MALTA

# CIVIL COURT
# FIRST HALL

**HON. MR. JUSTICE**
**GEOFFREY VALENZIA**

Sitting of the 30 th June, 2003

Citation Number. 1910/1999/1

**Mid-Med Bank plc and by note dated 22nd February 2000 the name was changed to HSBC Bank Malta plc as from the 1st December 1999.**

**Vs**

**Dr. Henri Mizzi by decree of the 10 th January, 2000 was nominated curator for and on behalf of M & I Eastpoint Technology Inc and by another decree of the 21st October 2002 the name of the company M & I Eastpoint Technology was changed to "Metavante International Inc".**

**The Court,**

**Preliminaries**

Having seen the summons;

After considering the note of pleas presented by defendant company; (page 32 of the proceedings);

After considering the counterclaim which defendant company presented; (page 43 of the proceedings):

After considering plaintiffs' pleas to defendant company counter-claim; (page 68 of the acts);

After hearing the submissions of the parties' lawyers;
After considering the notes of submissions presented by the parties;
Having considered all the acts of the proceedings and the documents exhibited;

**Contestation**

This court has to decide plea 2(i) raised by defendant company in the sense that the claims advanced by the plaintiffs are unfounded in fact and in law and should therefore be rejected as by letter dated 30 June 1999 the Bank terminated the Phase 1 Agreement (and the other agreements listed in the said letter) without having first given notice of material performance failure, and without having waited for the lapse of the contractual cure period of thirty days before terminating the said agreements.

From what has been premised in the writ of summons; from the evidence tendered by the parties up to this stage; and from what has been stated in the counter claim lodged by defendant company; it is established that there was an agreement which consisted of various other agreements, in which it was envisaged that defendant company was going to offer services relating to the installation, the programming and customization of computer software. This agreement between the parties seems to have been quite complex in nature, and consisted of various phases of execution.

During the execution of the first phase of the agreement, problems between the parties arose. These problems resulted in plaintiffs sending a letter dated 30th June 1999

to defendants entitled: 'Notice of Termination of Professional Services agreement (Phase 1)'.

By virtue of the above-mentioned plea 2(1) defendant company is stating that this termination is not valid due to the fact that it was not in conformity with article 8.1 of the Phase 1 agreement.

The question which has to be decided by the court, relates to the validity of the termination of the agreement by plaintiffs, which question involves the interpretation by the Court of article 8.1 of the Phase 1 agreement.

Article 8.1 of Phase of the Agreement reads as follows:

"Mid-Med shall have the right to terminate this Agreement at any time during the Term if (I) M&I EastPoint shall have failed to perform a material obligation of this Agreement, and such failure is not due to any failure in performance by Mid-Med or any event beyond the reasonable control of M&I EastPoint, and (ii) Mid-Med shall have given written notice of such material performance failure to M&I EastPoint and such performance failure shall have continued to exist for thirty (30) days thereafter without correction. Notice of termination shall be given pursuant to section 9.5 of this Agreement."

According to plaintiffs by means of a letter dated 30th June 1999 the Bank gave notice of termination to M & I specifically subjecting the termination to the provisions of clause 8.1 of the Agreement as well as in accordance with article 1640 of the Civil Code. As can be seen from the contents of the said notice of termination, the Bank's decision to give such notice of termination was based on M & I s poor performance and poor quality of work during the implementation of the agreement. A number of performance failures known to the Bank at the time of the writing of the said letter were listed and various attachments were also included with the letter in order to give M & I a clear statement of what the Bank was considering at that moment in time as serious shortcomings in M & I's performance.

Plaintiffs contend that in the letter of the 30th June 1999 there is clear, unequivocal and full reference to clause 8.1 of the Agreement without any reservations whatsoever. The understanding of the Bank was at all times that the Agreement had to be adhered to in all respects and consequently M & I had a thirty day cure period to remedy the material performance failures as envisaged in clause 8.1 A (ii) of the Agreement, M & I 's position vis-a'-vis performance of the contract was to say the least dubious as they had unilaterally suspended performance. This suspension had been intimated to the Bank between the 10th and 25th June 1999 and a condition imposed by M & I for resumption of performance was the payment of their invoice for US$ 717,697.50 when the milestone for such payment to become due had not yet been achieved by M & I.

The notice of termination was received by M & I on the 6th July 1999 and accordingly plaintiffs calculated that M & I would have up to and including the 5th August 1999 to remedy the above mentioned failures. During the cure period, plaintiffs hold, that there was no contact whatsoever between M & I and the Bank with a view to curing the material performance failures. They therefore maintain that there was e*vidence of written notice of material performance failure prior to the letter of 30 June 1999.* The correspondence exchanged between Mid-Med and EastPoint since February 1999 is replete with written notices of material defaults.

On the other hand defendants contend that the termination letter had, even according to the writ drafted by the Bank – immediate effect, without any cure period applying. EastPoint therefore submit that :

- The Termination Letter does not give notice of material performance failure; nor does it make reference to any cure entitlement on EastPoint's part. On the other hand, it gives notice of termination and has been construed as such by the Bank itself.

- Not content with giving notice purportedly in terms of the Phase 1 Agreement, the Bank also gave notice of termination pursuant to section 1640 of the Civil Code : therefore there can be no doubt that such notice had immediate effect.

