



QORTI CIVILI PRIM`AWLA

**ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON**

Illum il-Hamis 28 ta` Settembru 2017

**Kawza Nru.
Rik. Gur. Nru. 1246/07 JZM**

**M.A.I.N. Services Limited (C 17373)
prezentement fil-process ta`
amalgamazjoni ma` Mekanika
Limited (C 3238)**

u

**b`digriet tas-16 ta` Dicembru 2009
Mekanika Limited assumiet l-atti.**

kontra

**Albert Galea [numru tal-karta
tal-identita` 340153(M)] f` ismu
propju u wkoll ezercenti l-kummerc
taht l-isem AG Industrial Solutions**

Il-Qorti :

I. Preliminari

Rat ir-rikors guramentat ipprezentat fit-28 ta` Novembru 2007 li jaqra hekk :-

GENERALI

1. *Is-socjeta` rikorrenti hija socjeta` li n-negozju principali taghha huwa l-bejgh ta` makkinarju u l-provediment ta` servizzi relatati ma` tali prodotti.*

2. *Matul iz-zmien is-socjeta` rikorrenti kellha, u ghad ghandha, bosta fornituri li whud minnhom jipprovidu l-prodotti taghhom sabiex jinbieghu mis-socjeta` rikorrenti fit-territorju Malti b`mod esklussiv.*

3. *Wiehed minn dawn il-fornituri kienet is-socjeta` estera CompAir UK Limited ("CompAir") li maghha s-socjeta` rikorrenti kellha relazzjoni kummercjali fuq medda ta` kwazi tnax-il sena. Din is-socjeta` estera kienet tipprovidi l-prodotti taghha lis-socjeta` rikorrenti u dan fuq bazi ta` esklussivita` fit-territorju Malti. Ir-relazzjoni ma` CompAir kienet tmur aktar lura fiz-zmien meta din is-socjeta` kienet sa mis-snin sebgħin tinnegozja ma` socjetajiet ohra fil-Grupp ta` socjetajiet Gasan u partikolarment ma` Mekanika Limited.*

L-INTIMAT U L-KARIGI TIEGHU FI HDAN IS-SOCJETA` RIKORRENTI

4. *L-intimat kien ilu impjegat fil-Grupp tas-socjetajiet ta` Gasan sa mit-13 ta` Mejju 1982 (vide kuntratt ta` impjieg hawn anness u mmarkat Dokument "MS1A"). F`dik id-data l-intimat kien gie impjegat bhala "sales executive" tas-socjeta` Mekanika Limited (socjeta` ohra fi hdan il-Gasan Group) u l-kuntratt ta` impjieg kien gie rivedut fl-4 ta` Frar 1986 (vide kuntratt ta` impjieg hawn anness u mmarkat Dokument "MS1B").*

5. *Is-socjeta` rikorrenti M.A.I.N. Services Limited giet ikkreata fit-28 ta` Dicembru 1994. L-intimat kien wiehed mill-ewwel erba` diretturi tas-socjeta` rikorrenti (vide l-ewwel statut tas-socjeta` rikorrenti mmarkat u anness ma` dan ir-rikors bhala Dokument "MS2") u kien ukoll jokkupa l-kariga ta` General Manager f`din is-socjeta`.*

6. *Is-socjeta` rikorrenti kienet tafda l-gestjoni tan-negozju taghha fidejn l-intimat li fil-kapacita` tieghu ta` direttur kellu obbligu fiducjarji lejn l-istess kumpannija.*

7. *Matul dan iz-zmien li l-intimat kien kemm General Manager u kif ukoll direttur tas-socjeta` rikorrenti huwa kien prattikament jiggstixxi n-negozju tas-socjeta` rikorrenti wahdu, kien jinneozja mal-fornituri wahdu u kien ghalhekk ukoll stabbilixxa relazzjoni kemm ma` dawn il-fornituri, mal-impjegati l-oħra u wkoll mal-konsumaturi finali. Kien fdat.*

8. *Wiehed minn dawn il-fornituri kienet propju s-socjeta` CompAir.*

TMIEM TAL-IMPJIEG U L-KARIGA TA` DIRETTUR TAL-INTIMAT

9. *Kien fl-20 ta` Novembru 2006 li l-intimat informa lis-socjeta` rikorrenti li huwa kien se jirrezenja mill-kariga tieghu. Huwa hadem il-perjodu kollu tan-“notice” u l-aħhar gurnata tieghu bhala General Manager kienet it-23 ta` Jannar 2007. Huwa rrirenja minn direttur b`effett mill-1 ta` Dicembru 2006 (vide Dokument “MS3” hawn anness).*

10. *Wara li rapprezentanti tas-socjeta` rikorrenti kellmu lill-istess intimat, is-socjeta` rikorrenti fehmet ir-raguni ghal tali rizenja, wara kariga importanti li thaddnet mill-intimat ghal numru twil ta` snin (fl-aħhar tal-karriera ta` xoghol tieghu l-intimat kellu 53 sena), kienet ghal ragunijiet personali.*

11. *Is-socjeta` rikorrenti apprezzat din ir-raguni ghalkemm b`certa diffikulta` u dan minhabba fir-relazzjoni tajba li kellha mal-intimat u r-rwol essenzjali li kien assumat l-istess intimat fi hdan is-socjeta` rikorrenti matul iz-zmien.*

12. *Mat-tmiem tal-impjeg u tal-kariga ta` direttur, ir-rikorrenti accertat ruhha li wara tant snin ta` servizz, it-tmiem ta` din ir-relazzjoni tkun wahda fuq nota tajba, u ghalkemm mhux obbligata li hekk taghmel, bieghet lill-intimat il-vettura tal-kumpannija bi prezz ridott hafna u dan biss di buona volonta` u bhala apprezzament tax-xoghol li l-intimat kien wettaq matul iz-zmien.*

IT-TMIEM TAR-RELAZZJONI MA` COMPAIR

13. Gara illi fit-2 ta` Frar 2007, is-socjeta` rikorrenti rceviet notifika minghand is-socjeta` CompAir li din kienet se tittermina l-kuntratt u r-relazzjoni kummercjali taghha mas-socjeta` rikorrenti – relazzjoni li kienet ilha ghaddejja ghal bosta snin (vide Dokument “MS4” anness).

14. Is-socjeta` rikorrenti nhasdet b`din in-notifika u sabiex tivverifika x`kienet ir-raguni wara din it-terminazzjoni giet skambjata xi korrispondenza ma` CompAir stante li fil-fehma tas-socjeta` rikorrenti ma kien hemm ebda raguni valida illi tali kuntratt jigi terminat (vide Dokument “MS5” u “MS6” annessi). Il-gustifikazzjoni li ppruvat taghti s-socjeta` CompAir kienet dik li fl-ahhar sena il-bejgh tal-prodotti kien naqas. Is-socjeta` rikorrenti diversi drabi wriet li dan ma kienx minnu u li r-rizultati tal-bejgh kienu juru mod iehor. Madankollu, u ghal raguni li dak iz-zmien is-socjeta` rikorrenti kienet ghadha mhix cara, il-pozizzjoni tas-socjeta` CompAir baqghet mhix mibdula.

IN-NESS BEJN IT-TERMINAZZJONI TAL-IMPJIEG U L-KARIGA TAL-INTIMAT U T-TERMINAZZJONI TAR-RELAZZJONI KUMMERCJALI MAS-SOCJETA` INTIMATA

15. Ftit zmien wara li l-intimat halla l-impjieg tieghu u rrizenja mill-kariga ta` direttur, irrizulta li l-intimat beda jahdem ghal rasu taht l-isem tad-ditta AG Industrial Solutions b`negozju ugwali ghal dak tas-socjeta` rikorrenti.

16. Irrizulta wkoll lis-socjeta` rikorrenti li, kljent partikolari u regolari taghha kien innegozja ma` AG Industrial Solutions – id-ditta ta` Albert Galea – ghall-akkwist ta` spare parts tal-prodotti CompAir. Is-socjeta` rikorrenti ghandha raguni tissuspetta li n-negozjati u l-ftehim dwar dawn l-ispare parts saru meta l-intimat kien ghadu direttur u impjegat tas-socjeta` rikorrenti, jew almenu ffit granet biss wara li tali kariga u impjieg gew terminati.

17. Is-socjeta` rikorrenti bdiet serjament tissuspetta li r-raguni moghtija mill-intimat ghat-terminazzjoni tal-impjieg u tal-kariga ta` direttur

ma kinitx minnha u li r-raguni vera kienet wahda ohra li kellha x`taqsam mill-qrib mat-terminazzjoni tar-relazzjoni kummercjali ma` CompAir.

18. Ir-raguni vera ta` wara din it-terminazzjoni tal-kariga tal-intimat malajr irrizultat cara f`ghajnejn is-socjeta` rikorrenti u dan meta fl-1 ta` Meju 2007 is-socjeta` CompAir baghtet tinforma lis-socjeta` rikorrenti li r-raprezentant taghha f`Malta se jkun Albert Galea, tramite din id-ditta tieghu (vide Dokument anness u mmarkat "MS7").

19. Is-suspetti tas-socjeta` rikorrenti b`hekk gew ikkonfermati.

20. Ghal din l-ittra s-socjeta` rikorrenti rreagixxiet b`ittra ohra (vide Dokument "MS8" anness). Kien issa evidenti ghas-socjeta` rikorrenti li ma kien gara xejn hlief li l-intimat sfrutta, u uza ghall-ghanijiet personali tieghu, il-fiducja li kienet poggiet fih is-socjeta` rikorrenti tul iz-zmien. Mhux biss waqt l-impjeg u l-kariga ta` direttur li kien jokkupa – izda anke wara – l-intimat inqeda b`dak li kien propjeta` u/jew taghrif tas-socjeta` rikorrenti ghall-ghanijiet u beneficji personali tieghu bi ksur tal-obbligi fiducjarji tieghu.

21. Minhabba f`dan l-agir is-socjeta` rikorrenti sofriet, u ghadha qed issofri, danni. In oltre, b`rizultat tal-istess agir, l-intimat qieghed ukoll igawdi minn propjeta` u/jew taghrif fil-kapacita` tieghu ta` fiducjarju tas-socjeta` rikorrenti u dan bi ksur tal-obligi fiducjarji tieghu fil-konfront tal-istess socjeta` rikorrenti.

22. Ghalkemm l-intimat gie debitament interpellat sabiex jersaq ghal-likwidazzjoni u hlas ta` dawn id-danni huwa baqa` inadempjenti (vide Dokumenti "MS9" u MS10" annessi).

Ghaldaqstant, jghid ghalhekk l-intimat ghaliex din l-Onorabbli Qorti m`ghandhiex:

1. Tiddikjara li l-intimat kiser l-obbligi fiducjarji tieghu.

2. *Tiddikjara ulterjorment li s-socjeta` rikorrenti sofriet danni minhabba fl-agir tal-intimat kif fuq deskritt u kif se jigi ppruvat ahjar fit-trattazzjoni tal-kawza.*

3. *Tiddikjara lill-intimat responsabbli ghall-hlas tad-danni u wkoll responsabbli li jrodd lura kull propjeta` flimkien mal-beneficji l-ohra kollha miksuba minnu, u li jista` jikseb fil-futur, sew direttament u wkoll indirettament.*

4. *Tillikwida l-ammont ta` danni hekk imgarrba, u jekk ikun il-kaz ukoll l-ammont ta` propjeta` u beneficji kollha miksuba minnu, sew direttament u wkoll indirettament, anke jekk ikun il-kaz bil-hatra ta` periti nominandi ; u*

5. *Tordna lill-intimat ihallas lis-socjeta` rikorrenti dik is-somma ta` danni, propjeta` u beneficji hekk likwidata.*

Bl-ispejjez u bl-interessi skont il-ligi sad-data tal-pagament effettiv.

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

Rat ir-risposta guramentata pprezentata fl-20 ta` Frar 2008 li taqra hekk :-

1. *Illi fl-ewwel lok, l-ewwel talba tas-socjeta` rikorrenti hija infondata fil-fatt u fid-dritt in kwantu l-fatti minnha allegati ma jikkostitwixxux il-ksur tal-obbligi fiducjarji li seta` kellu l-esponent fir-rigward tas-socjeta` rikorrenti.*

2. *Illi minghajr pregudizzju ghas-suespost l-ewwel talba tas-socjeta` rikorrenti hija infondata fil-fatt u fid-dritt in kwantu l-esponent dejjem onora u rrispetta b`mod shih l-obbligi fiducjarji tieghu, kif se jirrizulta ampjament fil-mori ta` dawn il-proceduri u l-azzjoni tar-rikorrenti hija intiza biss sabiex tivvessa u ddejjaq lill-intimat.*

3. *Illi minghajr pregudizzju ghas-suespost it-tieni talba tas-socjeta` rikorrenti ghandha tigi michuda in kwantu s-socjeta` rikorrenti ma sofriet l-ebda dannu u anke jekk "dato ma non concesso" li s-socjeta` rikorrenti sofriet xi danni, fl-ewwel lok jispetta lis-socjeta` rikorrenti ggib prova ta` tali danni u fit-tieni lok jispetta lis-socjeta` rikorrenti ggib prova li kien ir-rikorrenti li kkawza tali danni.*

4. *Illi minghajr pregudizzju ghas-suespost, it-tielet, ir-raba` u l-hames talba tas-socjeta` rikorrenti ghandhom "per conseguenza" jigu michuda in kwantu msejsa fuq mera allegazzjonijiet u spekulazzjoni u di piu` tali talbiet huma insostenibbli fil-ligi.*

Salv eccezzjonijiet ulterjuri fil-ligi.

Bl-ispejjez kontra s-socjeta` rikorrenti li minn issa hija ingunta in subizzjoni.

Rat id-dikjarazzjoni bil-gurament tal-fatti li saret mill-konvenut.

Id-dikjarazzjoni taqra hekk :-

1. *Illi l-esponent jaqbel ma` dak iddikjarat fl-ewwel paragrafu tad-dikjarazzjoni maghmula minn Oliver De Giorgio.*

2. *Illi ghal dak li jirrigwarda dak iddikjarat fit-tieni paragrafu tad-dikjarazzjoni ta` Oliver De Giorgio, l-esponent jippreciza li l-fornituri tas-socjeta` M.A.I.N. Services Limited kollha huma fornituri Ewropej. Din is-socjeta` kellha franchising agreements ma` tnejn minn dawn il-fornituri; il-CompAir UK Limited li originarjament kien sar ma` Mekanika Limited u Jungheinrich. Ir-relazzjoni li kellha CompAir UK Limited kienet biss ma` Mekanika Limited u sussegwentament ma` M.A.I.N. Services Limited u ma kellhiex relazzjonijiet ma` socjetajiet ohra fil-Grupp Gasan.*

3. *Illi M.A.I.N. Services Limited kienet twaqqfet sabiex tiehu x-xoghol ta` product sales li qabel kien isir minn Mekanika Limited.*

4. *Illi l-esponent jaqbel ma` dak iddikjarat fir-raba` paragrafu tad-dikjarazzjoni maghmula minn Oliver De Giorgio.*

5. *Illi mhuwiex minnu li l-esponent kien jockupa l-kariga ta` General Manager tas-socjeta` M.A.I.N. Services Limited. Huwa dejjem okkupa l-kariga ta` direttur. Bhala impjegat ta` M.A.I.N. Services Limited, l-esponent kien jirrispondi lil Oliver De Giorgio nnifsu u d-decizjonijiet ta` natura importanti li kienu jikkoncernaw lil M.A.I.N. Services Limited kien jehodhom Oliver De Giorgio u l-istess Oliver De Giorgio kien ikun ikkonsultat f`kull hin dwar l-operat tal-kumpannija. Barra l-esponent, is-socjeta` M.A.I.N. Services Limited dejjem kien ikollha medja ta` bejn sitta u tmien impjegati.*

6. *Illi l-esponent l-ittra ta` rizenja tieghu baghatha lill-istess Oliver De Giorgio u huwa ma ta l-ebda raguni ghall-istess rizenja.*

7. *Illi fir-rigward ta` dak iddikjarat f`paragrafu 12 tad-dikjarazzjoni ta` Oliver De Giorgio jigi pprecizat li l-karozza in kwistjoni kienet tal-ghamla Ford Mondeo tal-1998 u li huwa xtraha bil-book value taghha u ma saret l-ebda koncessjoni specjali lill-esponent f`din it-transazzjoni. In kwantu ghal dak iddikjarat f`paragrafu tlettax u erbatax l-esponent ma ghandu xejn x`jikkummenta in kwantu huwa estranju ghall-fatti hemm allegati. Li ghandu jinghad huwa li tul iz-zmien kollu li l-esponent dam jahdem mas-socjeta` M.A.I.N. Services Limited huwa ddedika ruhu u gismu ghall-kumpannija bl-aktar mod assolut kif jistghu jixhdu dawk kollha li b`xi mod kellhom x`jaqsmu mieghu f`dawk iz-zminijiet u bl-ebda rizerva ta` hinijiet.*

8. *Illi dak allegat f`paragrafu sittax sa dsatax tad-dikjarazzjoni ta` Oliver De Giorgio mhuwiex minnu u huwa biss allegazzjoni gratuwita li l-esponent jichad bil-qawwa kollha.*

9. *Illi l-esponent mhuwiex qieghed igawdi minn propjeta` u/jew taghrif fil-kapacita` tieghu ta` fiducjarju tas-socjeta` M.A.I.N. Services Limited. Meta kien impjegat mas-socjeta` M.A.I.N. Services Limited huwa kien juza e-mail account tal-kumpannija li ghalih kellha u ghad ghandha access liberu l-istess socjeta`, id-dokumentazzjoni kollha relatata mal-impjeg tieghu thalliet fil-propjeta` ta` M.A.I.N. Services Limited u l-esponent ma ghandu l-ebda propjeta` u/jew taghrif tas-socjeta` M.A.I.N. Services Limited fil-pussess tieghu.*

10. Illi mhuwiex minnu li l-esponent gie interpellat sabiex jersaq ghal-likwidazzjoni u l-hlas tad-danni allegatament sofferti minn M.A.I.N. Services Limited kif jidher b`mod car minn Dok MS9 li ma fiha l-ebda interpellazzjoni ta` din ix-xorta.

