



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

**MAGISTRATE
DR. CAROLINE FARRUGIA FRENDU**

Case number: 490/2016 CFF

**The Police
Inspector Trevor Micallef
vs
Tomie Makita sive Tomie McCarthy**

Today, 16th October, 2020

The Court

Having seen the charges brought against Tomie Makita sive Tomie McCarthy, and identity card no. 48799(A).

Charged her with having on the 21st June, 2016 and/or in the previous days and or weeks, from the offices of Globalair Travel Limited (C5893), 110, Flat 5, San Michel, St. George's Road, San Giljan, and/or in these islands:

1. Stole files belonging to Globalair Travel Limited (C5893), which contained information, related to its clients; which theft is aggravated by 'person' and this to the detriment of Joseph Bugeja and/or other persons, and/or other entities (Articles 261, 268(d) of Chapter 9 of the Laws of Malta).
2. Charged her further for having during the same period, place and circumstances, appropriated herself by, converting to her own benefit or to the benefit of others, anything which has been entrusted or delivered to her under a title which implies an obligation to return such thing or to make use thereof for a specific purpose; by failing, after the termination of her employment, to return files and documents which she had in her possession belonging to Joseph Bugeja and/or other persons, and/or other entities and instead she used them for her own benefit or the benefit of others. (Article 293 of Chapter 9 of the Laws of Malta).
3. Charged her further for having during the same period, place and circumstances wrongfully appropriated and converted to her own benefit, payments which had been entrusted or delivered to her by reason of her profession and trade by clients of complainant company, since while clients were in Malta she approached them and offered to supply them with the services of a third party and personally kept the remaining balance of such payments to the detriment of Joseph Bugeja and/or other persons, and/or other entities (Article 293 of Chapter 9 of the Laws of Malta).

4. Charge her further for having during the same period, place and circumstances without authorisation made use of a computer or any other device or equipment to access any data, software or supporting documentation held in that computer or on any other computer, or used, copied or modified any such data, software or supporting documentation to the detriment of Joseph Bugeja and/or other persons, and/or other entities (Article 337C (1)(a) of Chapter 9 of the Laws of Malta).
5. Charge her further for having during the same period, place and circumstances without authorisation copied any data, software or supporting documentation to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held to the detriment of Joseph Bugeja and/or other persons, and/or other entities (Article 337C(1)(c) of Chapter 9 of the Laws of Malta).
6. Charge her further for having during the same period, place and circumstances without authorisation hindered or impaired the functioning or operation of a computer system, software or the integrity or reliability of any data to the detriment of Joseph Bugeja and/or other persons, and/or other entities (Article 337C (1)(e) of Chapter 9 of the Laws of Malta).
7. Charge her further for having during the same period, place and circumstances without authorisation hindered or interrupted the functioning of an information system by inputting computer data, by transmitting, damaging, deleting, deteriorating, altering or suppressing such data, or by rendering such data inaccessible; including the fact that she changed the address of the electronic post to the detriment of Joseph Bugeja and/or other persons, and/or other entities which is in contravention of (Article 337C (1)(ee) of Chapter 9 of the Laws of Malta).
8. Charge her further for having during the same period, place and circumstances without authorisation took possession of and made use of any data, software or supporting documentation to the detriment of Joseph Bugeja and/or other persons, and/or other entities (Article 336C (1)(f) of Chapter 9 of the Laws of Malta).

Having seen that the Prosecuting Officer Inspector Trevor Micallef read out and confirmed on oath the charges brought against the accused.

Having seen all the documents submitted in the proceedings, namely, the accused's conviction sheet, a photocopy of the accused's passport, a photocopy of the accused's residence permit, complaint letter, current incident report dated 26th August, 2016, the accused's statement dated 1st September, 2016, the consent of the Attorney General that these proceedings may be heard summarily, report by Globalair Travel marked as Doc VZT1, incident report compiled by InterTEk Laboratories marked as Doc VZT2,

Having heard the testimonies of the Prosecutions' witnesses, namely, Joseph Bugeja, Victor Zammit Tabone, Kyoko Gafa', Mihoko Sugiura, Sue Sultana, Miguel Gauci, Alan Scerri, WPS 299 Roxanne Tabone, Inspector Trevor Micallef, Inspector Timothy Zammit, Charles Zammit, Claudette Borg Carbone, Alex Camilleri.

Joseph Bugeja, is the Chairman of Globalair Travel and the accused was employed as the manager on the Japanese market. She had started working with the company approximately in 2009. One fine day, the accused informed the company that she was leaving to go and work for an IT company, but since it was difficult to find Japanese staff to replace her, she decided to work for an extra month for the company. Once the accused left the company, Joseph Bugeja noticed that certain files were missing and that the accused was still communicating with the company's correspondents abroad. She was called to the office and was accompanied by Mr. La Rosa, to find the file on the computer, which she did. The accused

was not supposed to be in contact with the tourists when they came to Malta, however she took control of the situation and put aside the company's representatives.

