



MALTA

QORTI CIVILI

PRIM' AWLA

ONOR. IMHALLEF

JOSEPH ZAMMIT MC KEON

Seduta tas-17 ta' Gunju, 2014

Citazzjoni Numru. 270/2008

Dietmar Mansfeld (Identity Card No. 20279A),

and by decree of the 11 June 2012 Manuela Holeschovsky was authorised to continue the suit as plaintiff in substitution of deceased Dietmar Mansfeld, and by decree of the 7 November 2013, Dr Shaheryar Ghaznavi was confirmed as special mandatary of Manuela Holeschovsky

vs

Ganymede Limited (C33570) ; John Biagini (USA Passport number 222235636) and for any interest that he may have Benjamin Golub (533070992)

The Court :

I. Introduction

On the 18 March 2008, plaintiff filed **a sworn application** in the Maltese language – together with a translation in English.

The **English** version of the sworn application states as follows –

1. *Whereas the plaintiff was a director in the defendant company from April 2004 to February 2008, which company had as shareholders the defendants Biagini and Golub ;*

2. *Whereas during the abovementioned period the plaintiff was never rewarded for the services rendered by him to the defendant company, that is, the services inherent to the offices of director and company secretary of the defendant company ;*

3. *Whereas the plaintiff had agreed with the shareholders of the defendant company, that is Biagini and Golub, on a monthly fee of one thousand six hundred and thirty Euros and fifty six Euro cents (€1,630.56) or seven hundred Maltese Liri (Lm700) ;*

Kopja Informali ta' Sentenza

4. *Whereas the two shareholders of the defendant company reassured the plaintiff that when the only asset held by the said company would be sold they would reward the plaintiff for the offices held by him and the services rendered by him ;*

5. *Whereas in addition to the reward agreed between the plaintiff and the defendants Biagini and Golub, the plaintiff was also promised that he would receive five percent (5%) from the proceeds of the sale of the only asset of the company. Such reassurance was given by each of the two shareholders individually, to the effect that the plaintiff was promised a total of ten percent (10%) of the proceeds of the sale of the vessel that was owned by the defendant company ;*

6. *Whereas on the fifteenth (15th) of February 2008, the defendant Golub transferred all the shares he held in the defendant company to the defendant Biagini and to Linda Kase Young ;*

7. *Whereas eventually the registry of the said vessel was cancelled from the Shipping Registry of the Malta Maritime Authority on the grounds of a declaration from the owners of the said vessel that such vessel had been sold ;*

8. *Whereas consequently the plaintiff claimed that the amounts due to him both as a reward for the services rendered by him as a director and company secretary as well as a success commission had to be settled, however, defendant Biagini did not agree with the amount that was being claimed by the plaintiff ;*

9. *Whereas notwithstanding the various demands from the plaintiff, the defendant Biagini still did not comply ;*

The defendants collectively or individually are being called upon to state why this Honourable Court should not :

1. *Declare that the defendants or any one or more of them are debtors of the plaintiff for the sum of one thousand six hundred and thirty Euros and fifty six Euro cents (€1,630.56) or seven hundred Maltese Liri (Lm700) monthly for the period between April 2004 and February 2008, amounting to seventy five thousand and five Euros and seventy six Euro cents (€75,005.76) or thirty two thousand one hundred and ninety nine Maltese Liri and ninety seven cents (Lm32,199.97) representing fees due to the plaintiff ;*

2. *Order the defendants in solidum or any one or more of them to pay the plaintiff the sum of seventy five thousand and five Euros and seventy six Euro cents (€75,005.76) or thirty two thousand one hundred and ninety nine Maltese Liri and ninety seven cents (Lm32,199.97) ;*

3. *Declare that the defendants in solidum or any one or more of them are debtors of the plaintiff for an amount due as success commission for the sale of the vessel known as Elin that previously had the registration number of 08085 with the Merchant Shipping Directorate in the Malta Maritime Authority at the rate of ten percent (10%) of the price of the said sale ;*