11. Illi tant mhuwiex minnu li l-esponent kien irrizenja minn direttur sabiex jiehu r-rappreżentanza tas-socjeta` CompAir UK Limited, illi kif se jirrizulta minn xhieda li se jressaq l-esponent, l-istess esponent kien fittex li jimpjega ruhu ma` kumpannija lokali u kien biss li wara tali tentattivi fallex li huwa fittex li jiftah negozju ghal rasu.

12. Illi di piu` kif se jirrizulta fil-mori ta` dawn il-proceduri ftit wara li kien baghat l-ittra ta` rizenja tieghu, l-esponent kien flimkien ma` Oliver De Giorgio zar diversi klijenti tas-socjeta` M.A.I.N. Services Limited sabiex jinfurmahom li huwa kien se jhalli l-kumpannija u sabiex iserrah mohh l-istess klijenti li r-relazzjoni ta` bejnhom u bejn M.A.I.N. Services Limited kienet se tibqa` l-istess.

13. Illi anke fl-ahhar zmien tal-impjeg tieghu l-esponent kien hadem fuq progett ta` M.A.I.N. Services Limited ghal konsenja ta` Forklifters lill-Grupp Farsons b`rabta mal-impjant gdid li kien se jiftah l-istess Grupp, liema progett kellu valur ta` circa Lm250,000 u frott l-istess hidma tal-esponent it-tender intrebah mill-istess M.A.I.N. Services Limited. Di piu` fit-tnejn u ghoxrin ta` Jannar 2007, l-esponent kien mar ma` Oliver De Giorgio ghand is-Sur Paul Micallef tal-Grupp Farsons fejn l-istess esponent kien kompli jistinka u jirsisti sabiex il-Grupp Farsons jaghzel l-offerta ta` M.A.I.N. Services Limited.

14. Illi l-esponent dejjem qeda dmiru lejn is-socjeta` M.A.I.N. Services Limited u l-Grupp Gasan bl-akbar lealta` u serjeta` u jichad bl-aktar mod kategoriku l-allegazzjonijiet li qeghdin jingiebu fil-konfront tieghu permezz ta` din il-kawza.

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

Rat id-digriet li kien inghata minn din il-Qorti diversament presjeduta fl-1 ta` Novembru 2010 fejn kien inhatar Brian Tonna bhala espert komputista.

Rat ir-relazzjoni tal-perit komputista li kienet ikkonfermata bil-gurament fil-15 ta` Dicembru 2011 quddiem din il-Qorti diversament presjeduta.

Rat il-provi l-ohra li ngabru minn din il-Qorti diversament presjeduta.

Rat l-ordni tal-Onor Prim Imhallef tal-24 ta` Jannar 2014 fejn il-kawza kienet assenjata lil din il-Qorti kif presjeduta.

Rat il-provi li ngabru wara l-24 ta` Jannar 2014.

Rat in-nota ta` osservazzjonijiet tas-socjeta` attrici.

Rat id-digriet illi tat fl-udjenza tal-21 ta` Marzu 2017 fejn halliet il-kawza ghas-sentenza ghal-lum bil-fakolta` li l-konvenut jipprezenta nota ta` osservazzjonijiet.

Rat illi l-konvenut baqa` ma pprezentax nota ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. Provi

Oliver De Giorgio xehed illi sar merger ta` MAIN Services Limited (“**MAIN**”) ma` Mekanika Limited (“**Mekanika**”) ; din hadet l-assi, id-drittijiet, id-djun u l-obbligi kollha li kellha MAIN. Il-merger sar effettiv fit-22 ta` Jannar 2008. Qabel din id-data, MAIN kienet kumpannija separata, parti mill-Gasan Group of Companies u kienet involuta l-aktar fil-bejgh ta` makkinarju u prodotti relatati. MAIN kienet kostitwita fit-28 ta` Dicembru 1994. Dak iz-zmien id-diretturi kienu l-konvenut, hu, Joseph Gasan u Anthony Axisa.

Kompla jixhed illi MAIN kellha diversi fornituri, kollha mill-Ewropa. Kellha kuntratti ta' *franchising* fosthom ma' CompAir UK Limited ("CompAir") li kienet tissupplixxi *stationary and mobile air compressors*. Ir-relazzjoni ma' CompAir bdiet originarjament ma' Mekanika izda wara ghaddiet ghand MAIN. Din kellha relazzjoni tajba mmens ma' CompAir u d-dirigenti taghha. Ir-relazzjoni damet madwar 12-il sena.

Stqarr illi l-konvenut kien gie mpjegat ma' Mekanika bhala *sales executive* mit-13 ta' Mejju 1983. Dak iz-zmien MAIN ma kenitx ghadha kostitwita. Kien involut l-aktar fin-negozju relatat ma' prodotti industrijali. Dak kien biss parti min-negozju kollu ta' Mekanika. Matul iz-zmien zviluppat b' tali mod li l-qofol tan-negozju taghha sar l-aktar dak ta' kuntratti ta' *mechanical and electrical engineering*. Aktar ma' Mekanika bdiet tiffoka fil-qasam, in-negozju relatat mal-bejgh ta' prodotti industrijali kien maz-zmien qed jigi aktar segregat mill-bqija tan-negozju ta' Mekanika. Ghalhekk kienet kostitwita MAIN sabiex topera fil-qasam tal-*mechanical and electrical engineering*.

Xehed illi l-ufficini ta' MAIN kienu separati minn dawk ta' Mekanika. Il-konvenut kien responsabbli ghan-negozju ta' kuljum ta' MAIN. Kien jipprepara u jipprezenta l-budgets ta' kull sena li kienu jinkludu ezercizzju fejn jigu elenkati l-ispejjez u jitnizzlu t-targets ghas-sena ta' wara. Kienu jinzammu laqghat tal-bord tad-diretturi regolament. Ghal dawn Albert Galea kien ikun dejjem prezenti flimkien mieghu u ma' Juan De Battista li kien il-kontrollur finanzjarju ta' Mekanika. Ghalkemm ma sab xejn bil-miktub li fih Albert Galea kien ufficjalment mahtur bhala General Manager, certament kull darba li kienu jqisu r-remunerazzjoni tieghu, il-konvenut dejjem kien identifikat u trattat bhala direttur u General Manager.

Qal li l-konvenut kien imexxi n-negozju ta' MAIN b'latitudni u liberta' ghalkemm kellu direttivi specifici dwar safejn seta' jasal fin-negozjar tieghu ma' terzi, dwar il-modalita' tal-pagamenti, u dwar iz-zmien tal-kreditu li seta' jestendi lil terzi. Kien izommu aggornat kull tant zmien u kien jirreferi ghandu biss dawk is-sitwazzjonijiet li fil-fehma tieghu kienu jkunu eccezzjoni ghad-direttivi. Ghall-bqija, Albert Galea kien imexxi prattikament wahdu. Lill-konvenut kien jafdah b'ghajnejh maghluqa. Kull cheque kellu zewg firmatarji ; il-konvenut kien wiehed minnhom. Il-konvenut kien imur tajjeb ma' kulhadd. Ghal MAIN Albert Galea kien essenzjali. Kien anke jzur il-fornituri barranin b' mod regolari.

Kompla jixhed illi huwa nhasad meta l-konvenut infurmah ried jirrizenja minn MAIN fl-20 ta` Novembru 2006. Bhala raguni, indika problema familjari li ried isolvi. Huwa offra lill-konvenut zmien fit-tul boghod mix-xoghol biex jittrata l-probelma li kellu, imbaghad jerga` lura magghom meta s-sitwazzjoni taqleb ghall-ahjar. Il-konvenut kien deciz li jitlaq. Ghalhekk accetta r-rizenja tieghu u avza lil Joseph Gasan. Il-konvenut avza li kien lest jahdem in-notice period kollu u ghalhekk l-ahhar gurnata tieghu kellha tkun it-23 ta` Jannar 2007. Irrizenja minn direttur b` effett mill-1 ta` Dicembru 2006.

Huwa stqarr li kellu suspetti li l-konvenutt kien ser imur jahdem ma` kompetitur tagghom. Meta rrinfaccjah bis-suspetti li kellu, il-konvenut wiegbu sempliciment : “imbaghad naraw...” Kien biss wara li sar jaf li l-konvenut kien determinat li jitlaq ghaliex kellu l-assigurazzjoni minn CompAir li l-ftehim ta` distribuzzjoni kien ser jigi assenjat lilu. Qabel il-konvenut spicca minn magghom, il-kumpannija uriet mieghu l-apprezzament taghha ghax-xoghol li kien wettaq.

Kompla jixhed illi dwar CompAir saret laqgħa fid-19 ta` Jannar 2007. Apparti hu u l-konvenut, kienu prezenti Colin Fountain, sales director, u Tristran J Barnes, international area sales manager, it-tnejn minn CompAir. Fil-laqgħa huwa infurmahom li Albert Galea ma kienx ser jibqa` jahdem ma` MAIN. Fl-ebda waqt tal-laqgħa, ma kien hemm accenn għall-fatt li fit-2 ta` Frar 2007 CompAir kienet ser tittermina l-ftehim.

Stqarr illi fit-2 ta` Frar 2007, Colin Fountain infurmah li ma kinux ser jibqgħu fornituri tagħhom u kienu qed jagħtu t-tlett xhur *notice* qabel ma` l-kuntratt jintemm fit-2 ta` Mejju 2007.

Huwa ddiskuta l-kwistjoni ma` l-familja Gasan ghax deher fic-car illi t-terminazzjoni kienet dovuta għar-rizenja ta` Albert Galea. Wara serje ta` korrisondenza, dahal fil-kwistjoni s-CEO ta` CompAir li b` ittra tal-21 ta` Marzu 2007 ikkonferma li l-ftehim kien ser jigi mitmum.

Qal illi s-suspetti tieghu kienu kkonfermati meta fl-1 ta` Mejju 2007, CompAir bagħtet ittra sabiex tavzahom illi l-prodotti tagħha kienu ser jigu akkwistati fis-suq Malti mingħand AG Industrial Solutions. Wara din id-ditta kien hemm Albert Galea. Ghalkemm kienet skambjata aktar korrisondenza, ir-relazzjoni tagħhom ma` CompAir giet mitmuma.

Kompla jghid li ftit granet wara li l-konvenut halla l-impjieg, huwa ltaqa` ma` Mike Atkins, purchasing manager ta` l-kumpanija De La Rue. Din kienet ta` spiss tixtri parts minghand MAIN. Atkins kellmu dwar purchase order li De La Rue kienet ghamlet ghal spare parts ta` kumpresuri tal-marka CompAir. Wara rrizulta li l-purchase order kienet saret minn De La Rue lil AG Industrial Solutions.

Spjega illi b`mod generali qabel tinhareg purchase order, hemm process li jdum madwar 15-il gurnata. Solitament li jigri huwa li De La Rue jew kumpanija li tkun trid tixtri spare parts tidentifika dak li jkollha bzonni u titlob quotation minghand MAIN. Din imbaghad tikkomunika mal-principali taghha barra minn Malta sabiex iggib il-prezzijiet jew tivverifika id-disponibilita` ta` dak rikjest. Wara l-verifiki, MAIN tikkomunika mal-klijent ; imbaghad jaghmel il-purchase order.

Qal illi meta kellem lil Albert Galea dwar din il-purchase order, il-konvenut qallu illi dik kienet ordni zghira u kulhadd ried jiekol. Meta ttenta jindaga aktar, ma nghatax aktar informazzjoni peress li l-klijenti evitaw li jindahlu fil-kwistjoni.

Wara t-2 ta` Mejju 2007, MAIN tilfet dawk il-klijenti kollha li kienu jixtru kumpressuri CompAir, tant illi bieghet biss kumpressur wiehed ta` ditta ohra.

Stqarr illi l-bejgh tal-kumpressuri CompAir fis-suq Malti illum jgawdi minnhom Albert Galea, rizultat tal-kuntatti u tal-informazzjoni li kiseb meta kien impjegat ta` MAIN.

Ipprezenta prospett tal-qliegħ medju ta` MAIN mill-bejgh tal-prodotti CompAir fis-snin 2003 – 2006.

MAIN tikkalkola li l-qliegħ medju taghha limitatament ghal dawk il-prodotti fis-snin indikati kien ta` Lm 21,344 (EUR 49,719) fis-sena.

It-total ta` bejgh li ghamlet MAIN mill-prodotti kollha taghha inkluz izda biss dawk ta` CompAir kien ta` Lm 362,426 .

It-total ta` bejgh li ghamlet MAIN mill-bejgh ta` spare parts inkluz izda mhux biss dawk ta` Comp Air ghas-sena 2006 kien ta` Lm 115,756.

Dan iwassal ghal total ta` bejgh ta` Lm 478,182 ; ma` dawn irid jizdied dhul iehor li seta` dahal kull sena fl-ammont ta` Lm 779 : b`kollox, Lm 478,961.

Spjega li sabiex wiehed jasal ghall-figura tal-qligh li ghamlet MAIN f` sena partikolari, jehtieg li mid-dhul totali jitnaqqsu l-ispejjez. Fl-2006, il-cost of sales ammonta ghal Lm 284,656 ghall-prodotti in generali u Lm 79,567 ghall-spare parts. L-ispejjez ta` l-overheads kienu jammontaw ghal Lm 84,863. Id-dhul ta` MAIN ghall-2006 kien ta` Lm 478,961 filwaqt li l-ispejjez kollha kienu ta` Lm 449,086 ; qligh ta` Lm 29,875. Il-figura tinkludi l-qligh nett ta` MAIN rikavat mill-bejgh ta` prodotti CompAir.

Xehed l-qligh totali ta` qligh mill-prodotti CompAir ghall-2006 kien ta` Lm 27,724 filwaqt li l-qligh totali minn spare parts kien ta` Lm 19,061. Ghalhekk il-qligh totali relatat esklussivament ma` prodotti ta` compare kien ta` Lm 46,785. L-overheads u l-ispejjez relative ghal CompAir biss mhux disponibbli izda huwa jikkalkola li kienu jammontaw ghal 37% ta` l-overheads totali.

Kompla jixhed illi mit-total ta` bejgh ta` Lm 478,961, jekk jitnaqqas it-total ta` qligh mill-prodotti CompAir ta` Lm 46,785, wiehed jasal ghall-qligh ta` MAIN minghajr l-element attribbwibbli ghall-prodotti CompAir. Din is-somma hija Lm 432,176. Jekk imbaghad mill-ispejjez totali ta` Lm 449,086, wiehed inaqqas l-ispejjez attribbwibbli ghal CompAir u cioe` Lm 31,399, wiehed jasal ghas-somma ta` Lm 417,687. Ghalhekk il-qligh nett ta` MAIN minghajr il-prodotti CompAir kien ta` Lm 14,489.

Sabiex jigi stabbilit il-qligh nett li kienet taghmel MAIN mill-prodotti CompAir, jehtieg li l-figura ta` Lm 14,489 titnaqqas mis-somma li tirrappresenta l-qligh nett totali tal-kumpannija ta` Lm 29,875. Dan iwassal ghall-qligh nett ta` MAIN limitament ghall-prodotti CompAir. Din is-somma ghall-2006 hija Lm 15,386, figura li tirrappresenta aktar minn 50% tal-qligh nett kollu ta` MAIN ghal dik is-sena.

Bl-istess metodologija, inhadmu s-somom li jirraprezentaw il-qligh nett mill-prodotti CompAir ghas-snin 2005, 2004 u 2003, rispettivament Lm

23,759, Lm 18,555 u Lm 27,678. Is-somma ta` Lm 23,759 tirrapprezenta 60% tal-qligh nett ta` MAIN ghall-2005, Lm 18,555 tirrapprezenta 52% tal-qligh nett ta` MAIN ghall-2004, waqt li Lm 27,678 tirrapprezenta 55% tal-qligh nett ta` MAIN ghall-2003. Dan iwassal ghal qligh medju nett limitatament mill-prodotti CompAir ta` Lm 21,344.