Victor Zammit Tabona, is the General Manager of Globalair Travel and explains that the company deals with incoming tourism and has been operating as such for 35 years. For 18 years, the company was tapping into the Japanese market. In September 2007, the company employed the accused who was responsible for the Japanese market and in her contract she had a confidentiality clause. The accused was the one who handled the clients and she was also the one who went abroad representing the company. In April 2016, the accused tendered her resignation and told the General Manager that she will be working with an IT company. After she left the company, the General Manager realised that there was a missing file in relation to clients coming to Malta in August. Two other staff of the company informed him that the accused had admitted to taking this file and asked them not to tell the General Manager. One of the staff told the management, Ms. Sue Sultana who in return contacted the accused and asked her to return the file. The accused denied ever taking anything from the company. When the group of tourists came to Malta, in August, even though the accused was no longer an employee of Globalair Travel, the representatives of the company found the accused with the group. Sometime later, a member of the staff was working on the computer previously used by the accused and found three open email accounts. One email account was from Richmore and Anderson, one email account was from Oneson Ltd and the other email account was her personal email. Going through these emails, it became clear, that the accused prior to handing in her resignation, had started poaching the company's clients and asking them to join her new company. She organised excursions directly through Richmore and Anderson, rather than Globalair. With regards to the company's blog, said blog was in Japanese and at the end of the blog there were contact details referring to Globalair. However, the accused changed those contact details to Onesun, her new company. Ms. Sue Sultana had informed the accused that this was illegal, and the accused amended the contact details, but instead of putting Globalair's details, she put her own personal contact details instead. A report was drawn up by Intertek Laboratories after Globalair Travel requested them to examine the computer the accused worked on. It resulted that the accused had opened a cloud account so that she can have access to the information even when not at work. From the correspondence found in the emails, there resulted a misappropriation of funds where she asked clients to pay her an amount of money in cash and said amount did not tally within the system of the company.

Kyoko Gafa has been employed with Global Air Travel since 2006 and responsible in handling tourists from the Japanese market. The accused had left the company in May 2016 and since then she took over as another employee was abroad at the time. Having been given a general handover of the tasks the accused was involved in, the witness stated that she knew nothing about the Asaf Travel Group. After having received an sms from the accused, she called her back and was informed about a group of students but only to take note. After her colleague returned from abroad, namely Mihoko, she informed about whether she knew anything about this group. Even Mihoko said that she knew nothing as only the accused knew of these things. During one of the messages she received was about an appointment with the Knights of Malta. To obtain the necessary information, she asked for a specific file on this matter to the accused. The accused had informed her that the file was either with her on with the Chamber of College which is a language school. The accused had told her that she should take charge of this group and not to inform her colleague as she had already a lot of things to do. According to this witness, the fact that the accused tried to help her at the time she thought she was doing a favour to them. When she asked the accused whether she should inform Mr Bugeja about the appointment with the Knights of Malta, she had told her not to tell anyone as the Chamber of College would pay Global Air Ltd. She thought that the accused had the authorisation to take the file with her and when she had told her colleague about the file, they did not inform anyone else about thinking that the accused had authorisation to keep the file. The accused had told her that a donation must be given to the Knights of St. John as this was essential

to make the arrangement however, she did not know what the amount was. At the time she was under the impression that the accused was working with an IT company, but she found out that she was with another Japanese handling company. Also, she mentioned that payments would be sent to Global Air Travel. Her colleague informed the General Manager about the accused working with another handling company and at the same time, she received an sms from the accused telling her to lie if someone asks her about this arrangement that it was the accused who had handed over this case to her and that Global Air Travel and Chamber of College are involved. The accused had told her to lie because in actual fact she had never given her the file on this group and it was for this reason that she spoke to the Mr Zammit Tabona and Sue Sultana about the missing file. The witness confirmed that she had translated several emails from the Japanese language into English.

Mihoko Suguira had been employed with Global Air Travel for over three years. She was informed by her colleague Kyoko about an arrangement that had to be done with the Knights of Malta. This arrangement was about a group of students, but they found out that they did not have this file. When she checked their website which was in Japanese, she found out that the site led to another company with different name and email address. She did not know anything about this company (a fol 124). After she searched on the internet about this company, the picture of the accused showed up on the website of Onesome which was a competitor of Global Air Travel. It was at this stage that they decided to inform Mr Zammit Tabone and Sue Sultana about the missing file. Some weeks later, a Japanese trainee started working with the company and was using the computer the accused had and saw something suspicious. From the information they had seen, there were three email accounts belong to different companies and to the accused. From the information she gathered from the emails (a fol 125 et seq until a fol 128), the accused was contacting several Global Air clients and giving information on bookings. It was confirmed that the accused had access to the website belonging to Global Air.

She added that the accused had told them that she was going to work with an IT company and not with another company that dealt with the Japanese market and to her that was bad. She added that on the website the accused had the same tours that Global Air dealt with. She could not confirm whether Global Air Ltd had exclusivity to deal with the Japanese Market. On the other hand, she said that Chamber College was managed by the son of the Directors of Global Air Travel and the accused used to take of the students as she was working for both companies. According to this witness, the accused had started a blog with the intent to attract clients for Global Air. The blog was accessible to anyone on the internet and it was the accused that used to upload any articles on the blog. As regards the email accounts that were accessed by the trainee, the witness confirmed that they were found on the computer through Outlook, that the accused used to use. It was the trainee that brought to the attention of the witness that there were accounts belonging to the accused. The access to the email accounts occurred after the accused had left the company nearly two months later. It was found that the email accounts were still open as the accused had not logged off her accounts from the computer which she used to make use of when she used to work with the Company. It was confirmed that the witness had accessed the personal email accounts of the accused (as per fol 125) as none of these accounts were logged off. It was found out when the witness read the emails that the accused was contacting Global Air Clients but she could not say whether Global Air had exclusivity with such clients in Japan.