4. *Liquidate the success commission due from the defendants in solidum or any one or more of them to the plaintiff over the vessel known as Erin that previously had the registration number of 08085 with the Merchant Shipping Directorate in the Malta Maritime Authority ;*

5. *Order that the defendants in solidum or any one or more of them pay the plaintiff the sum as liquidated by this Honourable Court representing the success commission due on the sale of the vessel known as Elin.*

With costs against the defendants, including the costs of the precautionary garnishee warrant number 319/08 and with legal interest from the date when the amounts were due to the plaintiff and from when the vessel named Elin that previously had the registration number of 08085 with the Merchant Shipping Directorate in the Malta Maritime Authority was sold to the date of actual payment, and the defendants are summoned from now for evidence by a reference to their oath.

With the sworn application, plaintiff filed a list of witnesses.

Respondents Ganymede Limited and John Biagini filed a **sworn reply** on the 6 May 2008 in Maltese which states as follows –

Illi t-talbiet attrici huma kompletament infondati fil-fatt u fid-dritt u ghandhom jigu michuda bl-ispejjez kontra l-attur ghar-ragunijiet segwenti :

1. *Illi m`huwiex minnu li kien hemm xi ftehim fejn gie accettat u debitament konkluz li l-attur jithallas seba` mitt lira (Lm700) fix-xahar bhala drittijiet kif qed jallega l-attur – xejn m`huwa dovut f`dan is-sens lill-attur kif qed jippretendi ;*

2. *Illi ebda success commission m`hija dovuta lill-attur mill-eccipjenti Ganymede Limited jew John Biagini stante li ma hemm ebda ftehim f`dan is-sens bejn il-kontendenti u ma hemm ebda bazi legali ohra li jintitola lill-attur ghas-success commission pretiza minnu ;*

3. *Illi m`huwiex minnu li l-attur "ta servizz" lis-socjeta` eccipjenti kif qed jigi allegat mill-attur fir-rikors guramentat tieghu, hlief li ismu kien jidher bhala direttur u company secretary tas-socjeta` eccipjenti ghall-perjodu msemmi fir-rikors guramentat. Il-fatt li l-attur kemm "sellef" ismu sabiex jidher bhala direttur/company secretary tas-socjeta` eccipjenti ma jintitolax lill-attur ghad-drittijiet minnu pretizi jew ghal success commission ;*

4. *Illi minghajr pregudizzju ghas-sueccepit, matul il-perjodu li l-attur ghamel bhala direttur u company secretary tas-socjeta` eccipjenti, l-attur ma wettaq xejn mill-obbligi tieghu anzi, addirittura, ippropona lill-eccipjent John Biagini li jsiru atti frawdolenti sabiex il-konvenut l-iehor (Benjamin Golub) jinhareg barra mis-socjeta` eccipjenti Ganymede Limited kif sejjer jigi spjegat ahjar fil-mori tal-kawza. Kwindi in vista ta` l-agir u n-nuqqasijiet kommessi da parti ta` l-attur, abbazi tar-regola tal-pactum commissarium tacitum, xejn m`huwa dovut lill-attur (artikolu 117 tal-Kodici Kummercjali, Kap. 13). Minhabba n-nuqqasijiet ta` l-attur, l-eccipjenti sofrew danni u ghalhekk, mhux talli l-attur ma haqqu ebda hlas, talli l-istess attur huwa obligat ihallas hu lill-eccipjenti dawk id-danni sofferti mill-eccipjenti ; ghaldaqshekk, flimkien ma` dina r-risposta, l-eccipjenti qeghdin jintavolaw talba rikonvenzjonali kontra l-attur sabiex jirkupraw d-danni minnhom sofferti ;*