Fisser illi l-figura ta` Lm 21,344 hija biss il-figura medja ta` qligh fis-sena ta` MAIN li l-kumpannija m`ghadhiex tirrikava minn mindu CompAir waqfet tissupplieha u minn mindu bdiet tissupplixxi lill-konvenut tramite AG Industrial Solutions. Din is-somma trid tigi multiplikata bl-ammont ta` snin li ppotenzjalment seta` kompla ghaddej il-ftehim ta` distribuzzjoni ma` Comp Air. Bhala fatt, ir-relazzjoni ta` MAIN ma` CompAir kienet wahda tajba hafna u fi tnax-il sena ta` relazzjoni ma kien hemm ebda problema.

Ipprezenta Dok SD1 li hija lista ta` klijenti ta` MAIN li kienu jixtru prodotti ta` CompAir.

Qal ukoll illi mis-sit elettroniku ta` CompAir jirrizulta li Albert Galea huwa l-*official distributor* taghha.

Fil-**kontroezami**, xehed illi apparti CompAir, MAIN kienet id-distributur ta` *fork lifters*, *UPS equipment*, u *batteries*. minghand Halcare u accessorji minghand Holman. L-ufficini ta` MAIN kienu Hal-Qormi fejn kien hemm *showroom*, *ufficini* u *workshop*. Meta Albert Galea kien ghadu jahdem maghhom, MAIN ittrasferiet l-ufficini taghha ghall-Imriehel.

Jghid illi huwa rtira fis-26 ta` Frar 2010.

Qabel kienet kostitwita MAIN, qal illi ma jiftakarx li kienu jigu rapprezentanti ta` CompAir f` Malta sabiex jivverifikaw is-*sales levels*. Huwa cahad li qatt qalulhom illi l-livelli ta` bejgh ma kinux sodisfacjenti u li ma kinux qed jintlahqu t-*targets* mixtieqa. Juan Debattista kien jattendi l-laqghat tal-bord ta` MAIN peress li kien *financial controller* ta` Mekanika. Il-laqghat kienu jinzammu darba fix-xahar u kienu jinzammu l-minuti. Ikkonferma li meta l-profitti ta` MAIN bdew jonqsu, kien suggerit mill-awdituri (li dak iz-zmien kienu PWC) sabiex MAIN tinbiegh bhala *going concern*.

Fisser li meta Albert Galea kien ghadu jahdem magghom, kien izur l-ufficini ta` CompAir darba fis-sena. Ikkonferma li kienet prattika generali fil-Gasan Group illi l-impjegati kienu jigu offruti l-karozza li kienu juzaw bi prezz vantaggjuz, wara li din tkun ghall-uzu tagghom ghal numru ta` snin.

Stqarr illi kien hemm proceduri differenti dwar kif isir *invoicing* ghal *contracting* u *invoicing* ghal *spare parts*. Fl-*invoicing* ghal *contracting*, dan isir fil-kors tax-xoghol permezz ta` *bills of quantities*. Fil-bejgh ta` *spare parts*, il-pagament isir jew mal-konsenja jew ratealment skont kif ikun miftiehem. Fil-kaz ta` *contracting*, jghaddi certu zmien, mentri fil-kaz ta` bejgh ta` *spare parts*, il-procedura tiddependi mill-konsenja.

Ikkonferma illi flimkien mal-konvenut huwa dar diversi klijenti biex jinfurmahom illi Albert Galea kien ser jitlaq minn magghom.

Stqarr illi l-konvenut kien involut f` ordni kbira ta` *fork-lifters* li kien saret minn Farsons.

Fisser illi l-figuri li ndika waqt l-ezami kienu bbazati fuq il-*management accounts* u *l-audited accounts* tas-socjeta` rikorrenti.

Joseph Gasan xehed illi huwa c-Chairman ta` Mekanika.

Fil-bidu taghha, il-kumpannija kienet timporta u taghmel servicing ta` mechanical u electrical equipment bhal fork lift trucks, compressed air compressors u jiggers. Meta n-negozju beda jiddiversifika ruhu, saret MAIN biex tiehu hsieb is-servicing waqt li Mekanika baqghet tiehu hsieb il-*contracting*.

Qal li CompAir hija ditta li taghmel compressed air compressors. In-negozju tal-kompressuri kien affidat lil MAIN u kien jiehu hsieb il-konvenut. Ma` CompAir, Gasan Group kienu dejjem l-agenti taht ismijiet differenti. Albert Galea kien persuna fdata. Kien ir-rapprezentant tagghom ma` Comp Air u l-franchises l-ohra. Kellu wkoll kuntatt dirett mal-klijenti. Minghajr l-apparat ta` CompAir ma kienx ikun hemm bizzzejjed negozju biex jaghtu impieg lil sebgha jew tmienja min-nies.

Spjega li n-negozju kien ihalli turnover ta` madwar 30% turnover u ftit aktar minn dak il-persentagg bhala profitt. Huwa kien kuntent bix-xoghol ta` Albert Galea. Kellu paga tajba ta` direttur u general manager, apparti perks.

Qal li kien Oliver De Giorgio li avzah illi Albert Galea kien ser jitlaq, Huwa staqsa jekk kienx ser imur jahdem ma` xi ditta kompetitrici taghha. Huwa ma accettax li l-karozza tal-kumpannija tinxtara minn Albert Galea *at book value*. Meta ltaqa` mieghu, il-konvenut impressjonah bil-problemi familjari li qal illi kellu.

Kompla jghid illi saret ma` CompAir, li ghalha kien prezenti ibnu Mark Gasan. Fil-laqgħa, CompAir dehret kuntenta bir-relazzjoni li kellha magħhom ; kemm talbet li l-konvenut jigi rimpjazzat wara li rrizenja. Xi gimghat wara, ircieva minghand CompAir kienet itterminat il-ftehim ta` bejniethom. Huwa hassu offiz li Albert Galea għamel kumpannija u sar l-agent ta` CompAir.

Sostna li klijent tagħhom, De La Rue, infurmathom gimgha wara li l-konvenut telaq minn magħhom, kien ha ordni importanti. Meta sar kuntatt ma` CompAir, dawn qalulhom illi CompAir ma kinitx kuntenta bil-bejgh. Għalih din kienet skuza għaliex li kieku l-bejgh ma kienx tajjeb da parti ta` MAIN, CompAir, kienet tinkarika agent iehor mhux tinkarika lill-general manager li kellha MAIN.

Qal illi fil-korrispondenza skambjata ma` CompAir, huwa pprova jikkonvincihom biex ma jitterminawx il-ftehim, izda dawn milli jidher kienu diga` ffirmaw ftehim ma` Albert Galea. Bit-tmiem tal-ftehim ma` CompAir MAIN kellha tagħmel restructuring, u kellu jinbidel l-operat tagħha.

Fil-**kontroezami** xehed illi minghajr in-negozju ta` CompAir in-negozju ta` MAIN ma kienx qatt *feasible*. Kien għalhekk li kellha ssir il-merger ma` Mekanika.

Xehed illi meta rrefera għall-kalkoli ta` turnover u profitt dan kien jirreferi għaz-zmien ftit qabel ma` Albert Galea ha l-*franchise* ta` CompAir. L-informazzjoni minghand De La Rue waslet għand Oliver Degiorgio.

Stqarr illi wara li CompAir qatghet minn magghom, gabu kompressuri minghand ditta ohra estera izda ma kinux irnexxew. Illum il-gurnata l-kumpannija ma ghadhiex tbiegh kompressuri bhalma kienet taghmel qabel.

Albert Galea kien persuna fdata.

Mike Atkinson – Servicing Co-ordinator - De La Rue xehed illi MAIN kienet tissupplixxi lil De La Rue b`fork lift trucks u spare parts. Dwar kompressuri, ittrata ma` Albert Galea. Fil-bidu tal-2007 kien infurmat mic-Chief Engineer taghhom illi Albert Galea kien telaq l-impieg ma` MAIN. Inghata struzzjonijiet sabiex jivverifika l-lista ta` prezzijiet li kellu minn kumpannija Ingliza u sabiex iqabbell il-prezzijiet. Anke Oliver De Giorgio kien infurmah li Albert Galea ma kienx ghadu jahdem ma` MAIN.

Il-konvenut issejjah biex jixhed mis-socjeta` attrici.

Xehed illi ma kienx f`posizzjoni li jipprezenta kopji ta` purchase orders, ta` quotations u tac-certifikat tieghu tal-VAT peress li qal illi dawk kienu dokumenti kunfidenzjali.

Xehed illi l-perit komputista kien talbu dokumenti. Huwa rrefera l-perit komputista lill-awditur tieghu David Pace. Qabel inhatar il-perit komputista, jghid illi huwa kien diga` pprezenta l-qorti l-invoices kollha mahruqa minnu lill-klijenti sa mill-bidu ta` l-operat tieghu sad-data li kienu rikjesti.

Sostna li ma kellux *transaction history* minghand CompAir UK Limited. Dwar stock purchase invoices partikolari mahruqa minn CompAir UK lil De La Rue, huwa qal illi dawk ma kienux ta` CompAir UK. Huwa ma kellux stock purchase invoices mahruqa minn CompAir UK relatati ma` invoices li huwa hareg lil De La Rue.

Stqarr illi kien hemm diversi kumpanniji ohra li jaghmlu *spare parts* mhux originali ghal kompressuri ta` CompAir. Spjega li huwa gieli jixtri *spare parts* minghand Standard Air u ohrajn, kif fil-fatt gara fil-kaz tal-invoices li hargu lil De La Rue.

Huwa cahad li Standard Air hija kumpannija li tiffirma parti mill-CompAir Group.

B`riferenza ghal dokument a fol 132 tal-process, ikkonferma li dak huwa *purchase order* ghal *spare part* ta` kompressur li kien akkwistat minghand Standard Air. Ikkonferma illi sar jaf b`CompAir u bi Standard Air fil-kors tal-impieg tieghu ma` MAIN.

Stqarr illi l-*spare parts* Broomwade huma prodotti ta` Standard Air, Kien jingiebu minn MAIN u anke minn kumpanniji ohra.

Qal li r-relazzjoni tieghu ma` CompAir bdiet minn Mejju 2007 u sar distributtur taghha Malta. Mhuwiex distributtur ta` Standard Air izda huwa biss wiehed mill-hafna li jixtru minghand Standard Air. Ikkonferma li De La Rue kkomunikaw mieghu minhabba l-*purchase order* a fol 132.

Ipprezenta kopji tal-*purchase orders* li ghamel lil Standard Air bejn Settembru 2006 u Settembru 2007.

Stqarr illi illum il-gurnata, CompAir spiccat u nbidel l-isem taghha ghal Gardner Denver. Il-*contact person* tieghu huwa Bobby Hodge.

Qal illi f` Settembru 2006, huwa kien jahdem ma` MAIN. Ma jiftakarx min kien il-*contact person* ta` CompAir dak iz-zmien.

Meta beda jahdem bl-AG Industrial Solutions, l-ewwel *contact person* ta` CompAir kien Chris Barnes. Qal illi huwa jaghmel negozju biss ma` CompAir u Standard Air.

Il-konvenut ipprezenta wkoll affidavit.

Albert Galea xehed illi huwa beda jahdem ma` Mekanika f` Mejju 1982 bhala *sales executive*. Wiehed mid-doveri tieghu kien li jizviluppa l-bejgh ta` kumpressuri fil-Libja. Kien responsabbli wkoll tas-suq lokali taht id-direzzjoni ta` Tony Axisa. Huwa dejjem hadem biex izid il-bejgh.

Fl-1995 kienet kostitwita MAIN bhala sussidjarja ta` Mekanika, u sar direttur. Beda wkoll imexxi l-kumpannija. Dwar kwistjonijiet importanti kien jittrata ma` Oliver De Giorgio u Joseph Gasan. Gara li sena minnhom ma kienx registrat il-profitt mistenni u waqt laqgha tal-bord tad-diretturi, De Giorgio ppropona li MAIN tinbiegh bhala *going concern*. Il-proposta waqfet hemm.

Kompla jghid illi bejn l-2004 u l-2005 huwa beda jhoss li l-pjani ta` Gasan Group ghal MAIN kienu nbidlu drastikament. Minn showroom Hal Qormi, MAIN spiccat go *showroom* l-Imriehel bla paragun ma` dik ta` Hal-Qormi. Fl-2006, is-*showroom* ittiehdet ukoll u huwa spicca go ufficini ma` dawk ta` Mekanika. MAIN spiccat bla *showroom*, waqt li l-*workshop* baqa` Hal Qormi. Is-segretarja ta` MAIN spiccat taghmel xoghol ta` Mekanika. Il-bord beda jiltaqa` inqas.

Stqarr illi fl-2006, huwa kellu problemi medici fil-familja li qeghduh taht pressjoni b`mod illi ma setax ikompli jmexxi l-kumpannija.

Spicca kellu jirrizenja minn MAIN. Fil-fatt huwa ta n-*notice* fl-20 ta` Novembru 2006. L-ahhar gurnata tax-xoghol tieghu kienet fl-20 ta` Jannar 2007. Fl-ahhar jiem tal-impjeg tieghu, saru laqghat ma` klijenti tal-kumpannija fejn De Giorgio nfirmahom bir-rizenja tieghu. Wahda mil-laqghat kienet ma` Paul Micallef mill-Farsons Group. Dak iz-zmien kien ghadu kif lesta offerta kbira u komplessa ta` *forklift trucks* u Micallef kien iddispjaci li huwa kien ser jitlaq. Baqa` attiv fil-bejgh sa l-ahhar, u gimgha qabel tem l-impjeg, kien biegh kumpressur lid-ditta Camel Brand.

Wara l-20 ta` Jannar 2007, kien bla xoghol.

Stqarr illi beda jahseb biex flimkien mal-mara tieghu jibda xi tip ta` negozju fejn jimpurtaw *souvenirs*. Kien ghalhekk mar japplika ghall-numru tal-VAT.

Fisser illi Mario Bonnici direttur ta` UNEC Limited kien talbu jibda jahdem magghom fil-bejgh ta` makkinarju tal-kostruzzjoni izda m`accettax.

Xi gimgha wara, ircieva telefonata minghand Peter Kirchhof ta` Jungheinrich li hija ditta ta` *forklift trucks*. Dan staqsih jekk kienx ser jibqa`

fuq l-istess xoghol izda huwa infurmah li ma kellux intenzjoni li jidhol fis-suq. Din kienet kumpannija li kien stinka hafna biex MAIN issir l-agent taghha. Illum il-gurnata Mekanika hija l-agent.

Sakemm dam jahdem ma` MAIN, jghid illi ha hsieb jikseb l-agenzija ta` dawn id-ditti : Chloride UPS Equipment ; Enersys Batteries ; Montabert Hydraulic Rock Breakers ; Alto High pressure cleaners, Orion Garage Equipment ; Parker Hannifin pneumatics ; Westpoint air conditioners ; CompAir ; Jungheinrich Forklift Trucks ; Perkins Marine Engines ; Belzona ; *l-spare parts* ghal dawn kollha.

Xehed illi fl-ahhar ta` Frar 2017, huwa rcieva telefonata minghand Tris Barnes ta` CompAir Uk Limited li nfurmah li kienu temmew ir-relazzjoni tagghom ma` MAIN u kienu qed ifittxu agent iehor. Hajru jaccetta l-proposta tagghom u huwa accettaha xi gimgha wara.

Iddikjara illi huwa qatt ma approfitta ruhu minn xi negozju tal-kumpannija jew jekk hajjar jew seraq klijenti jew *suppliers*. Dejjem baqa` leali.

Xehed illi b`ittra tal-21 ta` Marzu 2007, Nick Sanders, CEO ta` Comp Air Group cahad kull allegazzjoni li ghamlu Gasan Group illi kienu jafu li kien se jirrizenzja.

Sahaq illi assolutament mhuwiex minnu li huwa kien ghamel xi ftehim ma` De La Rue meta kien ghadu impjegat ta` MAIN.

Spjega illi Paul Fenech minn De la Rue kien cempillu ghal xi *spare parts* izda huwa kien infurmah li ma kellux intenzjoni li jahdem ma` CompAir u lanqas ma kien registrat ghal VAT. De La Rue spiccaw akkwistaw *spare parts* mhux originali minghand Standard Air.

Huwa ottjena n-numru tal-VAT fil-5 ta` Marzu 2007.

Sahaq illi qatt ma avvicina klijenti u fornituri ta` MAIN.

Qal illi mhuwiex minnu li MAIN tilfet il-klijenti kollha taghha li kienu jixtru minghand CompAir u li bieghet biss kumpressur wiehed ta` ditta ohra sad-data tal-prezentata tar-rikors guramentat.

Qal li huwa ghandu lista ta` klijenti li xtraw kumpressuri minghand MAIN jew Mekanika. Fil-fatt Mekanika baqghet attiva fis-suq tal-kumpressuri billi hadet l-agenzija tal-kumpressuri Taljani CECCATO ; wara xi zmien temmew ir-relazzjoni ma` dawn ; u hadu l-agenzija ta` BOGE. Mill-website ta` Mekanika, jirrizulta li din ghadha attiva fis-suq tal-kumpressuri. Skont Juan Debattista, il-bejgh tal-kumpressuri kien wiehed sostanzjali.

