MALTA

CIVIL COURT
FIRST HALL

HON. MR. JUSTICE
GIANNINO CARUANA DEMAJO

Sitting of the 21 st November, 2006

Citation Number. 473/2004

iWorld Group Holdings Europe p.l.c.; iWorld Group Management Ltd; iModel Music Holdings Ltd

versus

Bettina Vossberg

This case concerns a claim for damages for misappropriation of funds and breach of directors' duties filed by three commercial companies against a director.
Plaintiff companies state in the writ that defendant was a director in all three companies. In this capacity defendant acted in a way which was in clear breach of her duties. Her principal aim was to protect and promote her own personal interests and, because of this conflict of interests, she managed and administered the plaintiff companies in a way which had a drastic effect on the interests and the operations of the said plaintiffs. Defendant's behaviour caused enormous damages to plaintiffs, not only in their administration but also because

of loss of business and of profits, which led to a decline in their value.
Moreover, defendant abused of her position as director of *iWorld Group Management Limited* by making, or causing officers of the company to make, substantial payments to third party companies in which she had a personal interest. In order to achieve her own personal goals, defendant did not act honestly but rather in bad faith; moreover, she acted against the interests of the plaintiff companies because of a clear conflict of interests.
For these reasons plaintiff companies requested that this court:
1. do declare that defendant's actions when she held the position of director of plaintiff companies were in breach of her duties as director;
2. do further declare that defendant's actions were illegal; to the detriment of plaintiff companies;
3. do consequently declare that defendant is liable for the damages sustained by each one of the plaintiff companies;
4. do state the amount of damages sustained by each plaintiff; and
5. do order that defendant pay to each plaintiff the damages sustained by each one of them, with interests which are to run (a) in the case of monies disbursed by plaintiff companies to institute legal procedures, from the date of such disbursement, (b) in the case of monies pertaining to *iWorld Group Management Limited* paid illegally to third parties, from the date of such illegal payments, and, (c) in the case of damages sustained by each plaintiff, from the date when such damages were sustained, in each case until final payment.

Plaintiffs are also requesting the payment of costs, including those of precautionary warrants filed at the same time as the writ.
Defendant raised the following pleas:
1. the plea of nullity of the writ of summons because it lacks the requirements of art. 156 of the Code of Organisation and Civil Procedure;
2. the plea of prescription by the lapse of two years, in terms of art. 2152(3) of the Civil Code;

3. the plea that plaintiffs had renounced to all claims against defendant when on the 24 October 2003 they withdrew judicial proceedings they had instituted in Malta without any reservation; and

4. the plea that plaintiffs' claims are unfounded in fact and at law.

The factual background to this case is ably described in plaintiff's note of submissions, as reproduced hereunder:

Defendant Vossberg was a director of the company *iWorld Group Europe Holdings plc*. She had been appointed by the majority shareholder. This company had a complicated structure with a number of subsidiaries, some of which also had a role in the administrative structure of the parent company. Amongst these subsidiaries the two most important ones were: *iWorld Group Management Limited* and *iModel Music Holdings Limited*. *iWorld Group Management Limited* carried out most of the administrative functions of the parent company, including managing the accounts. All staff were employed by *iWorld Group Management Limited*.

iModel Music Holdings Limited on the other hand was one of the major businesses being carried out by the parent company and had a number of major clients, including the singer Britney Spears.

The main shareholder of the parent company was the so-called *Perikles Trust* which held voting rights of 84.6% in the company and was the majority shareholder in the company. It was originally managed by *Abacus Holdings Ltd* and subsequently (on the 2nd December 2004 [*recte* 2002]) by *Medfinco*. By way of clarification, Andreas Gerdes is the sole settlor of the *Perikles Trust*. Less than 15 % of the shares of *iWorld Group Europe Holdings plc* were owned by a number of institutional and private investors.

The *iWorld Group Europe Holdings plc* had in fact been founded by Andreas Wilhelm Gerdes in 2000, four years after his marriage to Bettina Vossberg. He was the face, voice and visionary of the company. On the 22 August 2002 the couple where formally separated, though they were informally separated for more than three years before that. From 2000 to 2002, when matters came to a

head, the whole relationship between Gerdes and Vossberg had evolved, or possibly degenerated.
We may add, further, that, due to issues of personality, the management of the companies was paralysed and, as a consequence, the business operations had come to a virtual standstill. The situation was such that the institutional shareholders were threatening to either withdraw their investments or to take over management of the companies, as they were entitled to do. The officers of the company had reached the conclusion that the personality causing the problems was that of Andreas Gerdes, who apparently considered the companies as a personal fiefdom. Indeed, an internal audit carried out on the initiative of a legal officer of the company revealed that Gerdes had made improper use of company funds in his own interest.
Eventually, the directors decided to remove Gerdes from the board and from his position of authority; this decision was implemented during a board meeting held on the 3 December 2002. Although, during the course of the present proceedings, plaintiffs voiced doubts on the validity of that meeting and of the decisions taken thereat, they produced no evidence that a judicial declaration of invalidity was ever pronounced and, therefore, for the purposes of today's proceedings, the decisions taken during that board meeting must be deemed to be valid.
The main issues in this case are two, namely, (i) whether improper payments were made to defendant *per interposita persona*, and (ii) whether defendant committed a breach of her duties as director.
Before considering these issues, however, we have to deal with the procedural pleas raised by defendant and with the plea of prescription.
The first plea is that of invalidity of the writ of summons because it lacks the requirements set out in art. 156 of the Code of Organisation and Civil Procedure, which, at the relevant time, read as follows:
156. (1) The writ of summons shall be prepared by the plaintiff and shall contain -
(*a*) a clear and correct statement of the subject-matter and the cause of the claim;
(*b*) the claim or claims, which shall be numbered.