5. *Illi subordinarjament u minghajr pregudizzju ghas-sueccepit, jekk huwa minnu li jezisti xi forma ta` ftehim ma` l-attur kemm ghar-rigward tad-drittijiet pretizi minnu u anke b`referenza ghas-success fee irid jigi stabbilit ma` min mill-konvenuti sar tali ftehim ; f`kaz, ex ipotesi, jirrizulta li jezisti ftehim bejn l-attur u l-konvenut l-iehor Benjamin Golub, dan il-ftehim m`huwiex a konoxxenza ta` l-eccipjenti u wisq anqas ikkonfermat minnhom u kwindi fil-*

Kopja Informali ta' Sentenza

konfront taghhom huwa res inter alios acta u ma jorbot la s-socjeta` eccipjenti u lanqas l-eccipjent ;

6. *Illi minghajr pregudizzju ghas-suespost, id-drittijiet pretizi mill-attur huma in ogni caso eccessivi u minfuha (inflated) stante illi bl-ebda mod ma jirriflettu x-xoghol u l-kontribut li l-attur ta lis-socjeta` eccipjenti u, fir-rigward tas-success commission, tali kommissjoni m`hijiex mehuda fuq il-prezz tal-bejgh nett tal-yacht ;*

7. *Illi inoltre, minghajr pregudizzju ghas-sueccepit, ma hemm ebda bazi legali ghal solidarjeta` bejn il-konvenuti u, kwindi, jekk xi dritt ta` success commission jirrizulta dovut lill-attur, irid jigi stabbilit min mill-konvenut huwa obbligat jaghmel tali hlas.*

8. *Salvi eccezzjonijiet ulterjuri permessi mil-Ligi.*

With the sworn reply, said respondents filed a list of witnesses and a list of documents. The Court has seen the document that was filed.

Respondents Ganymede Limited and John Biagini entered a **counter-claim** in Maltese which states as follows –

1. *Illi l-attur rikonvenzjat gie nominat direttur u company secretary tas-socjeta` konvenuta ghall-perjodu msemmi fir-rikors guramentat ;*

2. *Illi l-attur naqas milli jwettaq l-obbligi legali tieghu bhala direttur u company secretary u/jew bhala direttur u company secretary agixxa b`mod negligenti u traskurat b`konsegwenza li sofrew danni kemm il-konvenut John Biagini u dan fil-kwalita` tieghu ta` azzjonista tas-socjeta` Ganymede Limited u anke l-istess Ganymede Limited stante li l-attur kien direttur u company secretary taghha ;*

3. *Illi fost affarijiet ohrajn, l-attur rikonvenzjonat naqas milli jirregistra l-yacht in kwistjoni fisem is-socjeta` konvenuta wara li din kienet xtrat l-istess yacht, ipprova jfixkel il-bejgh ta` l-istess yacht mis-socjeta` konvenuta lil Mohammed A. Ghandour, naqas milli jaqdi l-obbligazzjonijiet ordinarji ta` direttur tas-socjeta` konvenuta fosthom li jsejjah laqghat u jzomm minuti taghhom, kif ukoll sfratta r-relazzjoni tas-socjeta` konvenuta ma` l-awdituri taghha KPMG ;*

4. *Illi fost affarijiet ohrajn, l-attur addirittura ppropona u heggeg lill-konvenut John Biagini jagixxi b`mod illi kien sejjer jippregudika l-interessi ta` l-azzjonista l-iehor fis-socjeta` Ganymede Limited ;*

5. *Illi ghad-danni illi sofrew, qed isofru u li jistghu jsofru l-konvenuti esponenti, jrid jirrispondi l-attur ;*

6. *Illi t-tentattivi sabiex tintlahaq transazzjoni bejn il-partijiet kontendenti ma wasslu mkien ;*

Kopja Informali ta' Sentenza

Ghaldaqstant jghid l-attur il-ghaliex m`ghandhiex dina l-Qorti :