Cahad li huwa qatt gie mahtur bhala *general manager*.

Spjega li De La Rue kienet baghtitlu ordni ghal *spare parts* madwar xahrejn wara li rrizenja, bil-preciz fit-22 ta` Marzu 2007. L-ordni ggib n-numru 24187 u kienet ghal zewg *bearings* tal-valur ta` Lm 52.00. Il-*bearings* kienu akkwistati minghand ditta Ingliza li tissupplixxi *spare parts* mhux originali. Huwa cahad li kien hemm xi *purchase order* li saret ffit granet biss wara li telaq mill-impjeg. L-ewwel *invoice* li ghamel bhala AG Industrial Solutions kienet lil klijent lokali fil-5 ta` Marzu 2007.

Ikkonferma li fis-settur tal-*contracting*, hemm bzonn certu tul ta` zmien biex tinhareg *purchase order*, mentri fil-manifattura ma jkunx hemm bzonn ta` tul ta` zmien.

Stqarr illi tlit ijiem wara l-ahhar jum tax-xoghol tieghu, u cioe` kien it-30 ta` Jannar 2007 huwa mar is-*showroom* tal-karozzi ta` Gasan fejn iltaqa` ma` Stefan Deguara li kien il-kontrollur finanzjarju ta` Mekanika biex ihallas LM 720 ghall-karozza. Insista li Deguara ghamillu ricevuta. Fl-4 ta` Frar 2007, ircieva telefonata minghand De Giorgio li kien staqsih jekk huwa kienx ha il-CompAir UK ghax dawn kienu ghadhom kemm baghtu ittra fejn itterminaw din l-agenzija. Huwa cahad li ghamel haga bhal dik. De Giorgio baghat ittra lill-klijenti f` Mejju 2008 biex jistaqsihom jekk huwa kienx ghamel negozju personali magghom bejn l-20 ta` Novembru 2006 u t-22 ta` Jannar 2007, u cioe` iz-zmien li kien bin-*notice*.

Fisser illi abbazi ta` *ricerka* li ghamel, irrizulta illi minn mindu temm l-impieg sal-2012, Mekanika baqghet attiva sew fil-bejgh tal-kumpressuri. Fost min xtara minghandhom kien hemm : Plastics, Agius Printing Press,

Auro Bindo, Daytona Garage, Dentcor Studio, De La Rue, Elepac, Farsons, Frame Grip, Gasco, Grixti Mobili, MIA, Progress Press, Prominent, Polmesh, Print Right, Tanprint, Thermoplastics, Tores, Trelleborg, JM Vassallo, J & A Bonnici, Cross Healthcare, Euro Star Garage, Jacap, Sado, u Vitafoam.

Huwa kkontesta l-konkluzjonijiet li wasal ghalihom il-perit komputista.

Kompla jixhed illi Mekanika ghadha taghmel xoghol fuq kumpressuri CompAir ghaliex qeghda tixtri spare parts minghand Standard Air u ditti ohra li jissupplixxu *spare parts non genuine*. Il-ftehim li kellha MAIN kien ma` Comp Air UK Limited li lanqas biss kienet ghadha tezisti sa sena wara li rrizenja hu. Comp Air hija *brand name*. Hadd Malta ma ghandu esklussivita` ghax is-suq huwa miftuh.

Fil-**kontroezami** l-konvenut ikkonferma li l-haddiema ta` MAIN kienu jirrapportaw lilu. Huwa kien jaghmel *preliminary budgets* li mbaghad kien jiddiskutihom mas-superjuri tieghu. It-tmexxija ta` kuljum kienet fdata f`idejh. Kwistjonijiet importanti biss kienu jigu diskussi mas-superjuri tieghu. Ikkonferma li huwa kellu rapport mal-fornituri ta` MAIN. Kien ukoll firmatarju ta` cheques flimkien ma` direttur iehor.

Qal li l-ewwel darba li Comp Air saret taf li huwa kien irrizenja kienet fil-laqgħa li saret fid-19 ta` Jannar 2007. Irizenja minn impjegat fl-20 ta` Novembru 2006. Irrizenja min direttur fl-1 ta` Dicembru 2006. Kellu 63 sena.

Qal li meta kkonsenja l-ittra ta` rizenja lil De Giorgio dan staqsieh ghala rrizenja u huwa wiegħbu li kien minhabba problemi fil-familja.

Cahad illi kien offrut assenza twila mix-xogħol.

Spjega li l-Form K kien għamilha habib tieghu li kien l-*accountant* personali tieghu.

Huwa qal li beda jahseb biex jibda xi tip ta` negozju lejn l-ahhar tal-2006 wara li kien ta r-rizenja tieghu. Applika għall-VAT f` Jannar 2007.

Stqarr illi ma ffirmat l-ebda ftehim ma` Comp Air. Ghax l-arrangement li kellu kien verbali.

Cahad li hemm xi ftehim dwar *commissions* li seta` jircievi fuq il-bejgh li jaghmel.

Sostna li huwa ghadu jopera d-ditta AG Industrial Solutions flimkien ma` ibnu u ghadu jqassam il-marka Comp Air.

Ikkonferma illi ghalkemm Dicembru 2006, hu u martu kellhom il-hsieb li jaghmlu negozju bis-*souvenirs*, imbaghad Jannar 2007 huwa applika biex jimporta t-taghmir.

Kenneth Cortis Finance Manager - De La Rue Malta – xehed illi kienilu fil-kariga mill-1 ta` Ottubru 2008. Qabel kien l-accountant tal-kumpannija.

Qal illi bejn Settembru 2006 u Settembru 2007, qatt ma kien hemm purchase orders mahruqa fuq Albert Galea.

Spjega li l-procedura hija li meta jkun hemm bzonn ta` spare parts, issir talba permezz ta` *requisition* li tkun approvata mill-Kap tad-Dipartiment. Wara tmur ghand il-*purchasing coordinator* li jiehu hsieb mejn se jixtri, jikseb quotations u u jaghmel *purchase order*. Din tal-ahhar tmur ghand il-*general manager* ghall-approvazzjoni u wara li anke din tinkiseb il-*purchasing coordinator* ighaddiha lis-supplier.

Stqarr illi minn verifiki li ghamel, ma rrizultax li hemm emails jew quotations bil-miktub dwar ordnijiet li dahlu minghand is-supplier Albert Galea. Ma kien hemm l-ebda quotation fil-perijodu ta` bejn Settembru 2006 u Settembru 2007. Lanqas verbalment ma rrizulta li kien hemm xi ordnijiet.

Kompla jghid li wara Settembru 2007, sar negozju ma` l-konvenut.

Ikkonferma Dok MA1 li kien esebit minn Mike Atkinson.

David Pace xehed illi huwa pprovda *accountancy services* lil Albert Galea u lil AG Industrial Solutions. Beda bl-inkariku Marzu 2007 u dam erba` snin.

Irrefera ghad-dokumenti li l-perit komputista ried illi jigu esebiti l-perit komputista. In partikolari rrefera ghal dak li talab Robert Magri mill-ufficju tal-perit komputista u cioe` BT Nexia.

Stqarr illi ghaddew kull dokument li talab Robert Magri u li kien fil-pussess taghhom.

Sostna li kien hemm *purchase orders* li ma nghatawx ghax kienu ta` *suppliers* ohra u mhux ta` Comp Air ; ez Standard Air li tbiegh *spare parts* ghall-magni.

Qal illi fl-10 ta` Mejju 2011, kien preparat file bid-dokumenti disponibbli.

Ghamel kritika tar-rapport tal-perit komputista fis-sens illi MAIN qatt ma kienet timporta u tbiegh *air conditioners*.

Fisser illi ntuza *sample* ta` *invoice* li kien limitat, u abbazi ta` dan kienu estrapolati *loss profit margins* tan-negozju kollu.

Sostna li fil-kalkoli tal-*gross profit margin* thallew barra mill-*cost tas-sale, il-labour, u l-installation costs* li uwa kunsidrat bhala *direct cost*. Ghalhekk, il-*gross profit margin* kien ikkalkolat b`mod ezagerat.

Stqarr illi r-rapport tal-perit komputista ghandu difetti teknici kbar.

Fil-**kontroezami** huwa qal li n-negozju ta` Albert Galea jinkorpora element ta` *direct costs* izda l-perit komputista baqa` ma ghamel ebda rikjesta ta` dokumenti dwar dan.

Huwa sostna li ma kienx hemm *invoices* datati wara l-2008 li hargu minn Comp Air UK Ltd.

Juan Debattista – direttur ta` MAIN u Mekanika – xehed dwar il-generu tan-negozju ta` MAIN.

Sostna li l-kuntratt li sar bejn MAIN u Comp Air kien ghal sena. Qal illi huwa ma jafx kif kellu jiggdedd.

Spjega illi MAIN damet madwar 12-il sena tirraprezenta lil Comp Air bhala distributtur esklussiv Malta.

Stqarr illi wara r-rizenja ta` Albert Galea, hafna mill-klijenti regolari taghhom ma baqghux klijenti taghhom, minkejja li qatt ma kellhom xi problemi ma` dawn il-klijenti.

Sandro Grixti xehed li huwa ghandu x`jaqsam man-negozju tal-mobbli u gieli xtara kumpressuri. L-ahhar li xtara kien minghand MAIN illum Mekanika Ltd.

Xehed illi huwa xtara kumpressur wiehed fl-2007.

Qal illi ma jafx lill-konvenut. Lanqas qatt kellmu.

Stqarr illi huwa xtara *parts* minghand Mekanika.

Sahaq illi huma baqghu jixtru minghand MAIN, ; qatt minghand il-konvenut jew minghand AG Industrial Solutions.

Ing. James Camenzuli – CEO - Foundation of Medical Services – xehed illi FMS akkwistat kumpressuri.

Xehed illi sar jaf bil-konvenut tramite MAIN ghaliex kien il-contact person.

Ikkonferma li l-konvenut qatt ma tahom servizzi wara li temm l-impjeg tieghu ma` MAIN.

Ing. Andrew Demarco xehed li jahdem ma` Corinthia San Gor. Bejn 2002 u 2012 hadem De La Rue. Sar jaf lil Albert Galea tramite x-xoghol tieghu ma` De La Rue.

Cahad li l-konvenut qatt avvicina lil De La Rue sabiex jiehu xoghol ghalih minflok MAIN.

Stqarr illi sakemm dam hu ma` De La Rue, MAIN baqghet supplier tagghom.

Ikkonferma li De La Rue ma baqghetx tikkomunika ma` Albert Galea wara li temm l-impjeg tieghu ma` MAIN.

Fil-**kontroezami**, xehed illi sal-2012 huwa kien responsabbli ghall-akkwist ta` *spare parts*. Ikkonferma li eventwalment sar jaf illi l-konvenut kien sar l-agent ta` Comp Air. Billi l-kompressur kien ta` CompAir bdew jinxtraw *parts* minghand Galea. Muri l-*purchase order* a fol 132 ikkonferma li dik kienet *purchase order* skambjata bejn De La Rue u AG Industrial Solutions.

Kenneth Caruana – MD – Thermo Plastics Limited – xehed illi huma kellhom kumpressur qadim. Albert Galea kien baghtlu email biex jinfurmah li ma kienx jaqbel ghalihom illi jsewwu l-kompressur izda kien jaqbel jekk jakkwistaw iehor gdid. Il-*quote* ghal kompressur gdid tad-ditta Comp Air saret fid-19 ta` April 2011 minn Albert Galea.

Ikkonferma li gieli akkwistaw *parts* minghand Mekanika jew MAIN.

Stqarr illi l-*quote* li rcieva minghand il-konvenut ma kinitx taqbel mal-bzonnijiet tagghom. Fil-fatt talab *quote* lil Mekanika u rrizulta li kienet aktar konvenjenti ghalihom.

Dik kienet l-unika darba li ttrata mal-konvenut.

Raymond Vassallo – MD – JM Vassallo Vibro Steel Limited – xehed illi fl-2008 akkwistaw zewg kompressuri minghand Mekanika : wiehed tad-ditta Rotary Screw li nxtara ghal EUR 11,328 fil-15 ta` Mejju 2008 ; u l-iehor li nxtara fis-26 ta` Mejju 2008. Kien akkwistat ukoll kompressur tad-ditta Ceccato ghall-prezz ta` EUR 4,625 u iiehor fl-2012 tad-ditta BOGE ghal EUR 13, 983.

Fil-**kontroezami** xehed li qabel l-2007, il-kumpannija kienet takkwista minghand MAIN u kienet tittratta mal-konvenut. Huma baqghu jaghmlu negozju ma` Mekanika.

Mario Bonnici – Direttur - United Equipment Co Ltd (UNEC) – xehed li huma kienu klijenti ta` MAIN. Fl-2007 huwa kien offra lil Albert Galea sabiex jahdem magghom izda Galea wiegbu li kien ser jabsibha forsi jaghmel xi haga hu. Albert Galea qatt ma kellmu dwar xi ditta ta` MAIN.

Fil-**kontroezami** xehed illi qabel l-2007, il-*contact person* ta` MAIN kien Albert Galea. Huwa ltaqa` ma` Albert Galea ftit wara li spicca mill-impjeg tieghu ma` MAIN.

Frederick Schembri – MD – Aurobindo Pharma (Malta) Ltd – xehed illi huma kienu akkwistaw zewg kompressuri minghand MAIN u Mekanika wara l-1 ta` Jannar 2007. Il-kompressuri kienu tad-ditta BOGE u kienu jiswew bejn €5000 u €7000. Albert Galea ma kienx involut fl-akkwist. Qal li huwa jafu lil Galea minn xoghol iehor. Il-kumpannija bdiet topera mill-2008.

Ing. Paul Fenech xehed li Engineering Manager ma` De La Rue sa l-2010. Huwa kien u jordna l-*parts*. Il-Purchasing Manager kien Michael Atkinson.

Spjega li Albert Galea huwa persuna ta` integrita` kbira. Qal li meta kienu jordnaw *spare parts*, kienu jittrattaw mieghu meta dan kien ghadu jahdem ma` Mekanika. Meta Galea ma baqax jahdem hemm, huma ppruvaw jgibu xi *parts* minn kumpannija ohra Ingliza li ma kienx involut fiha Galea.

Huwa cahad li Galea qatt tahom xi servizzi direttament lilhom abbazi ta` informazzjoni li kellu minghand Mekanika.

Huwa insista illi meta tkellem ma` Albert Galea, dan kien ghamilha cara mieghu li ma kienx ghadu jahdem ma` Mekanika u li ma setax jaghtih servizz.

Ikkonferma li l-kumpannija tagghom xtrat xi *bearings* minghand id-ditta ta` Albert Galea.

Cahad li qatt kien hemm *poaching* da parti ta` Albert Galea.

Fil-**kontroezami** kkonferma li Albert Galea kien il-*contact person* ta` Mekanika. Kien Michael Atkinson li qallu li l-konvenut ma kienx ghadu jahdem ma` Mekanika.

Stqarr illi kellhom kompressuri Comp Air li kien jinhtiegilhom *spare parts*. Qal lil Atkinson biex jipprokuralu dawn il-*parts* u ma qghadtx jghidlu minn fejn jakkwistahom. Huwa cahad li Galea kien qallu li Mekanika kienet tilfet l-agenzija ta` Comp Air. Wara li ghadta xi zmien, huwa sar jaf li AG Industrial Solutions kienu qed igibu *spare parts* tal-Comp Air. Ingiebu *bearings* li magghom ma kellu ebda konnessjoni Albert Galea. Kien imbaghad wara li bdiet ir-relazzjoni bejn De La Rue u AG Industrial Solutions.

Paul Scicluna ghall-Kummissarju tat-Taxxi pprezenta kopja tal-formola ta` registrazzjoni ta` Albert Galea ghal AG Industrial Solutions datata 12 ta` Frar 2007. Id-data ta` l-10 ta` Jannar 2007 li tidher fit-tieni faccata tad-dokument hija d-data ta` meta saret l-applikazzjoni. In-natura tan-negozju li kien behsiebu jaghmel Galea kien *to import machinery and industrial plants*.

III. **L-Art 1124A tal-Kap 16**

L-azzjoni attrici hija bbazata fuq l-Art 1124A tal-Kap 16 li dahal fis-sehh fl-1 ta` Jannar 2005.