Sue Sultana stated that she works with Global Air Travel and she knew the accused because she used to work within the same company as her dealing with Japanese clients. It was confirmed that the accused used to manage and handle the whole department and clients as regards tours, restaurants. The accused had informed them that she was leaving the company but was going to work with an IT company. In June she got to know that the accused was not working with an IT company as she had declared but with an incoming tourist agency. When they accessed the Global Air website the link to their blog was changed in that it would access the blog of One Sun Malta. One Sun Malta is a company which the accused

worked with and handles Japanese clients. On accessing the link to One Sun Malta, they found pictures of the accused and other staff and were advertising Malta for the Japanese market. According to this witness, the accused had accessed their website and changed the contact details to her email address. When she contacted an IT company, they informed her that the access was made through One Sun Malta which is situated in Hamrun. She was informed by two other members of her staff working in the same Department dealing with the Japanese market, that a file was missing. This file was on a Tour Operator Group called Asagi which according to these two employees, the file was in the possession of the accused. The accused had informed Kyoko and Mihoko not to tell anyone about the file and if anyone asks for the file to inform them that she had left it at the Chamber College. Although she had phoned the accused for the file, she denied ever having the file and immediately after she hung up, the accused called Kyoko. Sometime later, the accused came to their office with two persons one of whom the witness recognised as being Oliver La Rosa, although he denied being this person. The accused denied ever having this file. Although she was confronted about the changes that were made on the Global Air Travel website, she denied having the file. The file was never returned. She received an email from the General Manager Victor Zammit Tabona that they had found a lot of information on the computer that the accused used to use during her time with Global Air Travel. According to the information the accused was contacting their clients. The witness exhibited several documents in relation to their findings through their IT Support.

During cross examination, she confirmed that both Kyoko and the accused used to work with the company for several years. She confirmed that her father, Joseph Bugeja is a shareholder as well as in Chamber College. The accused used to work at Chamber College to deal with the Japanese Market. When asked about the missing file that it could have been taken to Chamber College, she said that the file belonged to Global Air and to Chamber College. She confirmed that the blog was created by the accused and in so far payments were made by Global Air although. She added that even though the blog was created by the accused, whatever was created belonged to the company. She added that changes that were made were on the website, whereby the Contact Us link directs the person to One Sun Malta, although she was not sure about this matter. She added that the only changes that were made to the website was the email address. Any clients contacting Global Air would be redirected to One Sun email address, although she could not confirm what email address was being used or whether there was any change. Regarding the missing file she did not see the accused taking the file or have not seen any CCTV footage.

Miguel Gauci was employed with an IT Company, namely Intertech and GlobalAir was their client. He was informed by Sue Sultana as their website was modified and he logged in remotely and took some screenshots. He exhibited a report doc MG 1. The website was accessed from Hamrun. Under cross examination, he explained that the IP address showed that the access management was made in Hamrun but it does not show in which address it was accessed from. From what he found out that the IP locator shows that the access management was made two weeks prior to the 21st of June. He was not in position to state which part of the website was changed.

Alan Scerri stated that he works with Intertech Laboratories and was contacted by Global Air to analyse the computer used by the accused. He added that the passwords used by the accused were saved on Google Chrome and sites requiring authentication were easily accessible. According to the information he had found that the Global Air websites had access to email accounts belonging to the Company. Any queries from such site would be sent to another email address which was a third party email address namely tomie131maki@yahoo.co.jp which did not belong to Global Air. On the website there were contact pages that refer to One Sun and had the following email address info@onesunmalta.com. He added that it was the accused had access to the website of Global Air Travel. He exhibited a report namely doc AS 1.

Under cross examination he added that he does not know whether one must pay for such accounts, and he does not know who owns the account. According to him it was Global Air Travel that created the account. Any information which was uploaded was done by the accused from her computer, but he was not aware whether any information was uploaded from Chamber college. He added that he had access to the content on the computer as the browser which was being used had all the passwords saved. He added that he was analysing the computer belonging to Global Air. He had accessed third party accounts which were discovered by the staff at Global Air Travel, which belonged to Richmore Anderson and stated that the accused would have the same access to these accounts if logged in from another computer. He added that some emails were forwarded from Globalair account to Richmore Anderson account. Accordingly, the computer was still being used by Global Air employees and he was informed of query in August 2016 which report was dated 4th November 2016.

WPS 299 Roxanne Tabone stated that she had received a complaint letter from Dr Mark Refalo on behalf of Susan Sultana as Managing Director of Globalair Travel to investigate Tomie McCarthy. Searches were also carried out at the residence of the accused and her office in Hamrun. Several documents were also exhibited which documents were handed over to her by the complainant.

Inspector Trevor Micallef testified that he was informed by WPS 299 Roxanne Tabone regarding a report which was lodged by Susan Sultana and Joseph Bugeja against the accused. The investigation concerned fraud and a search was ordered at the residence of the accused. She was interrogated and released a statement (a fol 15 et seq) where she denied she had defrauded her previous company. Several computers were taken by the police to be analysed by the Cyber Crime Unit.

Inspector Timothy Zammit testified that the analyses of the computers passed on by the Police to the Cyber Crime Unit was not yet finalized.

Charles Zammit stated that he was a photographer and used to work for GlobalAir Travel and other company, Japanese Weddings SIT. After being shown an email (a fol 285) he said that he had carried out this task and used to be paid by Global Air by means of a cheque. He was not sure whether a VAT receipt was issued which was later confirmed in another sitting that he could not find such receipt.

Claudette Borg Carbone stated that she works as a Financial Controller with Global Air Travel. She exhibited several documents and one invoice shows money that she received the sum of 390 from a booking. She added that the amount due was supposed to be to the amount of 970 Euro. She added that this information was obtained from an email and a translation of which was made (a fol 400).

Inspector Timothy Zammit stated that he was in a position to submit the report from the analyses that was carried on a number of computers that were handed in to the Cyber Crime Unit. The reported was marked as doc TZ 1.