- The Bank did not only terminate the Phase 1 Agreement ; it proceeded to terminate, with immediate effect, all the agreements between the parties even though Eastpoint had not even commenced performance thereunder.

- The Bank made it clear in the Termination Letter that "further efforts will not be undertaken", clearly indicating that it would not permit any attempts by EastPoint to cure the alleged performance failures.

- The Bank confirmed that it had already decided to install alternative software, and there is evidence that by 5 July 1999 the relative costs had already been incurred.

- The Bank claimed reimbursement of the deposit made initially and refused to pay outstanding invoices.

- The Bank advised EastPoint that it had no use for the software that had been installed and that it would await EastPoint's instructions as to what to do with it.
- The Bank acted in a manner consonant with termination having been immediate upon service of the Termination Letter : the conversation between Mr. Joseph M Demajo and Mr. Tony Mahoney on 8 and 13 July 1999 and the commencement of preparations for trial before 5 July 1999 are clear indications of this.

## CONSIDERATIONS

It must first be stated that in the opinion of the court, the wording of article 8.1 referred to above, makes a distinction as to the way in which one has to give notice

of termination and the way in which one must give notice of material performance failure. While in respect of the notice of termination it is stated clearly that the, 'notice of termination shall be given pursuant to section 9.5 of this agreement', in the case of the Notice of Breach, it is stated that' Mid Med shall have given written notice of such material performance failure'.

It therefore appears that whilst the,' notice of termination', must be made and notified in terms of article 9.5, the same cannot be said in respect of the 'notice of breach', since article 8.1 only specifies that this notice must be in writing. As a result the 'notice of breach', need not be made in the formal manner that is required in respect of the Notice of Termination. Now that this matter had been established, the Court must determine whether the correspondence sent by plaintiffs to defendants, before the letter of the 30th June of 1999, where complaints had been lodged in respect of the services of defendant till that stage, can be considered as a notice of breach in terms of article 8.1, and according to the interpretation which has been hereon made, as plaintiffs are claiming.

In fact plaintiffs, in their note of submission, list several instances, which they consider qualifying as, 'notice of failure of material performance', including the presentation made by Charles Fiorentino at the premises of defendants in February 1999, and the letter of the 28th April of 1999 sent by the former Chairman of the plaintiffs' company to defendants' company, wherein defendants were called upon to complete software development till the end of May 1999.

As to this letter which had been sent, plaintiffs state that the term that had been given, the end of May was the, 'cure period', that had to be given in accordance with article 8.1 of the Phase 1 agreement. In the opinion of the Court, even though, as has been already stated, the formalities relating to the notice of termination do not apply to the notice of material performance failure, it is still necessary that it be specified that the notice was in fact being given, in such way that who receives such notice

understands it as such. (i.e. as a notice of material performance failure).

As regards the facts and circumstances which plaintiffs are stating as constituting the, 'Notice of Material Performance', it has never been specified that these constituted the above mentioned notice and neither were these instances construed by defendants as constituting such a notice. In fact in the case of the letter sent by the Chairman of Plaintiff Company on the 28th April 1999, defendants even verified with Charles Fiorentino (acting on behalf of plaintiffs) if this letter in fact constituted or was to be considered as a, 'Notice of Breach'. The answer given to Dick Wildung by Charles Fiorentino was to the effect that in Fiorentino's opinion the letter was not meant to constitute such a notice, but he also stated that he did not know whether the Chairman, who sent this letter considered the letter as constituting such a notice.

The Court is of the opinion that once Plaintiff Company never clearly specified that it was sending and executing the mentioned, 'notice of material performance failure', the circumstances and facts that it has referred to cannot be considered within the parameters of article 8.1 of the Phase 1 agreement.

In defendants' note of submissions, they refers to a decision of the American Court of Appeal, Filmline (Cross-country) Productions Inc et Al vs. United Artists Corporation – United States Court of Appeals for the second Circuit – 865 F.2D 53) where it was stated that for there to be a Notice of Termination one must be granted the opportunity, 'to cure, correct or remedy', such breach or default within thirty days of written notice , and this, even if a breach leading to termination is envisaged. Defendant stated in their submissions that, 'it should be noted however that the Court of Appeals overruled the lower court's finding because it was alleged that Filmline did not have the ability to perform under the contract within thirty days. United Artists' failure to give an opportunity to cure, therefore, was of no consequence'. (fol. 293).

The reasoning behind this decision of the American Court of Appeals can be applied to this case in the sense that if this Court believes that it can be proven by Plaintiff Company that it was impossible for defendants to adhere to its obligations within the 30 days cure period , the fact that defendants were not granted such a 30 day term will be of no relevance or applicability. This reason is being put forward by plaintiffs in the particular case, and in fact it has produced evidence in order to substantiate such reason.

The court, therefore, is of the opinion that in order to determine whether there was this inability on the part of defendants to adhere to its obligations within the 30 day period, or any period, it must also consider the other question whether defendant company was in contractual default. This examination cannot be made without considering the merits of the case at hand.

The court concludes that the mentioned plea must be decided after deliberations on the merits of the case have been made, and therefore together with the decision on the merits of the case.

**DECISION**

The Court therefore decides that the above-mentioned plea must be decided after deliberations on the merits of the case have been made, and therefore together with the decision on the merits of the case.

Costs of this decision are reserved for final judgment.

**< Partial Sentence >**

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