Id-disposizzjoni taqra hekk :-

(1) *Obbligazzjonijiet fiduċjarji jinqalgħu bis-saħħa tal-liġi, kuntratt, kwazi kuntratt, trust, assunzjoni ta` kariga jew imġieba fejn persuna (il-"fiduċjarju")*

(a) *ikollha d-dmir li tħares l-interessi ta` persuna oħra, jew*

(b) *iżzomm, teżerċita kontroll jew jkollha setgħat ta` disponiment fuq proprjetà għall-benefiċċju ta` persuna oħra, inkluż meta din tkun vestita bħala sid ta` dik il-proprjetà għal dan l-għan, jew*

(c) *tirċievi tagħrif mingħand persuna oħra marbuta bid-dmir tal-konfidenzjalità u dik il-persuna tkun taf, jew fiċ-ċirkostanzi kollha b`mod raġonevoli għandha tkun taf, li lużu ta` dak it-tagħrif huwa intiż li jkun ristrett.*

(2) *Persuna li tkun delegata xi funzjoni minn fiduċjarju u tkun taf, jew miċ-ċirkostanzi għandha tkun taf blobligazzjonijiet fiduċjarji għandha wkoll titqies li hi soġġetta għall-obbligazzjonijiet fiduċjarji.*

(3) *Obbligazzjonijiet fiduċjarji jinqalgħu minn imġieba meta persuna –*

(a) *mingħajr ma jkollha dritt, tiegħu u tagħmel użu minn proprjetà jew tagħrif li jkunu ta` ħaddieħor, sew għallbenefiċċju tagħha jew xort`oħra; jew*

(b) *meta tkun terza persuna, tagixxi meta tkun taf, jew meta tkun raġonevolment mistennija li tkun taf, miċ-ċirkostanzi, bil-ksur ta` obbligazzjonijiet fiduċjarji mill-fiduċjarju, u tirċievi jew xort`oħra takkwista proprjetà jew tagħmel qligħ ieħor mill-għemil jew permezz talgħemil tal-fiduċjarju.*

(4) *Mingħajr preġudizzju għad-dmir ta` fiduċjarju li jwettaq l-obbligazzjonijiet tiegħu bl-ikbar bona fide u li jaġixxi b`mod onest fil-każijiet kollha, fiduċjarju jkun marbut, bla ħsara għad-disposizzjoni espressa ta` liġi jew kondizzjonijiet*

espressi ta` xi kuntratt bil-miktub li jeskludi jew jimmodifika dak id-dmir, skont il-każ –

(a) li jeżerçita d-diligenza ta` bonus pater familias fittwettiq tal-obbligazzjonijiet tiegħu;

(b) li jevita kull konflitt ta` interess;

(c) li ma jirçevix xi profitt mhux dikjarat jew mhux awtorizzat mill-kariga jew funzjonijiet tiegħu;

(d) li jaġixxi b`mod imparzjali meta d-dmirijiet ta` fiduċjarju jkunu lejn iktar minn persuna waħda;

(e) li jżomm kull proprjetà li tista` tkun akkwistata jew miżmuma bħala benefiċjarju, segregata mill-proprjetà personali tiegħu u minn dik ta` persuna oħra li favur tagħhom jista` jkollu obbligazzjonijiet simili;

(f) li jżomm records xierqa bil-miktub tal-interess talpersuna li favur tagħha jkunu obbligati l-obbligazzjonijiet fiduċjarji;

(g) li jagħti kont dwar il-proprjetà soġgetta għal dawk l-obbligazzjonijiet fiduċjarji;

(h) li jirritorna fuq talba li ssirlu kull proprjetà miżmuma taht obbligazzjonijiet fiduċjarji lill-persuna li legittimament ikollha jedd għaliha jew kif ordnat minnha jew kif xort`oħra meħtieġa mill-liġi applikabbli.

(5) B`żieda ma` kull rimedju ieħor skont il-liġi, persuna soġgetta għall-obbligazzjonijiet fiduċjarji li tikser dawk l-obbligazzjonijiet tkun marbuta li trodd lura kull proprjetà flimkien mal-benefiċċji l-oħra kollha miksuba minnha, sew direttament sew indirettament, lil min ikun dovut id-dmir.

(6) L-obbligu li tingħata lura proprjetà miksuba minn ksur ta` dmir fiduċjarju għandu japplika wkoll għall-proprjetà kollha li fiha il-proprjetà

originali kienet konvertita jew li biha kienet sostitwita.”

IV. Gurisprudenza u dottrina

Din il-Qorti kif presjeduta kellha l-okkazjoni li tqis din id-disposizzjoni fis-sentenza li tat fid-29 ta` Settembru 2016 fil-kawza : **Desmond Mizzi et vs KPMG et** : mhux appellata : fejn inghad hekk :-

“Din il-Qorti ssib ukoll sostenn fil-konkluzzjonijiet taghha fir-referenza li saret fit-trattazzjoni orali li saret quddiemha minn Dr Tonio Fenech, fejn kien citat l-Art 1124A tal-Kap 16.

...

*Fis-sentenza ta` din il-qorti kif presjeduta tat-2 ta` Dicembru 2013 fil-kawza “**Carmen Xuereb v. L-Avukat Anton Micallef**” inghad :-:*

“ ... Fiducjarju ghandu l-obbligu li jzomm u jittratta taghrif li jircievi b`mod kunfidenzjali. Ghandu d-dmir ta` lealta` fl-amministrazzjoni. Ghandu d-dover li jhares l-interessi tal-persuna li tkun tatu l-inkariku. Ghandu jiehu hsieb b`onesta` u b`kontabilita` l-affarijiet ta` min ikun tah l-inkariku. Ghandu jezercita d-diligenza ta` bonus pater familias fit-twettieq ta` l- obbligazzjonijiet tieghu. M`ghandux ikollu konflitti ta` interess, ghandu dejjem jagixxi fl-interess ta` min tah l-inkkariku u m`ghandux jircievi profitt mhux awtorizzat.”

*Fis-sentenza li tat din il-Qorti diversament presjeduta fit-13 ta` Novembru 2014 fil-kawza “**Vascas Enterprises Limited vs Adrian Ellul**” inghad hekk :-*

“Kif taraha din il-Qorti, il-kwisjtoni legali li trid tigi indirizzata tirrigwarda d-doveri fiducjarji u d-doverita` fedelta` relattivi ghal kuntratt ta` impjieg bejn il-konvenut u s-socjeta attrici.

Jibda biex jinghad illi l-ligi Ingliza taghmel distinzjoni bejn iz-zewg doveri. Il-Qorti tirreferi ghal zewg appelli moghtija wahda mill-Qorti tal-Appell Ingliz fl-ismijiet Jeremy Michael Ranson vs Customer Systems plc deciza fis-27 ta` Gunju 2012 u ohra moghtija mill-Qorti tal-Appell ta` Singapore fl-ismijiet Smile Incorporated Dental Surgeons Pte Ltd vs Lui Andrew Stewart deciza fil-31 ta` Lulju 2012. Il-kawzi huma b`fatti simili ghal kawza sub iudice u fihom saret espozizzjoni erudita u kwazi identika tal-principju regolatur in materia. Fl-appell Ranson il-Qorti tal-Appell Ingliz trattat il-kwistjoni ta` impjegat f`pozizzjoni manigerjali li rrezenja biex jiftah ghal rasu fl-istess sfera tal-impjieg tieghu u fil-perjodu tal-impjieg fetah il-kumpannija tieghu, tkellem ma` kuntatti tad-ditta li kienet timpjegah, ma qal xejn dwar dan lil principal tieghu u fil-fatt wara li ttermina l-impjieg accetta xoghol minghand l-imsemmija kuntatti.

Il-Qorti tal-Appell qalet hekk :

A "fiduciary" duty should not be confused with a duty of "fidelity". The duty of fidelity may be expressly set out in the contract but if not, it will be implied. All employment contracts contain an implied term that an employee will serve their employer in good faith and with fidelity (duty of fidelity) meaning that during employment, the employee should act in their employer's interests and not use the time for which he is paid by the employer in furthering their own interests. However, it also means that whilst the employee must have regard to their employer's interests, it does not in general amount to a "promise to give his employer the benefit of every opportunity within the scope of its business"

A fiduciary duty exists where there is fiduciary relationship, such as between a director and the company of which the director is an officer. Directors are under a fiduciary duty (partially set out in the Companies Act 2006) which requires the director to owe a "single-minded duty of loyalty to

the company and act in the company's best interests`

Il-Qorti tal-Appell qalet in oltre li l-impjegat hu f`pozizzjoni differenti u ma jassumiex, semplicement qua impjegat, obbligi fiducjarji lejn il-principal. Anki jekk jitqies bhala fiducjarju, mhux kull fiducjarju jassumi l-istess doveri f`kull cirkostanza. Il-fonti ghandu jkun il- kuntratt ta` impjieg. Obbligi fiducjarji jinsorgu fejn obbligazzjonijiet specifici kuntrattwali jpoggu lill-impjegat f`sitwazzjoni fejn il-ligi ghalhekk tramite dawn l-obbligi timponi fuqu doveri addizzjonali aktar rigoruzi.

Ma` dan jizdied illi impjegati ta` certa livell jistghu jkunu suggetti ghal doveri fiducjarji impost mill-kuntratt ta` impjieg pero ma jistghux jitpoggew fil-keffa ta` diretturi u d-doveri fiducjarju impost fuqhom. Dover fiducjarju ta` direttur inghad fil-kawza Fishel imsemmija fid-decizjoni kkwotata illi : "the hallmark of a fiduciary is a single-minded duty of loyalty. The duty of loyalty in that context has a precise meaning: ``namely the duty to act in the interests of another". As mentioned, this is not a feature of an employment relationship. In the employment context the duty of loyalty, although given the same label, "is one where each party must have regard to the interests of the other, but not that either must subjugate his interests to those of the other."

... llum bl-introduzzjoni tal-artikolu 1124(A) tal-Kap. 16 dwar obbligi fiducjarji, giet kristallizzata dak li l-Qrati taghna kienu jsostnu cioe illi certi kuntratti minn natura taghhom jimponu obbligi addizzjonali ghal dawk kuntrattwali fosthom il-kuntratt ta` impjieg. L-artikolu 1124(A)(a) fil-fatt jasserixxi li hemm obbligi fiducjarji meta dawn jirrizultaw mill-istess ligi, minn kuntratt u fost affarijiet ohra msemmija, minn assunzjoni ta` kariga fejn fost elementi ohra persuna jkollha d-dmir li thares l-interessi ta` persuni ohra.

Kwindi, hu car illi fil-ligi Maltija, rapport kontrattwali jew/u anki f'assunzjoni ta' kariga (kif certament il-kaz odjern jiccentra) hemm obbligu fiducjarju fejn hemm id-doveri li wiehed ihares l-interess ta' haddiehor. Hi l-fehma ta' din il-Qorti li dan l-artikolu ma hu xejn ghajr l-applikazzjoni generali tal-ligi illi fil-qadi tad-doveri tieghu, impjegat irid iqis l-interess tal-principal tieghu u jagixxi bid-diligenza kollha fil-qadi ta' dmiru u aktar ma hi gholja l-pozizzjoni jew il-kariga, aktar jassumi piz l-obbligu ta' fedelta, lealta, onesta u buona fede fil-konfront tal-principal u aktar hu ta' importanza li dak li ghandu kariga jagixxi bid-diligenza ta' bonus pater familias. Tradott f'termini semplici l-impjegat speċjalment fil-karigi esekuttivi ma jridx jaghmel hsara, jew jagixxi b'detriment jew pregudizzju jew b'dannu għall-interess tal-principal tieghu. Dawn id-doveri għandhom jitqiesu b'zieda ma' kull kondizzjoni ohra kontrattwali fir-rapport ta' impjeg bejn il-principal u l-impjegat.

Huma in-natura tal-kariga, ir-responsabilitajiet u poteri afdati oltre kundizzjonijiet specifici tal-kuntratt ta' impjeg li jiddeterminaw u jiddelineaw il-qies tal-fiducja riposta u mistennija u għalhekk huma dawn il-fatturi li jriedu jittiehdu in konsiderazzjoni meta jigi kunsidrat allegazzjoni ta' nuqqas ta' dover kemm esplicitu jew implicitu liema nuqqas igib mieghu il-konsegwenza ta' responsabilita għal hsara li tkun allegatament giet kommissa a dannu tal-principal.”

*Għal din il-Qorti huwa rilevanti wkoll dak li kiteb l-Av. Max Ganado bl-isem “Fiduciary Obligations under Maltese Law” fil-ktieb **“Trusts e Attivita` Fiduciarie 2013”**:*

“Two fiduciary obligations, that of acting with utmost good faith and acting honestly, are absolute and cannot be waived or otherwise tampered with.

... All fiduciaries must act with utmost good faith as they have no interest to act otherwise as they are acting for the benefit of someone else. This is an

*obligation that cannot be waived or reduced either...
Article 1124A (4) states :*

Without prejudice to the duty of a fiduciary to carry out his obligations with utmost good faith and to act honestly in all cases, a fiduciary is bound, subject to express provision of law or express terms of any instrument in writing excluding or modifying such duty, as the case may be –

“and then lists the obligations one by one in subparagraphs ...

These feature singly or even in groups, in other parts of the Code and in other laws and are not a statement of new law but a summary of existing law which is spread out all over the legal system and court judgements. Some of these obligations apply only in some contexts and not others. It should also be noted that this list is not exhaustive and there could be other fiduciary obligations which emerge from the context.

...

The list is as follows :

- (a) to exercise the diligence of a bonus pater familias in the performance of his obligations ;*
- (b) to avoid any conflict of interest ;*
- (c) not to receive undisclosed or unauthorised profit from his position or functions ;*
- (d) to act impartially when the fiduciary duties are owed to more than one person ;*
- (e) to keep any property as may be acquired or held as a fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations ;*
- (f) to maintain suitable records in writing of the interest of the person to whom such fiduciary obligations are owed ;*
- (g) to render account in relation to the property subject to such fiduciary obligations ; and*
- (h) to return on demand any property held under fiduciary obligations to the person lawfully entitled*

thereto or as instructed by him or as otherwise required by applicable law.”

Fis-sentenza li tat fit-30 ta` Mejju 2014 fil-kawza : **Office Essentials Limited vs James Veneziane et** : il-Qorti tal-Magistrati (Malta) qalet :-

*“Fil-kawza **Anthony Caruana & Sons Limited vs Christopher Caruana**` deciza mill-Qorti ta` l-Appell fit 28 ta` Frar 2014, intqal is-segweni dwar l-obbligi naxxenti mill-Artikolu 1124A u lill min japplikaw:*

Din il-Qorti tara` li filwaqt li hu veru li l-Artikolu 1124A tal-Kodici Civili dahal fis-sehh wara li sehhew il-fatti meritu ta` din il-kawza, dak l-artikolu ma hu xejn hlief riproduzzjoni ta` principju ta` dritt applikabbli gia` fid-dritt Ruman fejn kien meqjus bhala “a parasitic institution” (ara Lee, “The Elements of Roman Law”, pagna 340), mhux bhala kuntratt imma bhala li jimponi obbligi addizzjonali ghal dawk kuntrattwali fil-kaz ta` certi kuntratti. Il-kuncett ta` obbligazzjonijiet fiducjarja lanqas ma hu marbut necessarjament mal-kuncett ta` trusts li dahal fissistema maltija b`mod komplut fl-1 ta` Jannar 2005 u hu ta` applikazzjoni generali f`kull kaz li dak li jkun ikun qed jagixxi f`interest ta` haddiehor meta allura hu mistenni li jagixxi bid-debita attenzjoni u kura. Kif qalet il-Qorti tal-Magistrati (Ghawdex), Gurisdizzjoni Superjuri, fil-kaz Cordina v. Cordina, deciza fis-26 ta` Settembru 2007, bl- introduzzjoni tal-Artikolu 1124A fil-Kodici Civili, is- sitwazzjoni “giet hafna aktar iccarata”, pero` ma giex mahluq kuncett gdid. Kif qalet il-Prim`Awla tal-Qorti Civili fil-kaz Messina v. Galea deciza fil-5 ta` Jannar 1881, il-ligi Rumana kienet u ghada il-“ius comune” ta` Malta u, “nei casi non provediti dalle nostre leggi, dobbiamo ricorrere alle leggi Romane”. Il-kuncett ta` fiducja bejn il-principal u r-rapprezentant tieghu ilu jezisti fl-istorja legali taghna, u meta tqis li l-konvenut kien jokkupa kariga ta` General Manager, huwa car li l-ekwita` kienet timponi fuqu doveri u obbligazzjonijiet li jmorru lillhinn mill-obbligazzjonijiet kuntratwali tieghu.

Manager jinghad li ghandu doveri ta` ghaqal u lealta` lejn il-principal tieghu. Kif jghid il-mibki Professur Joseph A. Micallef fin-noti tieghu dwar il-Kodici ta` Kummerc (pagna 121-123):

“The office of manager from the legal point of view embraces both the concept of agency and the contract of trust which arises between the manager and his principal and he must, personally perform the duties which go with this office. The manager is an agent of the principal. He acts on his behalf and in his name. But he also administers the affairs of the principal and is in charge of the business or a branch of business of the principal in one or more fixed places. He is therefore the mandatory of the principal and the main function of his office is to increase the prosperity of the principal. He is therefore also the lessor of work and industry. These characteristics have been referred to by the Commercial Court, Judge Profs. Parnis presiding, in the case Zammit vs Galea et decided on the 5th March 1907. The manager is therefore in relation to his principal an administrator, namely a mandatory and a lessor of work while in relation to third parties he is the representative that binds the principal and therefore is his agent.”