Alex Camilleri stated that he knew the accused as she used to work with Global Air. He was shown a document (a fol 52 and 53) but he added that he could not recall the email. He said that he works with Chamber College as Sales and Marketing. His main business is to attract clients and Global Air was one of their clients. In another sitting, he testified that there was an agency agreement with a company named One Sun. He could not furnish any information on how payments were effected and to whom. He could not state whether the accused had done any business before that date. At the time any business was conducted if there was an agency agreement. During cross-examination he explained that Chamber College had changed its directors and there was no link with Global Air anymore.

Kyoko Gafa exhibited several documents (KG 1 a fol 572) which were translated from the Japanese Language to English.

Tomoko Cassar who was appointed by the Court to translate several documents and exhibited doc TC 1 containing the translation.

Having Considered:

The accused was employed with Globalair Travel for several years and was responsible for the Japanese market. Around May 2016, the accused informed the company that she was resigning and to start working with an IT company. After she had left the company, they discovered that she started working with an incoming tourist agency in breach of her confidentiality agreement. When they accessed the Global Air website, they found that the link to the blog used by Global Air Travel was changed in that email contacts were changed to One Sun Malta. One Sun Malta is a company which the accused worked with and handled Japanese clients. On accessing the link to One Sun Malta, they found pictures of the accused and other staff and were advertising Malta for the Japanese market. It was alleged that it was the accused who had accessed their website, and she was the one that changed the contact details to her email address. An IT company was contacted in order to verify whether there was any hacking to their system and they found out that the access was made from Hamrun. The management was informed by two members of the staff of Globalair Travel, that used to work within the same department as the accused that there was a file missing. This file was on a Tour Operator Group called Asagi which according to these two employees, the file was in the possession of the accused. Accordingly, both witnesses testified that the accused had informed them not to tell anyone about the file and if anyone asks for the file to inform them that she had left it at the Chamber College. The accused denied ever having taken the file, although she was confronted about the changes that were made on the Global Air Travel website, she denied everything. No CCTV footages were exhibited showing the accused taking the file in question and the file was never returned.

When a trainee was using the computer that the accused had been using at the time she used to work with Globalair Travel, they found out that they could have access to the accused personal email accounts. While reading through her emails they found out that she was contacting clients in Japan and organizing tours for them in direct competition with her ex employer. It was also alleged that a sum which was supposed to be paid to Globalair Travel was not fully paid up with the result that they accused her of taking the money.

Having considered

As with any criminal charge, for the Court to find the accused guilty, the prosecution must prove its case beyond any reasonable doubt. The onus is on the prosecution to bring forward the best evidence which will convince the Court on the guilt of the accused. **Manzini** in his book ***Diritto Penale Vol III Kap IV pagna 234, Edizione 1890*** stated that:-

“il cosi’ detto onero della prova, cioe’ il carico di fornire, spetta a chi accusa - onus probandi incumbit qui osservit”

Reference is being made to the case decided by the Court of Appeal on the 5th of December 1997 in the case *Police vs Peter Ebejer*, whereby it was stated that the prosecution must prove its case beyond any reasonable doubt. The Court in order to reach a conclusion on what was committed must be morally convinced with all the facts and evidence which was presented in Court. In fact reference is also being made to the case of **Lord Denning** in the case of ***Miller v Minister of Pension*** - 1974 - ALL Er 372 where the expression ‘proof beyond a reasonable doubt’ was highlighted as follows

“Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence. ‘of course it is possible but not in the least probable’, the case is proved beyond reasonable doubt, but nothing shall of that will suffice.”

While in the case of *Police vs Joseph Gauci* decided by the Court of Appeal on the 5th of October 1998 it was stated that:

“Circumstantial evidence is often the best. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics.”

Having considered all the facts and evidence presented to the Court, it is the role of the Court which must consider all elements and facts whether the accused is guilty or not of the charges brought against her.

Having considered

1. Aggravated Theft and Misappropriation

Our Courts have always resorted to jurisprudence and to authors to define theft. According to Professor Mamo this definition of theft by Carrara encapsulates five main essential elements so that a person can be found guilty of theft. These are the following elements:

- 1. The *contrectatio* of a thing.**
- 2. *belonging to others.***
- 3. *made fraudulently.***
- 4. *without the consent of the owner.***
- 5. *animo lucrandi.***

Combined with this definition, the law also highlights other issues which in this case refers to other aspects whereby theft is considered as being aggravated such as in this case when theft is aggravated by ‘Person’. The first thing that this Court must embark is whether the charge of aggravated theft in this case has been proven beyond any reasonable doubt.

According to the witnesses namely Kyoko Gafa and Mihoko Suguira, the accused had told them that she had the missing file and not to say anything to the management. Kyoko Gafa in her conversation with the accused stated that she got to know about the file when she spoke with the accused about certain arrangements that had to be done for a client of Globalair Travel. According to this witness, the accused told her that she wanted to make sure that every arrangement was done accordingly. She did not think that the accused had taken the file without any prior authorization and therefore she did not say anything. After some time, they found out that the accused might have contacted their clients without the knowledge of the Company and thus the management were informed about the missing file. The accused had denied of having had this file which is contrary to what the two witnesses have stated.

In this case the only evidence that the prosecution brought against the accused with regards the charge of aggravated theft, was the testimony of the two employees where it was stated that the missing file was in possession of the accused. On the other hand, Kyoko Gafa’ stated that the accused used to be responsible of this client for at least two years and hence the reason why she had the file, although she

said that she did not think that she had the proper authorization to keep the file. There is no reason not to believe what the witnesses had said about the missing file but in this regard a distinction must be made whether this was a case of theft or otherwise.