1. *Tiddeciedi u tiddikjara li l-attur naqas milli jwettaq l-obbligi tieghu bhala direttur u company secretary tas-socjeta` Ganymede Limited fil-perjodu li kien igawdi minn tali karigi u/jew li matul l-istess perjodu agixxa b`mod negligenti u traskurat u per konsegwenza l-konvenuti esponenti sofrew danni ngenti ;*

2. *Tillikwida d-danni dovuti lill-konvenuti esponenti mill-attur skond it-talba precedenti ;*

3. *Tikkundanna lill-attur ihallas lill-konvenuti esponenti dik is-somma hekk likwidata skond id-domanda precedenti.*

Bl-ispejjez kontra l-attur li huwa minn issa ngunt ghas-subizzjoni.

On the 23 May 2008, this Court acceded to plaintiff's request as detailed in an application which he filed on the 20 May 2008 for proceedings in this suit be carried out in English in terms of Art 4 of Chapter 189 of the Laws of Malta.

On the 30 May 2008, plaintiff filed a **statement of defence** in reply to the counter-claim which states as follows -

Kopja Informali ta' Sentenza

1. *Whereas, by way of preliminary plea, and limitedly to the counter claim made by the Curators nominated by this Honorable Court in terms of Article 929 of Chapter 12 of the Laws of Malta to represent the absent John Biagini, do not have the authority and ability to table a counter claim in terms of Article 396 of Chapter 12 of the Laws of Malta ;*

2. *Whereas, the respondent had carried out all the duties in respect of the post of Director and Company Secretary of the Company Ganymede Limited, and if there were any shortcomings it was due to the fact that the shareholders refused to deposit sufficient funds in the company so that all the expenses related to these duties ;*

3. *Whereas at no time did the respondent act in a careless and negligent manner, in fact it was the shareholders of the same company who abandoned the limited liability company Ganymede Limited, with the consequence that any damages that were suffered were caused by the same shareholders Biagini and/or Golub ;*

4. *Whereas the allegations made by the defendants in respect of the Yacht registration, the relationship between the company Ganymede Limited with Mohammed A. Ghandhour and KPMG, are all unfounded in fact and at law, as will be shown whilst the hearing of the case ;*

5. *With the right to present other defences as permissible by law.*

Plaintiff entered a list of witnesses to sustain his defence against the counter-claim.

Defendant Benjamin Golub filed a **sworn reply** on the 27 October 2008 which states as follows –

1. *Whereas, the amount claimed by the plaintiff is not due by the respondent but by the other defendant Ganymede Limited ;*

2. *Whereas, the respondent never had any contractual relationship with the plaintiff, and all dealings took place between the plaintiff and the defendant Ganymede Limited ;*

3. *Whereas, the respondent holds no office and no interests in Ganymede Limited, and this since 15th February 2008, at which time the vessel, 'Elin' bearing the registration number of 08085 with the Merchant Shipping Directorate in the Malta Maritime Authority, still pertained to the defendant Ganymede Limited ;*

4. *Whereas, part of the agreement that led to the share transfer between the respondent and defendant Biagini included the condition that all fees and commissions due to plaintiff will be settled by the defendants Biagini and Ganymede, due to the fact that after the said share transfer Biagini became the majority shareholder ;*

5. *With the right to present other defences as permissible by law.*

With his sworn reply, defendant Golub filed a list of witnesses.

The Court considered first plaintiff's preliminary plea to the counter-claim by defendants` Ganymede Limited and Biagini. After having seen the notes of submissions filed by the interested parties, and heard final oral submissions, the Court gave judgement on the 27 February 2009. For reasons given in the judgement (fol 90 to 99) the Court dismissed plaintiff's preliminary plea to the counter-claim with relative costs to be borne by plaintiff.

Having heard the testimony of Joseph Borg Cardona, of Leah Caffari, and of Michael Savona at the hearing of the 18 May 2009, and seen the documents that were presented during the hearing.

Having heard the evidence of Pierre Portelli at the hearing of the 12 November 2009.

Having seen plaintiff's affidavit that was filed on the 12 November 2009.