Il-manager allura avolja m`ghandux responsabbilta` ta` policy making, huwa fiducjarju tal-principal tieghu u jrid jagixxi dejjem in bona fede u b`lealta`. Kif jghidu l-awturi Hayton et fil-ktieb “The Law of Trusts” (pagna 760) fiducjarju ghandu dejjem “a duty of confidence which is coupled with the duty of loyalty”, u fost dawn id-doveri hemm dak ta` kunfidenzjalita`, fis-sens, kif jispjegah tajjeb Lord Millet fil-kaz Ingliz Balkiah v. KPMG (1999 1ALLER 517):

“the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not to misuse it, that is to say, without the consent of the former client to make any

use of it or to cause any use to be made of it by others otherwise than for his benefit.”

Tajjeb jinghad ukoll li direttur huwa meqjus bhala fiducjarju.

Ghax huwa hekk, ghandu jkun leali u jevita kull konflitt ta` interest.

Fil-Pag 489-491 tal-**Principles of Maltese Company Law** (OUP – 2007) **Andrew Muscat** ighid :-

“ ... it was noted that directors can also be regarded as fiduciaries. The notion of fiduciaries was introduced into Maltese civil law by amendments to the Civil Code in 2004. A fiduciary is defined as a person who (a) owes a duty to protect the interests of another person, or (b) holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or (c) receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted.

As has also been discussed, a director falls at least under the first limb of the said definition and may also qualify as a fiduciary under the second and third limbs....A fiduciary has a fundamental duty to carry out his obligations with utmost good faith and to act honestly in all cases. This duty of good faith and honesty cannot be excluded by contrary agreement. Apart from this general duty, fiduciaries are also subject to a number of specific duties which can be modified or excluded either by express provision of the law or by the express terms of an instrument in writing. These specific duties can be divided into three categories: duties of loyalty, duties of care and administrative duties. The duties of loyalty comprise (a) the duty to avoid any conflict of interest (b) the duty not to receive undisclosed or

unauthorized profit from his position or functions; (c) the duty to act impartially when the fiduciary duties are owed to more than one person; and (d) the duty to return on demand any property held under fiduciary obligations to the person lawfully entitled thereto or as instructed by him or as otherwise required by applicable law. The fiduciary's duty of care is expressed as the duty "to exercise the diligence of a bonus paterfamilias in the performance of his obligations." On the administrative side, the fiduciary is obliged (a) to keep any property as may be acquired or held as a fiduciary segregated from his personal property and that of other persons towards whom he may have similar obligations; (b) to maintain suitable records in writing of the interest of the person to whom such fiduciary obligations are owed and (c) to render account in relation to the property subject to such fiduciary obligations.

A fiduciary who acts in breach of his fiduciary obligations, is in addition to any other remedy that may be available at law, bound to return any property together with all other benefits derived by him, whether directly or indirectly, to the person to whom the duty is owed. The obligation to return property derived from a breach of a fiduciary duty shall apply also to all property into which the original property has been converted or for which it has been substituted."

Il-Qorti taghmel riferenza ghall-gurisprudenza estera citata mis-socjeta` attrici :-

"Directors, as with other categories of fiduciaries, are subject to a range of equitable obligations aimed at preventing abuse of position through secretly enriching themselves. In this respect, the no-conflict rule comes to the fore whereby directors are precluded from placing themselves in a position where their personal interest conflict with their duties to the company.....the fiduciary in breach of the no-conflict duty ...must account...for any benefit or gain...obtained or received in circumstances

*where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain.” – **Chan v Zacharia** (1984) 154 C.L.R. 178 at 199*

*“It is an inflexible rule of a court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided,...allowed to put himself in a position where his interest and duty conflict...human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.” – **Bray v Ford** (1986) A.C. 44 at 51 -52*

*“The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his beneficiary This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict...” – **Bristol and West Building Society v Mothew** (1996) EWCA Civ 533).*

Dan premiss, tinsorgi l-kwistjoni dwar jekk wara li persuna ma tibqax direttur, tibqax titqies bhala fiducjarju, bl-istess obbligi daqs li kieku tkun ghadha direttur.

L-Art 170 tal-Companies Act 2006 tal-Ingilterra ighid hekk :-

(1) *The general duties specified in sections 171 to 177 are owed by a director of a company to the company.*

(2) *A person who ceases to be a director continues to be subject –*

(a) *to the duty in section 175 (duty to avoid conflicts of interest) as regards the exploitation of any property, information or opportunity of which*

*he became aware at a time when he was a director,
and*

(b) to the duty in section 176 (duty not to accept benefits from third parties) as regards things done or omitted by him before he ceased to be a director.

To that extent those duties apply to a former director as to a director, subject to any necessary adaptations.

(3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.

(4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

(5) The general duties apply to a shadow director of a company where and to the extent that they are capable of so applying.

Fil-Pag 451 sa 452 u 455 sa 456), **Andrew Muscat** fil-**Principles of Maltese Company Law** (op. cit.) ighid :-

*“In **Industrial Development Consultants Ltd vs Cooley** (1972) 1 WR 443) the defendant, an architect, was managing director of the plaintiff company which was in the business of building and development consultancy. As the company’s representative, he took part in negotiations with representatives of the Eastern Gas Board, aimed at securing for the company contracts to build a number of large depots. The negotiations proved unsuccessful because the Board would not engage a firm of consultants (as distinct from a private architect). Soon afterwards, however, the assignment was offered to the defendant in his*

private capacity. He then obtained release from his employment with the company (by falsely representing that he was in ill health) and was later awarded the assignment by the Board.

The Court held that he was accountable to the company for the whole of his benefits under the contract. Liability was misuse of information, since the defendant had obtained, while he was managing director, information that the project was to be revived and consciously held this information back from the company and took steps to turn it to his advantage. It was considered irrelevant that he had been approached as an individual consultant. Information which he received while he was managing director and which was relevant and of concern to the plaintiff company was information which he was obliged to pass on to the company. It may, at first sight, appear curious that the company should receive a benefit which it would probably not have received had the defendant complied with his duty to inform it. The Court however pertinently remarked that if the defendant is not required to account he will have made a large profit as a result of having deliberately put himself into a position in which his duty to the company and his personal interests conflicted

...

*English courts have sometimes focused on the capacity of the profiteers: the corporate opportunity must have been acquired by reason of the profiteers` position as directors and the nature of the opportunity itself is not really examined (**Industrial Development Consultants Ltd vs Cooley** decided in 1972 (1972) 1 WLR 443. Cf, **Regal (Hastings) Ltd vs Gulliver** (1967) 2 AC 134). In **Canadian Aero Service Ltd vs O`Malley** (1974) 40 DLR (3d) 371 , however, the Canadian Supreme Court recognized the limitations of the capacity approach. In that case, the president and executive vice-president of the plaintiff company had been engaged on behalf of the company in negotiating for a large surveying and mapping*

assignment. Instead of securing the contract for the company, they resigned their posts and incorporated their own company to which they successfully diverted the assignment.

The Court held that the fiduciary duty had survived their resignation and that such duty was enforceable both against them personally and against the company they had formed. Laskin J observed that the capacity approach stultified the development of the doctrine. He accordingly preferred to consider a number of different factors in order to establish whether or not the defendant was in breach of his fiduciary duties. Factors that should be taken into account included the position or office held by the director, the director's relation to the opportunity, the amount of knowledge possessed, the particular circumstances in which it was obtained and whether it was "special , or indeed, even private" , and the nature, "specificness" and "ripeness" of the opportunity.

*The different approaches to the corporate opportunities doctrine were later considered in **Island Export Finance Ltd vs Umunna** ((1986) BCLC 460), a case involving a managing director who had resigned and subsequently obtained valuable orders from a client of the company. After considering English and Canadian authorities in this area of the law, the Court cited with approval Laskin J's key dictum in **Canadian Aero Service Ltd vs O`Malley** , and adopted a more flexible doctrine than the previous English judgements did. The Court took into account the lack of maturity of the opportunity as well as the motive for the defendant's resignation from the company and the fact that the company was not actively pursuing further business with the particular client. It was further noted that the defendant had not made improper use of any confidential information. The Court held that if what the director learnt before his resignation did not qualify as a corporae opportunity, it was no breach of this aspect of directors` duties to exploit the information personally thereafter. The defendant was*

accordingly allowed to keep the profit that he had obtained for himself.”

L-awturi **Mills & Reeve** ghamlu kitba fit-30 ta` April 2008 li dehret f` The Litigator (9th Edition) u li riferenza ghaliha saret fis-sit elettroniku lexology.com bl-isem “**Directors – competing in breach of fiduciary duty**”.

Mills & Reeve jghidu hekk :-

“Because of the unique relationship between a company and its directors, a director is precluded from obtaining for himself, either secretly or without the informed approval of the company, any business advantage either belonging to the company or for which he has been negotiating. This is known as a fiduciary duty and is analogous to the duty between the trustee of a private trust and a beneficiary. Like a trustee, if the director does obtain such an advantage he may be forced to account to his former employer for all the profits made from that advantage.

A director is free to resign as director and the fiduciary relationship ceases at the time of the resignation. In principle, once he has resigned his directorship, the director is free to set up in competition with his former employer and is not precluded (subject to any provisions in a service agreement or contract) from using, in the new business, the general fund of skill and knowledge he acquired as a director in the old one. However, a director may still be in breach of his fiduciary duty where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself any “maturing business opportunity” sought by his former employer and where it was his position as director that led to the opportunity being acquired.

What conduct amounts to a breach of fiduciary duty ?

In considering whether an act of a director amounts to the acquisition of a “maturing business opportunity” the court will take into account the position or office held, the nature of the opportunity, its ripeness, its specifics and the director’s relation to it, the amount of knowledge possessed, the circumstances in which it was obtained, the timing between resignation and acquiring the opportunity and the circumstances of the resignation.

In Foster Bryant Surveying Ltd v Bryant, the Court of Appeal reviewed all the authorities and identified three different situations. At either end of the spectrum, where the former director’s conduct was either obviously without fault (as was the case with Mr Bryant who had been frozen out of the company, forced to resign and had not solicited the subsequent approach from a client) or obviously in bad faith (where the director had plotted from the outset to divert the opportunity, resigned without notice and immediately set up in competition with staff and clients poached from his previous employer) it is easy to make a decision. However, the vast majority of cases fall into the middle ground.

In Bryant the Court of Appeal approved pragmatic solutions based on a common sense and merits-based approach. This may be a classic case, however, of something that it is easy for a court to say but far more difficult to actually do.

From the authorities, there is a whole range of activity that may or may not amount to a breach of fiduciary duty depending on the facts of each case. In particular, the court will focus on the activity while still a director, what preparatory steps were taken, when they were taken and whether there is a link between the resignation and departure of the director and the acquisition of the business opportunity.”

Kitba ohra li dehret fl-istess sit elettroniku kienet dik ta' **W L G**
Gowling bl-isem : **Former directors who set up in competition : the**

first post-Companies Act 2006 case comes to light : tal-10 ta` Marzu 2010 : fejn irrefera ghad-decizjoni : **Thermascan Limited v Norman Norman** [2009] EWHC 3694 (Ch).

L-awtur jghid hekk :-

It's the first reported case in England and Wales relating to those provisions of the Companies Act 2006 that govern conflicts of interest and the appropriation by directors of their company's business opportunities.

...

Mr Norman, a thermal engineer by trade, had been an executive director of Thermascan Limited (Thermascan) since 1997. Thermascan conducted specialised surveys of commercial property, typically for insurance purposes. It used infrared technology to scan factories and warehouses for problem signs such as a hot spot indicating an electrical fault and possible fire risk. A fresh survey would be required at the same time each year prior to renewal of the customer's insurance policy.

On 10 September 2008 Mr Norman gave one month's notice to Thermascan to terminate his contract of employment. On expiry of the notice - as it happens, nine days after the conflict of interest provisions of the Companies Act 2006 (CA 2006) came into force - he resigned as a director. Within a month he commenced employment with Sykes & Co, a building and property maintenance company. His job was to head up a new preventative maintenance division providing thermal engineering survey services. Four months after that Mr Norman was made redundant. He set about launching his own business through a company called Hotspot-Thermography Limited.

The issue

It is axiomatic that an executive director who, having left his company, joins or sets up a

competing business is, legally speaking, in a dangerous place. There is a real prospect of personal liability for breach of contract and/or fiduciary duty. The former director may even be ordered to account to the company for all the profits of the new venture.

It is best to consider Mr Norman`s two distinct roles in turn, first as employee and then as company director.

As employee

Mr Norman was bound by the terms of his employment contract :

- *Not, at any time, to use or to divulge any confidential information concerning Thermascan`s business which had come to his knowledge in the course of his employment and which was not in the public domain.*
- *Not, for six months after termination, to canvass or solicit business from any person with whom he had dealt to a material extent and who at any time in the twelve months preceding termination had been a Thermascan customer.*

Clearly therefore, while at Sykes & Co, Mr Norman could neither exploit confidential information nor canvass or solicit Thermascan`s customers. However, by the time he was made redundant, he was virtually free of the second of these obligations. He continued to be bound by the restriction as regards the use of confidential information.

As director

Perhaps counter-intuitively Mr Norman`s fiduciary duties as a director did not entirely come to an end when he resigned. As regards the exploitation of any property, information or opportunity of which he became aware when he was in office, he remained subject to a statutory duty to avoid a conflict between his duties to Thermascan and his self-interest (CA 2006, s 175(1) and s 170(2)(a)).

Thermascan sought a court order restraining Mr Norman from canvassing or soliciting its customers, even if no confidential information was involved. It invoked CA 2006, and specifically sections 170 and 175.

The case helps us answer the following questions :

- *Does CA 2006 change the way in which we advise company directors who, having left their companies, propose to join or set up competing businesses? Specifically, does it produce a different answer than the common law it replaced?*

No. The parties in Thermascan agreed, and the trial judge recorded, that the relevant provisions of CA 2006 did not alter the pre-existing law ...

- *How do the courts balance the interests of the company in such a case with the public interest in permitting former directors to continue to earn a living using their pre-existing fund of skill and knowledge ?*

As explained above, Mr Norman, even after resigning as a director, was precluded - without the informed approval of Thermascan - from exploiting property, information or opportunities of which he became aware when he was a director. This would extend to the exploitation of any business advantage either belonging to Thermascan or for which it had been negotiating. On the other hand, the courts recognise that, no less than employees, directors acquire a general fund of knowledge, skill and experience in the course of their work. It is plainly in the public interest that they should be free to exploit this fund of knowledge in a new position.

The effect of the court's judgment in Thermascan was that the "stock in trade" of knowledge which Mr Norman had acquired as a director of Thermascan, even including such things as business contacts and personal connections made as a result of his directorship, was his to exploit in the future.

However :

- *It would have been different if Mr Norman had been subject to ongoing contractual restrictions. Here however the six-month non-solicitation covenant to which he had been subject lapsed shortly after he was made redundant from Sykes & Co.*
- *While the restriction on using confidential information had not expired, there appeared to be inadequate evidence in Mr Norman`s case to support a conclusion that, by contacting Thermascan`s customers after the six-month period, he was in breach of it.*
- *The analysis would have been different if "trade secrets" had been at issue - the classic examples are chemical formulae and algorithms, but commercial information can fall into this category too.*
- *It would also have been different if Mr Norman`s resignation had been prompted or influenced by a wish to acquire "maturing business opportunities" sought by Thermascan and where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.*

For a business opportunity to be said to be "maturing" it appears that there must generally have been some discussion, if not significant discussion, of the potential opportunity. That would not typically have been the case at Thermascan where the lion`s share of the trade was repeat business and there was minimal contact between Thermascan and individual customers until shortly before the next occurring survey date. The judge dismissed an argument to the effect that the annually recurring surveys were in the nature of periodically maturing business opportunities. He came to the conclusion that, while Mr Norman remained subject to (limited) fiduciary duties even after resignation as a director, they did not amount to a blanket prohibition on canvassing or soliciting business from Thermascan customers.

Each case turns on its own facts and the nature of Thermascan`s business was particularly influential here. It would have been a relevant factor if there had been a greater level of formality in the arrangements between Thermascan and its customers under which Thermascan could definitely look forward to recurring business.

It is perhaps worth pointing out that Thermascan is to be distinguished from a long line of other cases which turn on what a director should or should not do while still in office. There was no suggestion in this case that the former director actually sought to compete with the company prior to termination. Still less was there that other classic feature of these sorts of case: a conspiracy to damage or even destroy the old business before moving on to the new.

Kitba ohra kienet dik ta` **John Lowry** tat-30 ta` April 2012 fl-**International Review of Law** bl-isem : **Codifying the corporate opportunity doctrine : The (UK) Companies Act 2006.**

L-awtur jittratta ***post-resignation liability*** :-

According to section 170(2), liability under section 175 will apply to former directors as well as those who are currently holding office. The existence and extent of the former directors` liability is not self-evident. A lay director may readily assume that with resignation liability is at an end. But, of course, section 170(2) signals that activity that pre-dates resignation may continue to be the source of fiduciary liability. In this it draws upon the case law. Yet, taking the two sections together, they fail to do justice to the multifarious conditions that attend imposition of liability in equity, conditions that depend upon the specific facts in dispute. Once more, the putative director will find that the devil is in the detail. There is a range of permutations that lie buried beneath the surface of the statutory language, involving both fact and law.