In this case it was shown that the file in question had been in possession of the accused for a couple of years due to her role within the company and had handled this client to which the file refers. No evidence was brought to show that the accused had the file in her possession while working with the company. In this case, the fact that she had possession of the file does not mean that she had stolen the file. It was within her obligations as an employee to make sure that the client received the services that the Company was to offer. It was also mentioned by the witnesses that any profits out of this arrangement with the incoming client were going to Globalair Travel as stated by Kyoko Gafa'.

Reference is being made to the case of *Il-Pulizija vs Steve Spiteri and Clayton Cremona* decided by the Court of Appeal on the 24th September 2009 whereby it was stated that:

“Illi ghar-rigward tal-ewwel aggravju tal-appellanti, dan jimpernja fuq il-*vexata questio* dwar meta effettivament jissussisti l-element tal-*contrectatio*’ li hu ingredjent essenzjali tar-reat ta’ serq, kif defenit mill-guristi Taljani w kif segwit u appikat mill-gurisprudenza nostrana. Kif jghid il-**Professur Sir Anthony Mamo** (Notes on Criminal Law – Part II.) :-

“This is the act of taking possession of a thing divesting the actual owner. ‘Contrectatio’ therefore represents the act of completion of the theft and all acts which precede it may, if all other conditions are satisfied, constitute an attempt. But the precise notion of ‘contrectatio’ is a matter of series controversy among jurists. Three main theories have been propounded.”

Umbaghad il-**Mamo** jghaddi in rassenja dawn it-tliet teoriji w cioe’ dik li tekwi para l-*contrectatio* mac-caqliq tal-oggett mill-post li jkun fih: “*amotio*”; dik li tghid li l-*contrectatio* tikkonsisti fl-“*apprehensio*” jew “*amotio de loco ad locum*” u cioe’ li l-oggett irid ikun inhareg mill-isfera tal-pussess jew kontroll tal-pussessor legittimu w it-tielet teorija li ttenni li l-*contrectatio*’ issir biss meta l-halliel jjeħu r-*refurtiva* fil-post fejn ikollu l-hsieb li johodha “*loco quo destinaverat*”. Jikkonkludi li l-ewwel teorija li avalla l-CARRARA giet generalment segwita w applikata mill-Qrati tagħna ghalkemm din hi aktar severa w stretta u li din kienet it-teorija abbraccjata fil-Kodici Penali Naplitan li fuqu l-Kodici Kriminali Malti kien tfassal. Jghid ukoll li din hija t-teorija kienet applikata fil-Common Law Ingliza w li giet mogħtija għarfien statutorju fil-Larceny Act Ingliz.”

In this case as highlighted above the accused had possession of this file for a few years as she had handled this client before. There was no mention or any evidence to show that the accused had taken the file without the authorization of the management while working for Globalair Travel. The fact that she had possession of this file was known by all as she had handled the client for a couple of years before she had left. What was not known whether the missing file was still in her possession at the time she had left. In fact, as stated above Kyoko Gafa' confirmed that the accused was still working on this file and was directing her to make sure that everything went according to the arrangements that had to be done for this client. Kyoko Gafa' added that Globalair was going to profit from such transaction, thus showing that the file was still in her possession due to the nature of her employment. The Court in this instance has serious doubts whether the file was stolen by the accused but rather kept at her end being the person that was previously responsible for this client.

Reference is being made to the case of *Il-Pulizija vs Enrico Petroni u Edwin Petroni* decided on the 9th of June 1998 by the Court of Appeal, whereby a distinction was made between theft and misappropriation. It said that:

“Dan ir-reat [ta’ approprijazzjoni indebita] jiddistingwi ruhu mir-reat ta’ serq, ghax l-oggett li jkun, jigi moghti mill-agent volontarjament u mhux jittiehed kontra l-volonta` jew minghajr il-kunsens tad-detentur; u jiddistingwi ruhu ukoll mit-truffa ghax id-detentur tal-haga ma jigix ingannat permezz ta’ raggiri jew artifizji biex jitlaq minn idejh dik il-haga favur l-agent.”

Thus, in so far as the first charge of theft, the Court sees that the accused had no intention of stealing the file but rather kept it due to her nature of the employment, to continue to make the necessary arrangements for this client. Even Kyoto Gafa’ testified that she had met the accused before she left the company to hand over all the clients that she used to handle to her. She added that she had only a week to get to know about all the clients and she had never handled the file in question as she did not know anything about it. As from the witnesses brought forward none had said that the accused had the intention to profit from the transactions but in actual fact, they said that Globalair Travel was to profit from the arrangements that had to be made with this incoming client. In this case the Court has serious doubts whether the accused had taken the file without the consent of Globalair Travel as everybody knew that she was responsible for this client. The fact that she had possession of the file does not equate to theft as defined by Carrara as she was entrusted to deal with the client. No other evidence was brought forward to show that the file was taken when she had left her employment. In view of these considerations, the Court cannot find the accused guilty of theft.

In this case, the Court must refer whether the accused can be found guilty or not under the second charge of misappropriation. In the case of the *Police vs Artur Arakelyan*, the Court stated the following on the offence of misappropriation.