The plea of nullity is regulated by art. 789 of the Code:

789. (1) The plea of nullity of judicial acts is admissible -

(*a*) … … …;

(*b*) … … …;

(*c*) if the act contains a violation of the form prescribed by law, even though not on pain of nullity, provided such violation has caused to the party pleading the nullity a prejudice which cannot be remedied otherwise than by annulling the act;

(*d*) if the act is defective in any of the essential particulars expressly prescribed by law:

Provided that such plea of nullity as is contemplated in paragraphs (*a*), (*c*) and (*d*) shall not be admissible if such defect or violation is capable of remedy under any other provision of law.

The court is satisfied that the writ of summons does contain a clear if concise statement of the subject-matter and the cause of the claim. If the writ and the accompanying declaration did not contain sufficient details for defendant to prepare her defence, this shortcoming was remedied following the decree of the 26 July 2004, before service of the writ and accompanying act on defendant. In fact defendant prepared a comprehensive defence and she suffered no prejudice as a result of any possible defect of form.

The plea of nullity is therefore dismissed.

The next preliminary plea is that of renunciation to plaintiffs' claims.

This plea is based on the argument, reproduced in defendant's note of submissions, "that all court cases [between the parties] had been withdrawn without any reservation".

The withdrawal of an action is not tantamount to a renunciation of the claim. Indeed, the law expressly provides, in art. 2132(2) of the Civil Code, that an action, once withdrawn, may be re-instituted. This applies with even greater force when the proceedings which were withdrawn were merely precautionary warrants, as in the present case, and not an action.

The plea of renunciation is therefore dismissed.

Defendant also pleaded prescription under art. 2152(3) of the Civil Code. Art. 2152 reads as follows:

2152. (1) Advocates and legal procurators are released from any obligation to account for papers relating to lawsuits or advice on the expiration of one year from the day when such lawsuits have been decided or otherwise disposed of, or such advice given.

(2) They are likewise released from any obligation to account for any papers which may have been delivered to them for the purpose of commencing a lawsuit, on the expiration of two years from such delivery, if within such time the lawsuit has not been commenced.

(3) They may, however, be called upon to declare on oath whether they are in possession of such papers, or whether they know where such papers are to be found.

It is evident that the prescription under art. 2152 is totally unconnected with the merits of the present action. Presumably, defendant had art. 2153 in mind:

2153. Actions for damages not arising from a criminal offence are barred by the lapse of two years.

Apart from the fact that the court cannot raise the plea under art. 2153 *ex officio*, that particular prescription is also not applicable to the present case.

Art. 2153 concerns actions for damages not arising from a criminal offence, whereas plaintiffs are in effect alleging that defendant misappropriated company funds, which is a criminal offence. The allegations of breach of directors' duties, while not necessarily a criminal offence, refers to events which took place between the summer and December of 2002, whereas the action was filed on the 25 June 2004, within the two year period.

The plea of prescription is therefore also dismissed.

We can now move on to consider the main issues, the first of which concerns the matter of unauthorised payments.

There was an agreement between the parties — which was implemented and put in practice before it was formalised in writing — that defendant was to be paid for services rendered by her to *iWorld Group Management Limited*. These payments were effected through a third company in which defendant held a controlling interest. The practice was for defendant's company to issue an invoice which was then processed for payment by *iWorld Group Management Limited*. Although it is true that on

occasions the authorisation for payment was countersigned by defendant herself, all the witnesses heard by this court, including those summoned by plaintiffs themselves, testified that all payments were issued after rigorous internal checks by plaintiff company officers, and on no occasion was an improper request for payment made or authorised. These requests were scrutinised not only before payment was authorised but also in an internal audit held afterwards. Indeed, the only irregularities revealed in that audit were those committed by Andreas Gerdes.

It is also true that there were payments which were effected at a time when the agreement was not yet formalised in writing. Nevertheless, the checks carried out prior to payment and also subsequently leave no doubt that the service for which payment was effected had in fact been rendered to the benefit of plaintiffs and with the consent of both parties. Denying payment to defendant in such circumstances would be tantamount to bad faith, and an attempt at unjustified enrichment.

