been produced before it, that is:

> *1. Li taghraf tislet minn dawn il-provi korroborazzjoni li tista' tikkonforta xi wahda miz-zewg verzjonijiet bhala li tkun aktar kredibbli u attendibbli minn ohra; u*

1 **Carmelo Farrugia vs Rokko Farrugia**, First Hall of the Civil Court decided 24th November 1966.
2 **George Bugeja vs Joseph Meilak**, First Hall of the Civil Court decided 30th October 2003.

> **2.** *Fin-nuqqas, li tigi applikata l-massima actore non probante reus absolvitur.*[3]

As regards corroboration in a situation of conflicting evidence, it has been held by this Court in its judgement **Emanuele u Rose konjugi Aquilina vs Lorraine u Frank konjugi Farrugia**, decided on the 28th of June 2001, that:

> "*Illi fil-fatt huwa wkoll principju assodat fil-gurisprudenza taghna li l-verosimiljanza hija forma ta' korroborazzjoni...*"

Deliberates;

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

Article 3 (b) reads as follows:

> *The employee undertakes to uphold confidentiality* ***of all affairs of the employer****, its brands, its suppliers and its clients both during the term of employment* ***as well as thereafter****.* [emphasis made by this Court]

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

3 **Maria Xuereb et vs Clement Gauci et**, Court of Appeal (Inferior Jurisdiction) 24th of March 2004.

The Court also considers it unlikely that from all the manufacturers in China, defendant and Bolam just so happened to conveniently choose plaintiff company's supplier. It is also relevant in this respect that in his affidavit, defendant also stated that he went to China with Bolam **specifically** to search for a manufacturer who would produce better quality products than plaintiff company's, thereby betraying a certain sense of competitive connection which defendant harboured against plaintiff company when he resigned. The defendant stated that he and Bolam went to China to try to source better quality products than those sold by plaintiff company, which further corroborates the idea that he had divulged to Bolam information about the quality of the products sold by plaintiff company.

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

The Court fully agrees with plaintiff company's erudite submissions regarding the duty of fidelty that permeates the relationship between employer and employee, especially when the employee holds the position of trust expected in a managerial post, as was the case with defendant.

The Court observes that the fact that defendant was working his notice period when he went to China with Bolam, did not signify that he was no longer in the employ of plaintiff company. Until the very last day of his notice period, defendant remained an employee of the company, thereby bound by all the duties that such employment entailed, including the duty of fidelty. Defendant was in particular still bound by another article of the contract of employment, cited in plaintiff company's note of submissions, that is Article 3 (f) of document A, which provides that :

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

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

Deliberates;

The Court makes reference to the authorative contribution – i.e *Law of Employment* (16th Edition 2011 – Oxford University Press) in which Norman Selywn deals with the matter in hand in the chapter entitled Duties of Ex-Employees, wherein he opines in respect of "E*xisting customers and connections*":

> 19.32 **An employer is entitled to have a <u>limited protection</u> against an ex-employee dealing with existing customers for this is part of the goodwill which has been built up over the years**. A covenant can restrict the right to solicit or endeavour to entice away former customers, or to have post-employment dealing such customers, but it is likely that such clauses should **be limited to customers with whom the ex-employee had some dealings for otherwise the restraint is likely to be regarded as to be designed to prevent competition (Marley Tile Co Ltd vs Johnson – 1982 IRLR 75, CA)** ...
>
> In GW Plowman & Sons Ltd vs Ash (1964 – 2 All ER 10 - 1964 1WLR 568 - 108 Sol Jo 216, CA) the defendant was employed as a sales representative. **He covenanted not to canvass or solicit orders from any person who was a customer of the firm <u>for a period of two years after leaving his employment</u>. It was held that the restraint was valid**, even though it extended to customers whom the employee did not know or with whom he had no contact during his employment.