“Skond giurisprudenza kostanti u anke skond awturi, generalment huwa ritenut li l-estremi ta’ dan r-reat ta’ approprijazzjoni indebita huma dawn li gejjin:

- 1. Illi l-pussess tal-haga jkun gie trasferit lis-suggett attiv tar-reat volontarjament mill-proprjetarju jew detentur, ikun min ikun. Jigi specifikat hawnhekk biex ma jkunx hemm ekwivocita, li l-konsenja da parti tal-proprjetarju jew detentur lil agent jew lis-suggett attiv tad-delitt, trid tkun maghmula con l'animo di spostarsi del possesso, ghax altrimenti jiffugura mhux r-reat tal-approprijazzjoni ndebita, imma s-serq.*
- 2. Illi t-trasferiment tal-pussess ma jridx wkoll ikun jimporta t-trasferiment tad-dominju cioe tal-proprjeta’ ghaliex f’dan il-kaz ma jiffugurax l-element tal-azzjoni ndebita.*
- 3. Illi l-oggett irid ikun mobbli;*
- 4. Illi l-konsenjatarju in vjolazzjoni tal-kuntratt jaghmel tieghu il-haga cioe japproprja ruhu minnha, jew jbiegha, jew jiddistruggiha a proprio commodo o vantaggio;*
- 5. Irid ikun hemm wkoll l-intenzjoni tas-suggett attiv tar-reat li japproprja ruhu mill-oggett li jkun jaf li huwa ta’ haddiehor” (The Police vs Marbeck Cremona – 15/02/2007)”*

Also in another judgment delivered by the Court of Criminal Appeal in its inferior jurisdiction, the Court listed the legal elements which constitute the crime of misappropriation (*The Police vs Enrico Petroni and Edwin Petroni – 09/06/1998*).

“Dana ir-reat isehh meta wiehed (1) jircevi flus jew xi haga ohra minghand xi hadd; (2) bl-obbligu li jrodd dawk il-flus jew dik ix-xi haga lura jew li jaghmel uzu minnhom b’mod specifiku; (3) u minflok ma jaghmel hekk idawwar dawk il-flus jew dak l-oggett bi profitt ghalih jew ghal haddiehor.”

Consequently for the prosecution of the crime to be successful, the author of it must have the specific intention to make use of the object entrusted to him for a specific purpose, as if he were the owner and therefore make use thereof or disposing of the same, at a resultant profit for himself or for others. The jurist Francesco Antolisei explains:

“La vera essenza del reato [di appropriazione indebita] consiste nell’abuso del possessore, il quale dispone della cosa come se ne fosse proprietario (uti dominus). Egli assume, si arroga poteri che spettano al proprietario e, esercitandoli, ne danneggia il patrimonio” (Manuale di Diritto Penale, Giuffrè (Milano), 1986, Parte Speciale, Vol. 1, p. 276)9

The key phrases in the law lie in the words **“under a title which implies an obligation”** and **“to make use thereof for a specific purpose”** – a purpose specified by the person delivering the object to the agent or agents, which person has the right to impose an obligation on the agent regarding the use to be made of the object entrusted to his care. If the agent proves that he has made use of such object according to the instructions given to him, then he cannot be found guilty of the commission of this offence.

Finally the mens rea or the intention of the agent must be proven beyond reasonable doubt – the intention to make a gain or profit from the misappropriation of the object entrusted to him. In another judgment delivered by the Court of Criminal Appeal in its inferior jurisdiction in the case *The Police vs Dr. Siegfried Borg Cole* (23 December 2003) the Court quoted the jurist Luigi Maino with regards to the intentional element necessary for the commission of this crime. (**Commento al Codice Italiano UTET (1922) Vol IV para 1951 pagina 105 – 106**):

“Finalmente, a costruire il delitto di appropriazione indebita e’ necessario il dolo. Trattandosi di delitto contro la proprietà, a scopo d’indebito profitto per se’ o per un terzo, il dolo sarà costituito dalla volontarietà, della conversione con scienza della sua illegittimità e dal fine di lucro; onde colui che si appropria o rifiuta di consegnare, nella ragionevole opinione d’un diritto proprio da far valere, non commette reato per difetto di elemento intenzionale. Per la stessa ragione, e per difetto inoltre di elemento obiettivo, non incorrerà in reato chi ne dispone della cosa altrui abbia avuto il consenso del proprietario o ragionevole opinione del consenso medesimo ... il dolo speciale nel reato di appropriazione indebita e’ [come nel furto e nella truffa] l’animo di lucro, che deve distinguere appunto il fatto delittuoso, il fatto penale, dal semplice fatto illegittimo, dalla violazione del contratto, dell’inadempimento della obbligazione: osservazione questa non inopportuna di fronte alle esagerazioni della giurisprudenza ed ai deviazioni della pratica giudiziale che diedero spesse volte l’esempio di contestazioni di indole civile trasportate affatto impropriamente in sede penale. Rettamente pertanto fu giudicato non commettere appropriazione indebita [e neppure il delitto di ragion fattasi, per mancanza di violenza] il creditore che trattiene un oggetto di spettanza del suo debitore a garanzia del credito; l’operaio che avendo ricevuto materia prima da lavorare, si rifiuta, perché non pagato dal committente, di proseguire nel lavoro e di rendere la materia ricevuta; l’incaricato di esigere l’importo di titoli, che non avendo potuto compiere tale esazione, trattiene i titoli a garanzia del dovutogli per le pratiche inutilmente fatte allo scopo di esigere. In generale la giurisprudenza e’ costante nel richiedere come elemento costitutivo imprescindibile il dolo.”