Having heard the evidence of Donald Sant, and of Joseph Sammut at the hearing of the 15 February 2010.

Having heard Roland Darmanin Kissaun`s testimony at the hearing of the 28 February 2011.

Having seen the note (with attached document) filed by defendant Ganymede Limited on the 12 October 2011.

Having seen the affidavit of defendant John Biagini (with attached documents) that was filed on the 23 December 2011.

Having seen the note (with attached documents) filed by defendants Ganymede Limited and John Biagini on the 23 December 2011.

Having heard the evidence of plaintiff at the hearing of the 24 January 2012, and seen the documents that were presented during the hearing.

Having heard the evidence of defendant Benjamin Golub at the hearing of the 3 April 2012.

Having seen the written observations filed by the parties except for defendant Benjamin Golub.

Having seen the document which plaintiff filed at the hearing of the 7 November 2013.

Having seen the decree given at that same hearing where the suit was adjourned for judgement.

Having seen the other acts of the cause.

II. Evidence

Leah Caffari (representative of the Registrar of Companies) testified that Ganymede Limited did not file any financial statements since inception. After 2004 the director and company secretary of the company was Dietmar Josef Mansfeld. Although action was undertaken by the Registrar for the recovery of penalties due according to law, only a part settlement of dues was effected. As regards the filing of other documents, the company was fully compliant. The company is still active. Its present director is John Biagini. The registered address of the company is 171, Old Bakery Street, Valletta.

Witness stated that Dietmar Josef Mansfeld was removed from office as director and company secretary on the 18 February 2008. On that date, the company was still in default as regards the filing of the financial statements. The amount of fines that were outstanding on the 18 February 2008 amounted to €695.91c. That amount was settled : when and by who she was not in a position to relay. Later other dues accrued which amounted to €728.29c. These were penalties that were inflicted for the non-filing of accounts for the period 12 December 2008 – 14 May 2009. When Mr Mansfeld was director and company secretary, the Registrar was not served with any notices of directors' meetings or of any company resolutions. The Registrar was advised of a share transfer with effect from the 15 February 2008.

Joseph Borg Cardona (representative of Bank of Valletta plc) testified that Ganymede Limited held two accounts at BOV plc : a US\$ call account ; and a fixed term deposit account. Account No 400147134657 was holding €100,035 while Account No 40014734607 is €6.51c. The bank was also holding a bid bond due to a court bank guarantee.

Michael Savona (representative of the then Malta Maritime Authority) presented as evidence the official transcript of register under the Maltese flag of the vessel *Elin*. On the basis of that document, it results that the present owner of the vessel is Moonlight Yachts Limited of Seabreeze, Giuseppe Cali Street, Ta' Xbiex, Malta. The vessel was first registered on 29 January 2003 in the name of Elin Yachting Ltd of Seabreeze, Giuseppe Cali Street, Ta' Xbiex. On the 23 January 2006 the vessel was registered in the name of on Ganymede Limited and on the 22 February 2008, a request was filed for closure of the registry. Witness explained that such a request is normally made when the vessel is sold and the prospective buyer decides to register the vessel in another jurisdiction. In the case in point, MMA was informed that the vessel was being sold to third parties. On the 29 February 2008, the vessel was deregistered under Moonlight Yachts Ltd.

Witness stated that when a legal person requests the registration of a vessel, MMA requires the presentation of that company's memorandum and articles of association. The present owner of the vessel has a sole director : Mohammed Amin Ahmed Abdel Rahan Gandar who is an Egyptian national. When one comes to register, he can produce a declaration of ownership. When one intends to effect a permanent registration, the bill of sale is required. The vessel *Elin* was permanently registered on the 29 January 2003. The vessel was acquired by Ganymede Limited. The vessel was permanently registered. A bill of sale was presented when Ganymede Limited acquired the vessel.