Directors are free to resign at any time. Absent specific terms in the contract of employment, their fiduciary relationship does not continue beyond resignation (Att. Gen. v. Blake [1998] Ch 439, at 453, varied on other grounds [2000] 3 WLR 625 (HL). Should they subsequently use their expertise in the pursuit of an opportunity that might have been of interest to their former company, this will not automatically engage liability within the terms of section 175. To that extent they are free to use their fund of general knowledge and skill. How far this knowledge includes specific information acquired in furtherance of the previous company's enterprise, may vary with each case. Sometimes the information will not be open for exploitation but take the form of a trade secret or property belonging to the ex-directors' former company. This fact alone indicates a problem for the lay director who may find little guidance on a significant demarcation simply by studying the language in the statute.

Juxtaposed with the sparse language of section 175, it confirms that what directors need to know about their potential liability may not readily be encapsulated in a blanket restatement. This is hardly surprising. The recent case law has had to confront multifarious issues deriving from modern competitive enterprise. This issue typically arises where the allegation is that an ex-director has exploited specialist knowledge and skill acquired while in his or her former employment. In Dranez Anstalt v. Zamir Hayek [2001] 1 BCLC 693. Appealed on other grounds: [2003] 1 BCLC 278. Evans-Lombe J held that a company cannot claim protection in respect of know-how and general knowledge memorised by a director as part of his or her job, notwithstanding that such fund of knowledge will equip the director as a competitor. The exception concerns information that qualifies as 'trade secrets'. Noting that this is an area where detailed and accurate pleadings are required, the judge drew upon Mummery LJ's observations in FSS Travel and Leisure Systems Ltd v. Johnson (1998 IRLR 382.), a case involving computer software:

This distinction necessitates examination of all the evidence relating to the nature of employment, the character of the information, the restrictions imposed on its dissemination, the extent of use in the public domain and the damage likely to be caused by its use and disclosure in competition with the employer.

*Typical examples of trade secrets include company databases, customer lists, suppliers` agreements, and business and sales strategy (See, for example, *Item Software (UK) Ltd v. Fassihi*, above n 42; and *Quarter Master UK Ltd v. Pyke* [2005] 1 BCLC 245).*

A director who anticipates leaving one company to go it alone, may find little guidance in the code on how far it is permissible to set about establishing a new enterprise while still engaged by the old. Of course this is a challenging area in terms of equitable principles of liability. One of the favoured rationalisations for fiduciary obligations is to ensure that everything the director does is exclusively in furtherance of the principal company`s economic advantage. Taken at face value, this seems to rule out the possibility of a director being allowed to begin his own venture until he has ceased to hold office. However, as is clear from the case law, the courts are prepared to engage in a fact intensive exercise when determining whether the activities of a director undertaken in anticipation of resignation have crossed the line.

*For example, in *Balston Ltd v. Headline Filters Ltd* ([1990] FSR 385. See also, *Framlington Group plc v. Anderson* [1995] 1 BCLC 475. See J. Lowry and R. Edmunds `The Corporate Opportunity Doctrine: The Shifting Boundaries of the Duty and its Remedies` (1998) 61 MLR 515) the defendant (Head) had been an employee and director of Balston for some seventeen years. Immediately before resigning from the company he agreed to take a lease of commercial premises in order to start-up his own business. At that stage, he had not decided upon the nature of the business he would enter.*

Shortly after his resignation, one of Balston's customers contacted Head after being told that the company would be discontinuing its supply to him of a certain type of filter tube. Head therefore began manufacturing the filters and supplied them to the customer. Balston Ltd sought to hold him to account. Falconer J held that it was not a breach of fiduciary duty for a director to start-up a business in competition with his former company after his directorship had ceased, even where the intention to commence business was formed prior to the resignation. On the evidence, Head had not attempted to divert to himself a maturing business opportunity, an opportunity which was in the contemplation of Balston Ltd. The issue continues to be litigated.

A more recent illustration is Coleman Taymar Ltd v. Oakes. The claimant, Coleman Taymar Ltd, had decided to close both the manufacturing process and its research and development facility in the UK. Mr Oakes, while still technically a director of, but after the termination of his employment with Coleman Taymar Ltd, launched GoGas (UK) plc as a competitor. In so doing, several of his preparatory steps in establishing GoGas were breaches of his general fiduciary duty as a director. Thus Oakes was liable by: making use of confidential company reports in negotiating leases of premises vacated by the claimant; indirectly buying equipment at full value from the claimant, and using Taymar's employees to assist him in establishing GoGas. In terms of liability, the claimant's victory seems somewhat pyrrhic, insofar as the judge found that Oakes's preparatory activities were honest and reasonable breaches for which it was fair to relieve him of liability under section 727 of the Companies Act 1985.

Not surprisingly, pre-resignation activities, which are flagrantly designed to denude the company of an opportunity by diverting it to the defendant director, will attract the full rigour of equity's proscription. For example, in CMS Dolphin Ltd v. Simonet [2001] 2 BCLC 704., CMS Dolphin (CMSD), an

advertising company, successfully claimed that Simonet, its former managing director, was in breach of fiduciary duty by diverting a maturing business opportunity to a new company established by him, following his resignation from CMSD (As is typical in such litigation, CMSD bolstered its claim by arguing that there was also a breach of the duty of fidelity by virtue of his employment contract. the business or reputation of the company, and he was not precluded from using his general fund of skill and knowledge to compete with his former company. However, not surprisingly, it was held that appropriating a maturing business opportunity belonging to CMSD was a misuse of its property for which Simonet was liable). It was argued that Simonet had resigned in order to acquire for himself the opportunity sought by CMSD, and that he had diverted parts of CMSD`s business and taken its staff with him to his new company. Lawrence Collins J held that a director`s power to resign from office is not a fiduciary power and a director is entitled to resign even if it might have a disastrous effect on the business reputation of the company, and he was not precluded from using his general fund of skill and knowledge to compete with his former company. However, not surprisingly, it was held that appropriating a maturing business belonging to CMSD was a misuse of its property for which Simonet was liable.

Rix LJ`s judgment in Foster Bryant Surveying Ltd v. Bryant, 99 holds important lessons for future courts. Having subjected In Plus Group to close scrutiny, he stressed that there must be `some relevant connection or link between the resignation and the obtaining of the business.` He emphasised the need to demonstrate both lack of good faith with which the future exploitation was planned whilst still a director, and the need to show that the resignation was an integral part of the dishonest plan. Thus, in cases where liability for post-

resignation breach of duty had been found, there was, he noted, a causal connection between the resignation and the subsequent diversion of the opportunity to the director's new enterprise. However, Rix LJ recognised the difficulties of accurately summarising the circumstances in which retiring directors, may or may not be held to have breached their fiduciary duties because the issue is necessarily fact sensitive.

These cases serve to illustrate the types of conduct undertaken in anticipation of resignation that fall either side of the line. And, on their facts, no one can dispute the reasoning adopted by the judges. Yet, notwithstanding the underlying objectives of the CLR in codifying the duties, the statute offers little guidance beyond the somewhat abstract language of section 175(4)(a) which provides that the duty will not be broken if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest (Although, as Lord Goldsmith explained when the Bill was going through Parliament: 'Once you know that you are now in a situation of conflict, you will have to do something about it, but you are not in breach simply because it happened when, as is set out in subsection (4)(a), it could not, reasonably be regarded as likely to give rise to the conflict.' See the Official Report, 6/2/2006; coll. GC289). Whether this is sufficient to convey the distinction drawn in the case law between the permissible exploitation of know-how and general knowledge on the one hand, and steps that might be taken which represent the diversion of a corporate opportunity on the other, is open to doubt. No doubt, legal advisors will have little difficulty in appreciating the distinction. But that belies the CLR's goal of simplifying the law and, thereby, making it accessible to the lay director."

V. Risultanzi

1. L-ewwel talba

Irrizulta illi l-konvenut kien direttur u l-impjegat ewlieni ta` MAIN.

Bhala impjegat kellu obbligi li jirrizultaw mill-kuntratt tax-xoghol tieghu tal-4 ta` Frar 1986 :

15. You shall not make use of, divulge or disclose to any person, company, corporation or body of any kind, any information whatsoever in connection with the business or management affairs, dealings or finances of the Company except as you may be directed in writing by the Company.

16. You shall not work for, not have any interest whatsoever in any business entity, individual or corporate, of any kind, irrespective whether the business be competitive or otherwise to that of the Company, unless with prior written approval of the Company.” (fol 13).

Il-konvenut kien ilu direttur ta` MAIN mit-28 ta` Dicembru 1994. Id-diretturi l-ohra kienu Joseph Gasan, Anthony Axisa u Oliver De Giorgio (fol 18 sa 28).

Kien hemm numru ta` impjegati li kienu jirrispondu lilu.

Huwa kien wiehed mill-firmatarji ta` cheques tal-kumpannija u kien jiehu hsieb id-*day to day business* taghha.

Kien biss dwar kazi ta` importanza sostanzjali, li kien jirreferi lis-superjuri tieghu.

Jirrizulta illi l-konvenut kien involut direttament fit-tmexxija ta` MAIN u ma kienx semplici impjegat.

Il-konvenut kien *al corrente* ta` informazzjoni kummercjali sensittiva tas-socjeta` attrici,, inkluz min kienu l-klijenti taghha, min kienu l-principali taghha, il-*cost prices* taghha, kif ukoll x`kienu l-*profit margins*.

Irrizulta li wara li l-konvenut irrizenja kemm minn direttur kif ukoll minn impjegat ta` MAIN, huwa sar id-distributur il-gdid ta` d-ditta estera Comp Air ghal Malta.

Irrizulta li CompAir kienet tinnegozja ma` MAIN sa mill-1995 skont ftehim ta` bejniethom (fol 659 sa 667).

CompAir kienet ilha tforni l-prodott taghha lil MAIN ghal `il fuq minn 12-il sena, sakemm qabdet u tterminat il-ftehim li kellha mas-socjeta` rikorrenti. Immedjatement wara li ghadda t-terminu tal-preavviz tat-terminazzjoni tal-ftehim, CompAir inkarikat lill-konvenut bhala d-distributur taghha (ara l-ittra tal-1 ta` Mejju 2007 mibghuta minn CompAir lis-socjeta` rikorrenti a fol 35).

Fil-fehma tal-Qorti, il-konvenut kien fiducjarju tal-kumpannija attrici b`diversi obbligi fil-konfront taghha, liema obbligi u responsabilita`, baqghu fis-sehh, anke fiz-zmien ta` wara r-rizenja tieghu minn direttur u minn impjegat tal-kumpannija attrici.

Ghall-fini tal-konsiderazzjoni tal-ewwel talba, tajjeb li ssir riferenza ghall-fatti ppruvati :-

1) Fl-20 ta` Novembru 2006, il-konvenut informa lis-socjeta` attrici li huwa xtaq jirrizenja mill-kariga tieghu.

2) Fl-1 ta` Dicembru 2006, il-konvenut irrizenja minn direttur tas-socjeta` attrici; kienet prezentata l-Form K lir-Registratur tal-Kumpanniji (fol 29).

3) Meta kien ghadu mpjegat tas-socjeta` attrici, bil-preciz fl-10 ta` Jannar 2007 (fol 690), il-konvenut ressaq applikazzjoni biex jottjeni numru tal-VAT ghal attivita` kummercjali li kienet indikata bhala "*import and retail ind. plant*".

4) Waqaf mix-xoghol mal-kumpannija attrici fit-23 ta` Jannar 2007.

5) Fit-2 ta` Frar 2007, CompAir infurmat lis-socjeta` attrici li kienet qeghda taghti avviz ta` tlett xhur biex tittermina l-ftehim maghha. CompAir irrimarkat illi : *“We were also shocked and dismayed to learn of Albert Galea’s decision to resign from his position as Director of Main Services.”* (fol 30).

6) Huwa minnu li CompAir dejjem insistiet fil-korrispondenza taghha li r-raguni tat-terminazzjoni kienet purament ghaliex il-ftehim kien jippermetti terminazzjoni ghal kwalunkwe raguni, izda huwa minnu wkoll illi d-decizjoni ttiehdet wara l-laqgha tad-19 ta` Jannar 2007 meta CompAir saret taf bir-rizenja ta` l-konvenut.

7) Fil-21 ta` Marzu 2007, il-Kap Ezekuttiv ta` CompAir jikteb :-

“After very careful consideration the conclusion was reached that this sudden change in personnel at Main Services was detrimental to CompAir’s position in the market, and that alternative distribution arrangements for Malta would be necessary ... As we understand that Albert Galea was a Director, and one of a relatively small team of six employees of Main Services, we firmly believe that his departure represents a substantial change to the management of the business.” (fol 31 - 32)

Il-Qorti hija tal-fehma illi d-decizjoni ta` CompAir li ttejjem il-ftehim li kellha mas-socjeta` attrici kien dovut għall-fatt illi Albert Galea kien irrizenja mis-socjeta` attrici, u digà` kellu hsibijiet li jopera negozju fuq l-istess linji bhal dak tas-socjeta` attrici.

Jirrizulta ppruvat illi waqt li kien għadu għaddej *in-notice period*, Albert Galea kien digà` applika għan-numru tal-VAT, mhux biex jopera negozju tas-souvenirs (kif allega) izda sabiex jkun jista` jagħmel importazzjoni u bejgh ta` *industrial plant*. Inoltré huwa rilevanti ferm ukoll il-fatt illi kif għaddeu it-tlitt xhur ta` preavviz bejn CompAir u s-socjeta` attrici, CompAir fil-pront għamlitha cara li d-distributur tagħha Malta kien ser ikun il-konvenut jew id-ditta tiegħu.

Albert Galea sar jaf b`CompAir tramite x-xogħol u l-posizzjonijiet li kellu fis-socjeta` attrici. Kien hu wahdu li kien jirraprezenta lis-socjeta` attrici ma` Comp Air u kellu kuntatt dirett u kontinwu magħha.

Il-Qorti tiskarta bhala mhux attendibbli r-ragunijiet li gab il-konvenut ghar-rizenja kompleta tieghu mis-socjeta` attrici. Mhuwix kredibbli il-konvenut meta jallega illi telaq ghal ragunijiet ta` sahha tal-mara tieghu, u prattikament fl-istess nifs, japplika ghal numru tal-VAT mhux sabiex igib minn barra s-souvenirs, kif xehed li ried jaghmel, izda applika ghal numru tal-VAT sabiex jimporta u jbiegh *industrial plant* – altru milli souvenirs !

Meta taqra u tqis id-deposizzjoni ta` Albert Galea, il-Qorti ssib illi l-konvenut irrizenja ghax deherlu li kien ta hafna lill-kumpannija attrici izda haseb illi din ma kinitx qeghda taghtih lura s-sodisfazzjon li kien jimmerita.

Il-Qorti taghmel riferenza ghal parti mid-deposizzjoni tal-konvenut fejn stqarr illi beda jhoss li s-socjeta` attrici kienet qeghda tigi traskurata mid-dirigenti l-ohra u li kwalunkwe inizjattiva u/jew proposta li kien qed jiehu jew jaghmel kienet qed tigi injorata.

Dan kien l-ispunt li mbotta lill-konvenut sabiex jaghmel l-ghazla li jirrizenja ; sa hawn xejn hazin. Izda mhux jiftah negozju identiku jew kwazi identiku ghal dak tas-socjeta` attrici ; dak le, tenut kont tal-posizzjonijiet, inkluz l-access ghal data sensittiva ferm, li kellu fis-socjeta` attrici.

Il-Qorti tosserva riluttanza – jekk mhux resistenza – evidenti da parti tal-konvenut, li jipprezenta dokumenti wara talba tas-socjeta` attrici. Minkejja dan, anke minn evalwazzjoni tad-dokumenti li kienu esebiti mill-konvenut fis-27 ta` Jannar 2010, li fihom hemm numru ta` *purchase orders* li rceviet AG Industrial Solutions mill-1 ta` Settembru 2006 sad-data tas-27 ta` Jannar 2010, jirrizulta li kien hemm ordnijiet ghal kompressuri ta` CompAir.

Ghal din il-Qorti, jirrizulta kjarament illi l-konvenut ried jaqla` barra lis-socjeta` attrici sabiex jidhol hu bhala distributtur ta` Comp Air u dan b`aperta vjolazzjoni tal-obbligi fiducjarji tieghu versu l-kumpannija attrici.

L-ewwel talba qeghda tkun milqugha.

2. It-talbiet l-ohra

Is-socjeta` attrici ressqet prova dwar kemm kienet taghmel qligh mill-bejgh ta` kumpressuri tad-ditta CompAir.

Issir riferenza ghall-provi li tressqu fl-udjenza tat-12 ta` Gunju 2015. Jidher illi fl-2006, is-*supplier* tal-kumpressuri u accessorji kienet CompAir. Tressqet ukoll lista ta` diversi persuni li kienu klijenti tas-socjeta` attrici izda li ma baqghux.

Kienu esebiti dokumenti fit-23 ta` Lulju 2015.