Reference is also being made to the case of *Il-Pulizija vs Keith Arthur Mayho* decided by the Court of Appeal on the 4th February 2013 whereby the Court stated:

*“That, as regards the present case, if reference is made to the three elements mentioned in the judgment above- referred to, **Il-Pulizija vs. Enrico Petroni u Edwin Petroni**, whereas from the evidence brought forward it can safely be said that the first two elements have been satisfied, the same cannot be said as regards the third element. The proof that the accused has converted to his benefit or to the benefit of any other person is surely lacking. It should also be noted that no proof whatsoever was brought forward as to what actually happened to the freezer in question and who actually removed it, which the accused says was removed by someone when he was abroad on a holiday and who had removed the freezer without him knowing. As regards the fact that there was a time when the accused used to use the freezer to store some ice cubes in it, when he was not permitted to do so, not even this can be considered as misappropriation.’*

Consequently from the above it results that the crime of misappropriation is based on the abuse of trust given to the agent, which abuse results in the consequent mishandling of any object by making use of the same for personal gain or profit whether financial or otherwise. In this case, as highlighted above one of the essential elements of this offence that must be proven beyond any reasonable doubt that is whether the accused had the intention of making a profit for herself or to others. In this case, Kyoko Gafa’ stated that even though the file was in the possession of the accused, she added that accused had informed her that any profits will go to the Company. Thus, to prove this element of misappropriation, it must be shown that accused had profited from such activity. In fact, the Court had seen that no evidence was brought forward to show that payments were actually paid to the accused or in a way that she had profited from the file in question. No witnesses were summoned to testify that payments which were supposed to go to Globalair Travel from a client to which the file refers to were actually paid to the accused or otherwise. Although the first two elements of misappropriation can be said were proven in that she had possession of the file and specifically to return it back, it cannot be considered that the third element of having profited herself or others was proven beyond any reasonable doubt.

Lastly one may refer to the case of *‘Il-Pulizija versus John Gauci’* decided by the Court of Criminal Appeal on the 14th February 1997 with regards article 293 of the Criminal Code:

‘Minn eżami ta’ dan l-artikolu jidher ċar li wieħed mill-elementi essenzjali ta’ l- approprjazzjoni indebita, fil-kuntest tal-każ preżenti, huwa kostitwit mill-frażi: “... taht titolu illi jgħib miegħu l-obbligu ... li jsir użu minnha speċifikat ...”. Speċifikat minn min? Ovvjament minn min ikun ikkonsenja l-ħaġa lill-aġent u minn hadd iżjed. Hija l-persuna li tikkonsenja l-ħaġa u ħadd hlietħa li jkollha jedd timponi l-obbligu ossia tispeċifika lill-aġent dwar kif ikollu jagħmel użu mill-oġġett ikkonsenjat lil minnha. Jekk il-konsenjatur jagħti flus lill-aġent biex dan bihom jixtrilu dar, l-aġent jikkommetti r-reat ta’ approprjazzjoni indebita jekk minflok jagħtihom karita’. Jekk il-konsenjatur jagħti flus lill-aġent biex dan jixtrihom armi bi skop ta’ serq, l-aġent ikun approprja ruħu mill-flus indebitament jekk jagħtihom karita’, apparti l-kwistjoni tal-moralita’. Jekk jixtrihom armi, allura l-aġent ikun għamel uzu mill-flus kif speċifikat. F’kull każ, fl-indaġini dwar il- ħtija jew le ta’ approprjazzjoni indebita, għandha ssir prova ta’ l-użu tal-ħaġa speċifikata mill-konsenjatur, u prova ta’ jekk l-aġent ma ikunx għamel mill-ħaġa dak l-użu jew użu divers.’

Even at this point with reference to this case, no evidence was shown to the Court that in fact the accused had made use of the file differently to what has been entrusted with while she was in employment. As highlighted above, an essential element that must be proven beyond any reasonable doubt is that the

accused had profited herself or others from such a deal. No such evidence was shown that she had profited herself or that others had profited.

Having seen the elements of the offence of misappropriation and the evidence brought in front of the Court, this Court does not find the accused guilty of the offence of misappropriation.

Having considered

Misappropriation of Funds

The accused has been charged of misappropriating funds belonging to the Company under article 293 and 294 of Chapter 9 of the Laws of Malta, the crime of misappropriation which has been defined and explained as above. The prosecution has to prove beyond any reasonable doubt the charge of misappropriation brought against the accused. According to the testimony of Claudette Borg Carbone (a fol 401) she stated that Globalair Travel had received the sum of 390 Euro. According to this witness the sum due was supposed to be 970 Euro. In this case, she referred to a translated email (a fol 400) whereby it showed that the accused was planning in so far as a client was concerned. In this translated email, it showed what the costs involved in this specific transaction. On the other hand, the allegations made by the company were not corroborated by any other evidence to show that payments were not affected. The witness testified that they received 390 Euro but in fact did not show how much was owed to the Company (apart from the email). No witnesses were summoned to testify on the transaction to show that Globalair Travel was owed a larger sum and which payment were affected to the accused instead. Even though the accused may have made such arrangements with the client, no evidence was shown that accused had taken the money to herself as no witnesses were brought forward to testify. Based on the evidence the Court does not find the accused guilty of the charge of misappropriating such funds.

Having Considered

Computer misuse

The last charges brought against the accused can be brought together as they reflect the crime of unlawful access or to use of information as found under article 337C of the Laws of Malta. These articles were enacted in 2010 and as emended in 2015. This law was brought into force to curtail computer misuse. There is no doubt the charges brought against the accused they relate to different circumstances of computer misuse in relation to different offences. **Richard Card** in his book entitled '**Criminal Law**' (Butterworths 1998 Edition, page 381) stated that

“Access of any kind by a person is unauthorised if he is not entitled to control access of the kind in question to the program or data and he does not have access of the kind in question to the program or data and he does not have consent to such access from any person who is so entitled.”