This court, after having seen the records and having heard the witnesses, is more than satisfied that plaintiff's claims in this regard are completely unfounded and should be dismissed without further ado. Indeed, the view of this court is that plaintiffs' claims are based solely on flimsy and unsubstantiated allegations.

The next question concerns the matter of breach of directors' duties. Plaintiffs' arguments in this regard are based on an allegation that defendant "conspired" to have Andreas Gerdes removed from any rôle in the management of the company and that, by so doing, she severely crippled the operations of the company.

In the first place it must be pointed out that the validity of the board meeting of the 3 December 2002, and of the decisions taken at that meeting, are not at issue in these present proceedings. For all purposes of this action, that meeting must be deemed to have been validly convened and held.

The allegations of a conspiracy are based on plaintiffs' suspicions that defendant, in league with other directors and company officers, plotted the removal of Andreas Gerdes in advance of the meeting.

If this were indeed the case it is hardly surprising that the company's directors and officers, understandably concerned at the lack of progress in business operations, put their heads together to try to identify the cause of the problem and its possible solution. Nor would it be surprising if, having identified what, in their view, was the cause of the problem, they agreed on a way to remove it. Such a course of action is neither surprising nor illegal; indeed, the directors would have been in breach of their duties to the company if, having identified the problem, they took no steps to resolve it. That they thought out their strategy beforehand is not evidence of bad faith.

What is at issue here is not whether the decision to remove Andreas Gerdes from positions of responsibility was a sound commercial decision but whether it was legitimate. Considering that it was held in a validly convened board meeting, in the absence of evidence of bad faith it cannot be held to be otherwise.

Plaintiffs also accuse defendant of being more concerned with the interests of the institutional shareholders than with the interests of the company.

What plaintiffs fail to realise is that it was in the interests of the company to satisfy the institutional shareholders that the company was still operational and viable, thereby dissuading them from withdrawing their investment or taking a direct role in management. Defendant attempted to achieve this not, as plaintiffs allege, by promoting the interests of the institutional shareholders when these were in conflict with the interests of the company, but by attempting to reassure them that their investment was safe.

That defendant did not place the interests of the institutional shareholders above those of the company is evidenced by the fact that she did not disclose the improper transactions carried out by Andreas Gerdes himself when these were revealed in the internal audit. This was not necessarily a correct decision, because it was in the interests of the company itself, and not merely of its shareholders, that improper transactions carried out by a company officer be disclosed; however, even if defendant was at fault for this omission, the company did not incur any damage thereby because defendant still

took prudent action to prevent any further improper transactions by taking steps to secure the removal of the person responsible for such transactions.
Plaintiffs further allege that, by removing Andreas Gerdes from positions of responsibility in the company and, further, by cutting off all communications with him, defendant fatally damaged the prospects of successfully concluding a lucrative deal.
Plaintiffs' argument is based on the premise that, but for the removal of Andreas Gerdes, the deal would have been successfully concluded. This premise has not, however, been proved. Indeed, the evidence shows that, at the time of the board meeting of the 3 December 2002, the operations of the company were not commercially viable; in the words of a witness produced by plaintiffs themselves, the company was at that time already a "dead duck".
Furthermore, the decision to remove Andreas Gerdes from management rôles was a board decision and not a personal decision of defendant. Having decided to remove him from positions of responsibility, the board acted consistently in also relieving him from any rôle in the discussions with prospective partners; it could hardly have been expected to do otherwise.
For the above reasons, plaintiffs' claims based on allegations of breach of directors' duties on the part of defendant have not bee proven, and the claims, also in this regard, are to be dismissed.
Finally, a note on plaintiffs' lament that they were not allowed to produce the evidence of witnesses who are resident abroad.
On the 26 May 2006 the court decreed that the hearing of all the oral evidence was to take place on the 24 and 26 October 2006. Since, due to a misunderstanding on the part of plaintiffs for which they were given the benefit of the doubt, the sitting of the 24 October was missed, an additional sitting was held on the 30 October 2006.
On the 26 October 2006, plaintiffs filed an application for the taking of evidence by letters rogatory of seven witnesses, the address of only one of whom was known to plaintiffs.

This application was, for very obvious reasons, dismissed. Plaintiffs were aware, as early as May of 2006, that the hearing was to be concluded by October of that year. The correct procedure would have been for them to file their application at the earliest possible opportunity so that the evidence by letters rogatory would have been available in good time for the hearing in October. Instead, they filed the application at the last possible moment, thereby ensuring, had their application been successful, that the case would not be concluded in terms of the decree of the 26 May 2006. In the best case, plaintiffs were procedurally negligent; in the worst case, they acted suspiciously like one whose true intention is to bog down the proceedings.

For the reasons given above, the court disposes of plaintiff's action and defendant's pleas as follows:

1. the pleas of nullity of the writ and of renunciation of the action are dismissed;
2. the plea of prescription is dismissed; and
3. all plaintiffs' claims are dismissed.

The costs of the pleas of nullity and renunciation are to be borne by defendant; all other costs are to be borne by plaintiffs jointly.

< Final Judgement >

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