Witness testified that the request to close off the registration of the vessel in 2008 was made by Ganymede Ltd. MMA was requested to issue a deletion

certificate but that certificate was never issued. One of the requirements for the issue of a deletion certificate is that all certificates of registry must be returned. The certificate was declared lost by Ganymede Ltd. Ganymede Ltd sold the vessel to Mohammed A Ghandour and then Mohammed A Ghandour sold the vessel to Moonlight. A bill of sale was presented when the vessel was sold to Moonlight.

On **cross-examination**, witness explained that a bill of sale would be signed by the persons who have a power of attorney from the director of the owner company or by the director himself. When Ganymede Ltd sold the vessel, the bill of sale was signed by John Biagini who had the power and authority to sign on behalf of the company. When Ganymede Ltd acquired the vessel, the bill of sale was signed by Gada Hana who was the director of Elin Yachting. The dates on Doc MMA 2 and MMA 3 were 26 March 2004 and 21 February 2008 respectively.

Witness confirmed that on the documents which he presented, the name of Mr Mansfeld did not appear anywhere. Ganymede Ltd sold the vessel to Mohammed A Ghandour for US\$ 600,000. Ghandour sold the vessel to Moonlight for €1, and other considerations. Ganymede Ltd acquired the vessel for a price exceeding US\$ 1,000,000 in 2004.

Donald Sant – an accountant and auditor by profession – testified that he had met plaintiff, and had some communication with defendant Golub, although he never met Golub in person. He was asked to render his services to plaintiff. He met plaintiff who informed him that he was a director of Ganymede Limited. The company was building a boat but there were problems between the two shareholders i.e. defendants Golub and Biagini. There were also communications with defendant Biagini via email regarding the quotation of auditing services.

On **cross-examination**, witness explained that plaintiff approached him professionally as KPMG could not assist him. He discussed with plaintiff the problems which the company was facing. He had three or four meetings with plaintiff, but when he witness noted that matters were not moving forward, he refused to accept the appointment.

Joseph Sammut - a certified public accountant and auditor – testified that he knew plaintiff Mansfeld since November 2007 when he went to his office to request his services regarding the compilation of the accounts and audit of Ganymede Limited. On 5 November 2007 plaintiff Mansfeld on behalf of Ganymede Limited signed a letter of engagement. As a company Ganymede Limited was registered on 26 March 2004. When witness was first approached by plaintiff Mansfeld, the company was in default in that it had not submitted any financial statements to the Registrar of Companies and to the Commissioner of Inland Revenue.

Witness stated that plaintiff Mansfeld delivered to him various documents and other information so that a trial balance could be prepared. He assisted plaintiff to draft the accounts and performed the audit. The audit was not certified as he concluded his job until the stage of the trial balance as there was a share transfer. His last contact was February - March 2008. When his brief was halted, there was still further work that had to be carried out. But he did not receive further information. Although he made contact to meet defendants Golub or Biagini, who were the shareholders of the company, there was no follow up. He was not paid for his services. The documents and trial balances were still in his possession.

On **cross examination**, witness testified that he received his instructions from plaintiff Mansfeld who was the director of the company. At the time he did contact the shareholders. Until January 2008, plaintiff was still the director of the company.

Dietmar Mansfeld testified that he had been residing in Malta since 1998. His area of interest was consultancy ; in fact he had a company registered in Malta by the name - Eurotech Consultancy Limited. He was asked to assist defendant Golub to set up business in Malta and shift his activities from Sweden to service the North African market. In February 2004, defendant Golub asked plaintiff to look into the possibility of setting up a company in Malta to own a vessel. Plaintiff researched the matter and relayed the information he had gathered. Golub expressed his interest in forming such a company and enquired whether plaintiff would be interested to assist further. Plaintiff accepted. He was later informed that the company would be having two shareholders : Golub himself and defendant John Biagini. Plaintiff briefed KPMG to form a company on the information provided by Golub. He informed Golub that for the company to be formed, the shareholders had to come to Malta to sign the necessary documents. He also informed Golub that the company required a Maltese address as a registered office, that the shareholders had to elect a board of directors, and had to appoint an auditor for the company.