A study of the laws of various European States shows that so called '**contact prohibition clauses**' or '**clauses in restraint of trade**' referred to in the jurisprudence of the Maltese Courts, will only be valid if they are limited in scope and, or duration, in order to limit their anti-competitive effect.[4]

With regards to the law in the United Kingdom, it was opined in **Anson's Law of Contract** (23rd Edition pg. 333) that "***partial restraint if reasonable and not contrary to the public interest***" is acceptable. In fact, the House of Lords held in **Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd.,** decided in 1984 that:

> *"1. **All restraints of trade, in the absence of special justifying circumstances, are contrary to public policy and therefore void**;*
> *2. It is a question of law for the decision of the Court whether the special circumstances adduced do or do not justify the restraint; and if a restraint is not justified, the Court will, if necessary, take the point, since it relates to a matter of public policy, and the Court does not enforce agreements which are contrary to public policy;*
> *3. **A restraint can only be justified if it is reasonable (a) in the interests of the contracting parties, and (b) in the interests of the public**;*
> *4. The onus of showing that a restraint is reasonable between the parties rests upon the person alleging that it is so, that is to say, upon the covenantee. The onus of showing that, notwithstanding that a covenant is reasonable between the parties, it is nevertheless injurious to the public interest and therefore void, rests upon the party alleging it to be so, that is to say, usually upon the covenantor. But once the agreement is before the Court it is open to scrutiny in all its surrounding circumstances as a question of law."*

4 Mayer Brown, A Global Guide to Restrictive Covenant'

A more recent decision of the England and Wales High Court (Chancery Division) struck down a far reaching **no-contact clause**, finding that its far reaching, unlimited scope constituted an unlawful restriction of competition, attracting the application of Article 101 TFEU thus rendering it automatically void.[5]

Even in countries outside of the European Union, such as the United States and Canada, **non-solicitation clauses** are considered to be valid only under certain circumstances; in the case of Canada for instance, a non-solitication clause is enforceable **only if it is limited in time frame, business scope, and geographic scope**.[6]

The Maltese courts have also had occasion to consider the issue of **contact prohibition clauses/restriction of trade clauses** and held that such a clause "*ma jaghtix garanziji tajba favur kompetizzjoni hielsa, kif imwettqa fil-ligijiet vigenti fil-pajjiz.*"[7] In yet another case, the court first examined the nature of the clause, before giving effect to it, holding that the clause was enforceable because it was reasonable, limited in scope and solely intended to render the agreement viable, since the relevant clause was limited in duration to one year after the termination of employment.[8] In an earlier judgement, it was held that non-contact clauses are "in restraint of trade" and their anti-competitive effects are to be examined:

> "*Tali klawsoli, notorji ahjar bhala pattijiet "in restraint of trade", gew estensivament debattuti fid-duttrina Ingliza, fejn, bejn wiehed u iehor giet espressa l-fehma li trid issir distinzjoni bejn dawk il-klawsoli li jkollhom l-iskop li jipprevjenu lill-obbligat milli jikkompeti ma' dak li a favur tieghu tkun saret il-klawsola, u dawk il-**klawsoli li jillimitaw il-kompetizzjoni ta' terzi billi jipprevjenu lill-obbligat milli jinnegozja maghhom.***

5 **Robert Andrew Jones vs Ricoh UK Limited**, England and Wales High Court (Chancery Division) [2010] EWHC 1743 (Ch) decided on 14 July 2010.

6 Jason Hanson, and Sandra Cohen Osler, Restrictive covenants in employment contracts: Canadia Approach in Labour and Employee Benefits Volume I, Association of Corporate Counsel (2011/12).

7 **Alberta Fire & Security Limited vs Mark Mifsud**, First Hall of the Civil Court decided on the 7th of January 2014.

8 **Simonds Farsons Ciks p.l.c. vs Christopher Caruana et**, First Hall of the Civil Court decided 28th November 2013.