In **Blackstone**, in his book entitled **Criminal Practice** (Edition 1996 fol B18-1 pg 643) describes unauthorised access as the following:

“Access of any kind by any person to any program or data held in a computer is unauthorised if (a) he is not himself entitled to control access of the kind in question to the program or data and (b) he does not have consent to access by him of the kind in question to the program or data from any person who is so entitled”

The first charge against the accused is found in article 337C (1)(a) whereby it states that:

(1) A person who without authorisation does any of the following acts shall be guilty of an offence against this article –

- (a) *uses a computer or any other device or equipment to access any data, software or supporting documentation held in that computer or on any other computer, or uses, copies or modifies any such data, software or supporting documentation;*

According to a report exhibited by Miguel Gauci who has been appointed by Globalair Travel in order to examine the computer used by the accused, stated that he found folders with similar names on the personal cloud account of the accused to those found on the system owed by Globalair Travel. No evidence was shown that the accused had accessed the computer system of the company and copied the information. Although from the report it was shown that the folders have similar names, no evidence of the content was exhibited in Court to show that they contained files which were owed by the Company. It is to be pointed out that the access to the personal cloud account was accessed without the accused consent or by the Police during their investigation. On the other hand, although several computers were seized by the Police, there is no mention or any evidence to show that the accused had accessed the computer system of Globalair Travel. Apart from this fact, even though the folders within the cloud storage as shown in the report were similar to those of the Company, no evidence was brought in front of this Court to show that the personal cloud account where the data was held belonged to the accused and thus the Court has no option to find the accused not guilty of this charge.

The same argument applies to article 337C(1)(c) which states that:

- (b) *copies any data, software or supporting documentation to any storage medium other than that in which it is held or to a different location in the storage medium in which it is held;*

Mainly this sub-article was introduced to curtail any copying of data which is commonly known as software piracy. This offence means that there is copying of data, software or other documentation which was not authorised. In this case copying does not include transfer. If a document is stored in one place and transferred to another place is not copying as found under this article. But would fall under sub-article 337C(1) (g) but the accused was not charged with. As stated above, the *parte civile* rests upon the information obtained through their appointed IT expert. As shown above, the report of their findings indicate that folders found on a personal cloud account had the same folder names of those found on the server of the Company. The accused in her statement stated that she used to work from home and thus it was possible for her to have access for such information. On the other hand, there was no evidence to show which data was copied.

No evidence was shown that the folders contained similar information to that of the company. It is not enough to show that the folders had similar names from the information obtained, even though they are similar, such information is accessible from open sources. As no files within the folders (even though the folders had the same name), was shown that they belonged solely to the company, the Court cannot find the accused guilty of this charge.

Article 337C(1)(e) of the Criminal Code states that:

- hinders or impairs the functioning or operation of a computer system, software or the integrity or reliability of any data;*

Again, in this instance, no evidence was shown that the accused had hindered or impaired the functioning or operation of the computer system. The facts show that the company had no issues with its operations. It was nearly two months after the accused had left the company, that a part-time employee was deleting files from the system that she found that she had access to the personal accounts of the accused. Thus, in so far as the operation of the company this shows that they had no issues whatsoever. Even their IT

expert who had accessed the computer system did not mention that there were any issues and thus this Court cannot find any evidence that in actual fact the operations of the Company were hindered or impaired as no evidence was shown that actually there was an impairment of their system. None of the witnesses had stated that they could not have access to the system. Thus, in so far as this charge, the Court finds that accused not guilty.

In another charge brought against the accused is that found under article 337C(1)(ee) of the Criminal Code which states:

“hinders or interrupts the functioning of an information system by inputting computer data, by transmitting, damaging, deleting, deteriorating, altering or suppressing such data, or by rendering such data inaccessible;”

In this article, the focus is the introduction of a computer data which hinders the operation of the computer system. Again, in so far as the evidence brought against the accused none can be shown or indicate that she had caused such access to the system to cause the system not to function. The fact that even after two months the Company had still access and there were no complaints of inaccessibility to the data, the accused cannot be charged of an offence which in fact did not occur. Thus, the Court finds the accused not guilty of this offence.

While in the last charge, which is found under Article 337C(1)(f) of Chapter 9 of the Laws of Malta which states:

takes possession of or makes use of any data, software or supporting documentation;

This article refers to when a person when not authorized takes possession of or makes use of any data, software, or documentation. In so far as the evidence brought in front of this Court, the Company alleged that the accused had contacted their clients. It is imperative first to indicate which data was taken from the Company. The only information that was presented to this Court was a list of folders taken from a personal cloud account which had similar names as those found in the computer system of the Company Globalair Ltd. No evidence was shown that it was the accused who had copied the folders and as indicated elsewhere on the same issue, no files within the folders were shown that they belonged to Globalair Travel. The fact that the accused had contacted their clients does not mean that she made use of their data. No clients were summoned to testify that they had submitted information to Globalair Travel and were being used by third parties. The fact that this article refers to the possession of or makes use of data, was not proven beyond any reasonable doubt by the prosecution to show that the data belonged to Globalair Travel. Under these circumstances the Court finds the accused not guilty.

Decide

Thus, the Court, after having seen Articles 261, 268(d), 293, 294, 337 of Chapter 9 of the Laws of Malta, does not find the accused **Tomie Makita sive Tomie McCarthy** guilty of all charges brought against her and acquits her from them.

Dr. Caroline Farrugia Frendo LL.D.
Magistrat

Nadia Ciappara
Deputat Registratur