Kemm minn dawn kif ukoll dawk li kienu esebiti fit-12 ta` Gunju 2015, jirrizulta li s-socjeta` attrici baqghet tbiegh kumpressuri ohra, billi ghamlet ftehim ma` ditti ohra.

Minkejja dan kollu, is-socjeta` attrici garrbet telf.

Juan Debattista ghas-socjeta` attrici fisser il-figuri tat-*turnover* tal-kumpannija attrici wara l-2005 mnejn jirrizulta li t-*turnover* naqas b`mod konsistenti u sostanzjali.

Tressqu l-*management accounts* li jsostnu l-figuri dwar it-*turnover*.

Skont ma xehed Oliver de Giorgio, il-figura medja ta` l-qligh fis-sena li kienet taghmel is-socjeta` attrici mill-prodotti CompAir kien jammonta ghal EUR 49,718. Ix-xhud dahal fid-dettall dwar kif wasal ghal din il-figura. Stqarr illi l-ammont kien jirrapprezenta figura medja ta` qligh ghal sena li MAIN ma kenitx ghadha tiggera minn mindu CompAir ma baqghetx tissupplixxi lil MAIN bil-prodott taghha u bdiet minflok tforni lill-konvenut u/jew lid-ditta tieghu.

Il-Qorti tirrimarka li minkejja li l-konvenut kien rikjest jaghti informazzjoni dwar il-qligh tieghu, baqa` ma ghaddiex it-taghrif.

Dan in-nuqqas ta` l-konvenut wassal sabiex minkejja r-rapport ta` perit komputista, il-konkluzjonijiet peritali ma kinux daqstant precizi u affidabbli.

Il-perit komputista fisser il-metodologija ta` kif wasal ghall-konkluzjonijiet tieghu :-

“The approach adopted to calculate the gross profit margin on sales made by Mr Albert Galea with respect to products purchased from Comp Air Uk Limited, consisted of taking a sample of the sales issued to De La Rue Currency & Security Print Limited and compared to their corresponding purchase invoice.

From the above sample, a gross profit margin was established, which was then extrapolated to all purchases made by Mr Albert Galea with respect to Comp Air Uk Limited products from May 2007 till report date.

In carrying out our task the following assumptions were made:

- *The workings were based on a sample of 21% of the total sales made to De La Rue Currency & Security Print Limited. The original sample requested by us amounted to 84% of sales, however only 21% of sales had their corresponding purchase invoice provided to us. We have requested the remaining purchase invoices which as at today were not supplied to us nor matched with their corresponding sales invoice.*
...
- *The sales figures were calculated by grossing up the value of purchases made from Comp Air UK Limited by the gross profit margin as calculated in the table shown in page 3. The actual sales value could not be established since the client sold Comp Air UK Limited products to customers other than De La Rue Currency & Security Print Limited. These sales were not presented to us for the basis of our calculation.*

- *Labour and installation costs were also not accounted for the purpose of our calculation.*
- *We have also requested, through Mr Albert Galea a transaction history from Comp Air Uk Limited, to collaborate information given to us by Mr Albert Galea. To date we have not received this information. When calculating the purchases figure we had to rely on the documentation presented to us by Mr Albert Galea since no other source of information could be obtained.”*

Fl-isfond ta` dan, il-perit komputista kkonkluda li l-konvenut ghamel qligh ta` EUR 32,276.53 bhala qliegh minn fuq prodotti CompAir bejn Mejju 2007 u l-20 ta` Gunju 2011 (ossija d-data li fih sar dan ir-rapport), ghalkemm fir-rapport hemm innizzel illi ma tistax tinghata stampa kompleta tas-sitwazzjoni minhabba nuqqas ta` informazzjoni mghoddija. Jinghad mill-perit komputista : *“The report provides limited assurance on the profit made by Mr Albert Galea with respect to purchases of products from Comp Air UK Limited.”*

Il-konvenut ittenta jiggustifika l-agir tieghu.

Ressaq bhala xhud lil David Pace.

Dan stqarr illi bejn l-2007 u l-2012, ma kienx hemm akkwist ta` kompressuri CompAir minn Albert Galea.

Madanakollu, dan jikkuntrasta ferm ma` dak li sostna Albert Galea nnifsu meta xehed li huwa kien ghadu agent ta` prodotti ta` CompAir go Malta.

Anke diversi xhieda ohra kkonfermaw li huma kienu jafu illi l-konvenut kien qed iforni prodotti CompAir fis-suq Malti.

Kien esebit reklam mehud mis-sit elettroniku ta` CompAir a fol 183 mnejn jirrizulta li l-agent taghhom Malta kienet AG Industrial Solutions. Tirrizulta wkoll ittra ta` CompAir li nformat lis-socjeta' attrici li l-agent il-gdid taghha Malta kienet AG Industrial Solutions.

Tajjeb li jkun rimarkat illi huwa minn awl id-dinja illi CompAir nehhiat lil MAIN minn distributtur Malta wara li rrienza l-konvenut mhux biss tnaqqas il-bejgh u l-qligh taghha min-negozju ta` Malta izda propju ghal ragunijiet opposti.

Ghalhekk mhuwix kredibbli illi skarikata MAIN, u fdat in-negozju f` idejn Albert Galea de proprio, ma sarx bejgh.

Dan premiss, il-Qorti tghid illi l-kwistjoni tad-danni m`ghandhiex x`taqsam ma` jekk is-socjeta` attrici ghamlitx telf minhabba l-agir ta' l-konvenut.

Il-vertenza mhijiex jekk is-socjeta` attrici spiccatx bla qligh u minghajr prezenza fis-suq tal-kompressuri, izda illi l-konvenut kiser l-obbligi fiducjarji tieghu.

Il-konsegwenza hija illi l-qligh tas-socjeta` attrici naqas mill-qligh li kien ikollha li kieku baqghet tbiegh u tiddistribwixxi prodotti Comp Air.

Fid-decizjoni ta` **Foster Bryant Surveying Ltd and another vs Bryant and others** (2007) EWCA Civ 200 intqal li :

Moreover, in considering the claim for loss and damage, the judge was unable to identify any existing projects which had actually been subsequently transferred to Mr Bryant or his new company, even though the judge had before him the lists of projects which had passed between Mr Foster and Mr Black in January 2005: see paras 43/44 above. He said that although it had been suggested that there had been such a transfer of existing projects, the matter had been "but little investigated before me". The factual premise had not been made out: what the facts were as to whether any work

*already entrusted to the company had been removed to Savernake "was unclear". The judge considered various categories of projects to which his attention was drawn by claimants' counsel, but was unable to make any positive findings. On the contrary, such findings as he made were by way of rejecting the claimants' submissions. There was therefore no finding of any transferred work, and no finding of any profit made by Mr Bryant or his new company in respect of which there was any liability to account. In these circumstances, although **I accept the position in law that, if he or his company had profited from any breach by him of his fiduciary duties, then they would be liable to account, even if the claimant company had itself suffered no loss** (and if the judge suggested otherwise, he was in error), nevertheless there is simply no finding of any profit connected with any assumed breach (see Mr Justice Lawrence Collins' requirement in *Simonet* of "some relevant connection or link between the resignation and the obtaining of the business" (at 731f): moreover there the resignation spoken of was one planned towards the exploitation of such business, which is not the case here)*

...

*Secondly, I would wish specifically to record my respectful agreement with my Lord, in his §88, **that a fiduciary is liable to account for profits connected with or arising from a breach of duty even if there is not loss proved by the beneficiary.** However, as my Lord also points out, on the facts of this case that principle and the limits on it do not arise for decision.*

(nfasi u sottolinjar ta` din il-Qorti)

Mhuwieg mehtieg li s-socjeta` attrici tkun attwalment u materjalment sofriet telf izda huwa bizzjed illi l-konvenut ikun ghamel gwadann u dak il-gwadann kellu effettivament ikun gwadann tas-socjeta` attrici li taghha kien direttur.

Max Ganado fil-kitba : **Fiduciary Obligations under Maltese Law**
(ara l-klietb : **Trusts e Attivita` Fiduciarie**) : jittratta r-rimedji disponibbli
fil-kaz ta` ksur ta` obbligi fiducjarji :

In many cases it is not enough to seek and obtain monetary compensation equal to the value of the asset because what the beneficiary often wants is the asset itself, so only a reversion in kind will suffice. The second problem is that when things are transferred at an undervalue to a third party in good faith, a refund of the price is clearly not enough. The third issue relates to potential profits which then accrue to the third party (or the fiduciary on an undisclosed basis) rather than to the beneficiary.

Maltese law has addressed this problem in a robust manner so as to ensure that the fiduciary cannot make any profit under any circumstances. A fiduciary in breach must pay for all losses suffered by the beneficiary from his acts. He must also account for any profit made. This principle is the only way a fiduciary will have absolutely no incentive to act in breach. When a fiduciary acts in breach, directly, he remains a fiduciary of the asset appropriated and all the profits made. When the fiduciary acts in breach with the connivance of a third party, the third party also becomes a fiduciary and he too must account for all profits he makes. The law denies him of any profit as well.

*This principle does not, however, ensure the reversion of the asset to the beneficiary and so the additional remedy to get the thing back has been enshrined into the law. This is often called the right to trace property in kind into the hands of a third party. For this to be successful, however, the third party cannot be a person in good faith for value, because in that case it is not possible to claim the asset back and the only remedy will be against the fiduciary in breach (**Muscat vs APS Bank Limited**, 8 October 2007, Magistrate Dr Anthony Ellul. Court of Magistrates (Gozo) (Superior Jurisdiction). The court said that what was agreed in bad faith between the plaintiff and his brothers regarding the*

purchase of the said property bound their own internal relationship and did not bind third parties in good faith i.e. this applies when third parties were not involved in any secret fiduciary agreement that may have taken place between the plaintiff and his brothers) (subject to other Civil Law remedies that, in the context of movables, permit the beneficiary to indemnify the third party and reclaim the movable). Of course, good faith will only protect a person who can demonstrate that he was not aware of the facts nor should, from the circumstances, have been aware. This requirement does not apply when the transfer to a third party is not for value but made gratuitously. In such cases the third party will need to return the property as he suffers no loss. Maltese law therefore prefers the victim of a fiduciary breach to a third party in good faith under a gratuitous transfer.

The second reason why an asset may not be returned in kind is because it has been converted to a different thing, of suitable value, in open market conditions. In these cases the value is still available but not the thing itself. The substitute thing may be in the hands of the fiduciary or an accomplice and our law then states that the same remedies will be available in relation to the substitute property. The typical example of this situation is the case where a fiduciary receives unauthorized profits in the form of a bribe to breach his duty of care and favour a third party. He is paid say \$1Million and then goes to buy a Villa on the beach. The beneficiary can then trace his claim for a return of unauthorized profits to the Villa and demand that asset from the fiduciary who is considered as having acquired it for the beneficiary. Of course if the act causes loss, then the fiduciary must pay for the loss as well.

When third parties are protected because they act in good faith for value, and are hence not accomplices in the breach, we see the law giving preference to the principle that bona fide purchasers obtain title over the rights of the victim beneficiary. In that case the beneficiary must sue the fiduciary personally for damages and his rights will be limited to what the

fi-ducary can compensate for. This is usually based on the fact that the fiduciary relationship is secret, is undisclosed, and the third party had no basis of suspecting that there is a breach taking place by the fi-ducary.

Riferibbilment ghall-kaz tal-lum, il-Qorti tishaq illi l-konvenut baqa` jgorr mieghu obbligi fiducjarji marbuta mal-pozizzjoni li kellu bhala direttur tas-socjeta` attrici.

L-agir tal-konvenut wassal sabiex is-socjeta` attrici iggarab telf fil-bejgh u fil-profitti taghha, ghal liema telf il-konvenut ghandu jaghmel tajjeb, peress li gara kien imputabbli ghall-agir tieghu.

Il-Qorti hija tal-fehma – in linea ta` principju – illi ghal kazi bhala dak tal-lum, il-qorti m`ghandhomx jaslu biss sal-likwidazzjoni ta` danni, izda ghandhom jassiguraw illi l-persuna li tkun kisret l-obbligi fiducjarji ma tibqax tibbenefika min-nuqqas taghha, dejjem jekk ikun rikjest minnhom illi jaghmlu dan.

Ghal aktar kjarezza, dan ifisser illi r-rizultat finali m`ghandux ikun li persuna li tkun kisret l-obbligi fiducjarji taghha tibqa` tgawdi mill-beneficji ta` l-agir taghha u thallas biss danni, izda ghandu jigi applikat il-principju : *commodum ex injuria sua nemo habere debet ut nemo licet locupletari cum aliena iactur.*

**Il-Qorti tirrepeti :
dment illi tkun mitluba taghmel xi haga tmur oltre d-danni.**

Qed jinghad dan ghaliex jekk il-qorti taghmel dak li ma kenitx mitluba taghmel, tkun marret oltre t-talbiet, bir-riskju li tiskonfina *the red line* li johodha fil-qasam ta` l-*ultra petita* bil-konsegwenzi ben noti u riaffermati fil-gurisprudenza.

Il-kawza tibqa` tal-partijiet mhux tal-qorti. Ghalhekk il-partijiet ghandhom jiehdu hsieb il-posizzjoni legali u processwali taghhom, bla ma l-qorti jkollha ghalfejn tissenjala xejn – favur naha jew ohra.

Dan premess, il-Qorti sejra tghaddi sabiex tillikwida d-danni li fil-fehma taghha ghandhom jithallsu mill-konvenut.

Il-Qorti tqis illi l-inkariku tal-perit komputista ma setax jigi ezegwit bi precizjoni u dettall minhabba n-nuqqasijiet riskontrati u ndikati mill-istess perit komputista.

Tqis illi l-konteggi li saru mis-socjeta` attrici kienu aktar sostanzjati, precizi u spjegati b` tali mod u manjiera li ma gewx kontradetti bl-ebda prova li ressaq il-konvenut.

Il-Qorti tqis illi abbazi tal-provi, irrizulta illi l-medja tal-qligh fis-sena li kienet taghmel is-socjeta` attrici mill-prodotti CompAir kien jammonta ghal EUR 49,718.

Jekk wiehed iqis din il-figura medja, u jadotta bhala parametri, medda ta` 10 snin, u cioe` bejn is-sena tal-presentata tar-rikors guramentat (2007) u llum (2017) l-ammont jamonta ghal EUR 497,180.

Dan premess, il-qorti tqis illi fil-likwidazzjoni li taghmel, filwaqt illi zzomm ferm mal-principji u l-konsiderazzjonijiet diga` esposti, il-Qorti trid izzomm bilanc ragonevoli.

Ghalkemm ma hemmx prova illi sal-lum il-konvenut ma baqax id-distributur tal-CompAir *brand* go Malta, il-Qorti trid tqis li aktar ma toktor il-htiega ta` l-prodott, aktar jitwessa` s-suq, u bis-suq liberalizzat, il-kompetitizzjoni tizdied.

Il-mizura tas-success tal-prodott tibqa` dejjem il-kwalita`, il-prezz u s-servizz.

Il-Qorti tapprezza illi l-bejgh ivarja skont il-fatturi tas-suq. Mhux eskluż illi fil-kaz tal-lum seta` kien hemm snin fejn in-negozju ma kienx sejjer tajjeb. Il-Qorti hadet kont anke ta` dan izda trid toqghod fuq il-provi. Qieset ukoll illi s-socjeta` attrici qeghda xorta wahda jkollha *turnover* tajjeb mill-bejgh ta` kompressuri forniti minn ditta ohra.

Il-Qorti tqis illi l-konvenut naqas li jipprezenta dokumenti biex juri l-introjtu tieghu minn mindu waqaf jahdem mas-socjeta` attrici jew dokumenti dwar hlas tal-VAT li ghamel minn mindu beda n-negozju tieghu.

Il-konvenut irnexxielu jhalli lill-Qorti sajma ghal kollox minn figuri li finalment setghu jkunu ta` beneficju ghalih. Anke ta` dan in-nuqqas, il-konvenut ghandu jerfa` l-piz.

Tenut kont tal-fatti u cirkostanzi kollha tal-kaz fl-assjem taghhom il-Qorti qeghda *arbitrio boni viri* tistabilixxi d-danni tas-socjeta` attrici fl-ammont ta` €350,000.

Decide

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi :-

Tichad l-ecezzjonijiet kollha.

Tilqa` l-ewwel talba.

Tipprovdi dwar it-tieni, it-tielet u r-raba` talbiet, billi filwaqt illi qeghda tillikwida d-danni tal-kumpannija attrici fl-ammont ta` tliet mija u hamsin elf Ewro (€350,000), qeghda tiddikjara illi dan l-ammont ghandu jithallas lill-kumpannija attrici mill-konvenut.

Riferibbilment ghall-hames talba, tordna lill-konvenut sabiex ihallas lill-kumpannija attrici s-somma hekk likwidata in linea ta` danni fl-ammont ta` tliet mija u hamsin elf Ewro (€350,000), b`effett mil-lum sad-data tal-effettiv pagament.

Tikkundanna lill-konvenut sabiex ihallas l-ispejjez kollha ta` din il-kawza.

Onor. Joseph Zammit McKeon
Imhallef