> ***Dan l-ahhar tip ta' klawsoli ghandu jigi dikjarat bhala "in restraint of trade". Wiehed allura jrid ihares lejn l-effett anti-kompetittiv tal-klawsola in kwistjoni***".[9]

In an earlier judgement, it was held that clauses in restraint of trade may, in deserving cases, be impugned under Article 985 of the Civil Code as being contrary to public policy, finding however that the impugned clause was infact valid because it was limited in scope:

> "*there is no specific provision of codified law in Malta about clauses in restraint of trade as such, and jurisprudence or judicial precedent is not apparently abundant, but it may safely be asserted that if clauses in restraint of trade may be impugned at all - and they certainly can in deserving cases - the heading under which an exercise of this sort may be attempted is Section 1028* [now Article 985] *of the Civil Code which provides that things which are impossible, or prohibited by law, or contrary to morality, or to public policy, may not be the subject matter of a contract.* (...)
>
> *In this case having regard to the particular circumstances of time and place emerging from the evidence, the Court cannot find the clause in question unreasonable, since the restraint applies only to a small island which is not the defendent's normal home and domicile or even less the country of his nationality, and* ***it applies only to reasonably limited period of time***."[10]

In its judgement in the names of **Attilio Vassallo Cesareo et vs Anthony Cilia Pisani** decided on the 31st of January 2003, this Court struck down a similar clause after careful consideration of Maltese and European doctrine and jurisprudence on the

9 **Carmelo Attard vs Carmela Frendo et**, First Hall of the Civil Court decided on the 31st of January 2003.

10 **Joseph Xerri noe vs Brian Clarke**, Commercial Court decided on the 31st of July 1969.

subject matter, holding that the restraint of trade clause was not justified under the reasonableness test.

The Court observes that the restraint of trade clause under examination in the cited judgement was actually less onerous than the one before this Court, since it was restricted to a time period of five years following termination, whereas the non contact clause being currently examined was unlimited in duration.

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

It is this Court's considered opinion therefore, that clause 3 (i) of employment contract Document A , in so far as it relates to the period following defendants's term of employment raises a matter of public policy due to its anti-competitive effects. As such, the validity of the clause may be scrutinised by this Court, notwithstanding the absence of a contestation as to its validity by the defendant, since according to the consistent jurisprudence of the Maltese Courts, issues relating to public order may be raised by the court *ex officio*.[11] In fact, in **Kevin Chircop vs Joseph Chircop** decided on the 28th of January 2004, this Court held that:

> *"...kwestjoni ta' ordni pubbliku li* ***l-gudikant hu <u>obbligat</u> li jirrileva ex officio****. Dan in omagg ghall-principju,* ***superjuri anke ghall-interess privat tal-partijiet****, illi l-gustizzja mhux semplicement tigi amministrata izda anke li din tkun qed tigi amministrata sew u skond il-ligi.*

The Court considers that since the part of clause 3(i) pertaining to the period following defendant's termination of employment, affects not only the present parties,

11 See for instance **Adam Galea et vs Tarcisio Calleja pro et noe**, Court of Appeal decided on the 25th of May 2001.

but also other players on the market who are not a party to it, in particular consumers who are those most vulnerable to anti-competitive practices, the matter is serious enough to warrant that it be raised *ex officio* by the Court.

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

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

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

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

It is clear that clause 3 (i) is meant to limit competition between the parties to this case for clients and suppliers. Such restrictions may be necessary, however they must be limited in scope and duration in order to be valid, as can be seen from the above-

quoted jurisprudence. The Court finds that clause 3 (i), in so far as it relates to the period following defendant's termination of employment, is unreasonable due to its lack of temporal and geographical limitation. This constitutes an unreasonable and unjustified restriction of competition, which is in flagrant violation of Maltese public policy that endeavours to promote free and fair competition for the benefit of the economy and of consumers.

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

The Court shall examine whether the defendant breached clause 3 (i) during his period of employment, as this part of the clause is still valid and therefore enforceable.