Plaintiff stated that after some time, Golub asked him if he would be willing to act as the sole director of the company and if the company could use his personal address as its registered address. He agreed but he made it quite clear to Golub that there are serious legal repercussions for directors of companies who were in breach of the law and therefore insisted to have a say in all the operations of the company to ensure compliance. He suggested that the registered office would be the address of the firm of auditors who would be assisting in the formation of the company. At that point Golub informed him that the post of Director would be remunerated. His tasks would be to carry out operations and errands on behalf of the company ; therefore the role of Director was not ceremonial but operational. It was convened that Golub would transfer money to his personal bank account to finance the paid up share capital, the MFSA fees, the KPMG fees, and the transfer of funds to an individual of Egyptian nationality by the name of Ahmed Sami from whom the future company intended to purchase a vessel. A sum of US\$ 125,000 was transferred.

Kopja Informali ta' Sentenza

Plaintiff explained that later Golub contacted him requesting him to make arrangements for Ahmed Sami to obtain a visa to enter Malta so that Golub could discuss and finalize all details in respect of the acquisition of the vessel. Plaintiff made the arrangements, and Sami came to Malta with his daughter. Golub came to Malta on 21 March 2004 to finalize the company formation. He also had a power of attorney to represent John Biagini. They went to KPMG who formed Ganymede Limited which was registered on 26 March 2004. He discussed with Golub the remuneration for his past and future services. Golub consulted his partner and informed him that the company would be effecting payment of a retainer of Lm700 per month. When Golub was in Malta, he met Sami who informed him that the vessel was already registered in Malta under his company's name, Elin Yachting Limited, even though the boat was still being built in Egypt. Golub left Malta leaving various instructions for plaintiff to follow and act upon. Golub had instructed him to transfer the sum of US\$ 125,000 to the account of the owners of *Elin*. On 25 March 2004 he received US\$ 60,000, out of which US\$59,850 were paid to S & D yachts to settle VAT on the purchase of the vessel.

Plaintiff continued to stated that Biagini came to Malta on 1 July 2004 together with Golub. A meeting was held at KPMG with Pierre Portelli. The purpose of the meeting was for Biagini to examine certain company documentation and sign them. A meeting was also held at S & D Yachts for verification of the documents of the boat. On 12 July 2004, KPMG requested him to provide them with details of John Biagini, namely his profession, his commercial activities, and his bankers. Although he requested these date from Biagini by email several times, these requests remained unanswered. On the 7 October 2004, he received an email from Pierre Portelli of KPMG requesting from him the documents necessary to finalise the financial statements of the company for 2004. Portelli informed him that he had written to Biagini in September 2004, but Biagini did not comply.

Witness affirmed that in the beginning of September 2005, John Biagini contacted him requesting if he had any information about Golub, and details regarding the boat, and his position with Ganymede Limited. Plaintiff answered all queries and when Biagini was discussing the vessel, he informed plaintiff that the vessel would be sold when ready. Plaintiff brought up with Biagini the

matter of the information requested by KPMG but Biagini seemed to indicate that no request had been sent to him by KPMG. Plaintiff stated that it was on 16 September 2005 that John Biagini replied to the requests made to him by KPMG. On 23 October 2005, Golub and Biagini came to Malta to finalize the registration of the vessel and to hold meetings with KPMG. On 30 January 2006, Biagini in an exchange of emails requested plaintiff to inform him what would he charge as a brokerage fee in order to find a buyer for the vessel. Biagini also informed him that funds had been sent to Malta and were at the disposal of Dr Diacono. He advised that there was a communication problem between Golub and Biagini.