It has not been contested by defendant that during his period of employment he went to Univolt's office with Bolam, trying to secure their business for a joint venture which he and Bolam were planning. Defendant argues that he cannot be held in breach of his contractual obligations for visiting Univolt because the agreement between plaintiff company and Univolt had fallen through. However, in **GW Plowman & Sons Ltd vs Ash** (1964 – 2 All ER 10 - 1964 1WLR 568 - 108 Sol Jo 216, CA), wherein it was argued that the anti-compete clause was invalid also because it could apply to those customers that had ceased doing business with the firm, the Court of Appeal had rejected this argument, holding that an employer is entitled not to abandon hope that such customers would return to the business once again.[12]

In the present case in fact, plaintiff company was still endeavouring to secure Univolt's business when defendant visited their office with Bolam, when still in employment with plaintiff company. On his part, defendant went completely against plaintiff company's interests when he sought to solicit Univolt's business, at a time when he was still in employment with plaintiff company, which was still trying to secure Univolt's business, following the original unsuccessful business deal. This is a

12 Cited in Norman Selywn, *Law of Employment* (16th Edition 2011 – Oxford University Press).

clear breach of the duty voluntarily undertaken by defendant to refrain from soliciting with a (potential) client of plaintiff company during his term of employment.

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

Deliberates;

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

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

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

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

Plaintiff company is seeking to be reimbursed with the wages it paid to the defendant. The Court considers that this plea is unfounded, as this eventuality does not result from the contract of employment entered into between the parties. On the contrary, the contract of employment stipulates that defendant would be obliged to refund his wages should he breach the non-compete clause found in clause 9. The question of

reimbursement of wages is not mentioned anywhere else in the contract, so it does not appear to have been the intention of the parties that defendant refund his wages to plaintiff company in the event of **any** breach of the employment contract. Therefore, the court cannot holds the plaintiff company's request for the reimbursement of the wages it paid defendant during his term of employment, is untenable.

The plaintiff company is also seeking damages from defendant with regards to the value of stock that went missing. The Court has examined the defendant's contract of employment, and has noted that his duties as per contract do not include responsibility for overseeing stock left in clients' warehouses. The Court considers also that plaintiff company produced no evidence in order to support its claim that this stock in fact went missing. Indeed no stock taking had been effected, no police report was lodged and no insurance claim was made. None of these documents were exhibited in these proceedings. In fact, whereas Borg testified under cross-examination that the final stock take could be compared with the shipping documents in order to ascertain the amount of stock that went missing, no documents were produced before this Court to enable it to determine the veracity of plaintiff company's claims. Since this Court may only make determinations based on the evidence brought before it, the Court is precluded from finding defendant liable for the value of stock that allegedly went missing while defendant was in employment with plaintiff company.

Plaintiff company is also seeking the reimbursement of all expenses paid for defendant's numerous trips abroad during his term of employment. The Court considered that it would be unjust to order defendant to reimburse all these expenses, considering that defendant did in fact procure business contacts for plaintiff company, some of whom entered into business agreements with plaintiff company. As has been held above, the contract of employment did not stipulated a minimum amount of clients that defendant was obliged to procure for plaintiff company, and furthermore plaintiff company did not successfully prove that these clients turned away from plaintiff company because of defendant's actions.

The Court does however consider that an amount of damages is due to plaintiff company by defendant because of the breaches of contractual obligations committed by him. Faced with damages that are inherently difficult in nature to prove, as in this

case, the Court determines *arbitrio boni viri* that the amount of damages due to plaintiff company by defendant is ten thousand Euros (€10,000).

For these reasons, the Court, while striking down the part of Article 3(1) of the Contract of Employment Document A in so far as it relates to the indefinite period and geographical scope subsequent to the defendant's termination of employment, rejects defendant's pleas and:

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

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

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

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

All expenses shall be borne by defendant.

Read.

Judge Jacqueline Padovani Grima LL.D. LL.M. (IMLI)

Lorraine Dalli
Deputy Registrar