Plaintiff testified that on 31 January 2006, Biagini instructed him to sign the necessary documentation for a mortgage to be placed on the vessel. The mortgage would be in favour of Biagini for sums he allegedly had loaned to the company. Plaintiff refused to comply because to effect such a measure he required instructions from both shareholders. Biagini was not pleased. On 9 February February 2006, Biagini acknowledged that the company would be willing to sell the vessel for an amount between US\$ 6,000,000 – US\$ 7,000,000. On the 16 February 2006, he reminded Biagni that KPMG was still awaiting all the documentation relating to the financial years 2004 and 2005 to prepare the company accounts and eventual audit. Plaintiff reminded Biagini that there were fines in case of default. It was only on 21 February 2006 that Biagini finally informed him that he had no documentation to present to KPMG in respect of expenses related to the company. In February 2006, KPMG informed plaintiff that they were not at all pleased with the state of affairs of the company as regards the question of the accounts. They proposed that another auditor and recommended Donald Sant.

Plaintiff stated that Biagini had a dispute with Pierre Portelli of KPMG in respect of certain billing aspects. Towards the end of June 2006, Biagini instructed plaintiff to engage a surveyor to carry out a survey of the vessel to ensure that works were being carried out, as he felt that the Egyptian builder was not carrying out any work on the boat, and that the condition of the vessel was deteriorating. He instructed a company from Montenegro, namely SeaMonte, to carry out the survey. A report was sent to him on 26 September 2006. He sent the report to both shareholders. The outcome of the report

confirmed Biagini's concern that the condition of the vessel was in fact deteriorating, and that unless works did not resume soon, the value of the vessel would diminish considerably. On 13 July 2006, he was informed by Biagini that he was having problems with Golub ; he did not exclude that they would end up in court to resolve their differences. Biagini inquired if an auditor had been found to replace KPMG. Plaintiff was instructed to send the curriculum vitae of the auditor to Dr Diacono. Plaintiff was asked by Biagini to give a power of attorney to an employee of Dr Diacono by the name of Siletto. He understood that Biagini had been seeking advice to transfer the vessel to another company and bypass Golub. Plaintiff made it clear to Biagini that such an act would be fraudulent but Biagini was of the view that that was the only way viable out of the deadlock as he was not receiving any feedback from Golub.

Plaintiff continued to state that in August 2006, he communicated with Biagini where he informed him that Dr Diacono had approached him with regard to the power of attorney. Dr Diacono advised that all the powers of director would be given to Siletto and plaintiff would remain responsible as director and towards Golub. He suggested to plaintiff to resign from director so that Biagini would appoint another person in his stead. On the 8 August 2006, Biagini informed him that he did not want plaintiff to resign and that the idea for appointing an attorney was not his. In August 2006, Biagini came to Malta and asked plaintiff to get in touch with Golub to obtain a power of attorney from him in order to facilitate the sale of the vessel. Plaintiff met Golub in Munich on 21 August 2006. Golub did grant him a power of attorney together with documentation he had with regards to the expenses of the company. On the 20 September 2006, Biagini sent him an email confirming receipt of the fax copy of Golub's power of attorney. In that email Biagini told him to take the necessary decisions in the management of the company as long as the funding of those decisions was shared equally between Golub and himself. On the 21 September 2006, he informed Biagini that KPMG were no longer willing to service the company and that he was awaiting instructions as to who to appoint in their stead. Donald Sant was approached to prepare the accounts and engage an audit of the company. Donald Sant sent a quotation on the 27 September 2006 with a request for information. Biagini and Golub did not reply to that quotation and therefore Sant opted out.

Plaintiff pointed out that as time passed, the problems between Golub and Biagini intensified and Biagini acknowledged that there were amounts of money due to plaintiff but that he was not willing to settle his dues unless Golub contributed as well. On 10 May 2007, Biagini mentioned that a success fee would be paid to plaintiff upon the sale of the vessel. This fee was not conditional to the conclusion of the sale, but was intended to cover the assistance that plaintiff had provided and his patience for having rendered services since February 2004 without being paid. The fee was a bonus payment. In the summer of 2007, plaintiff discussed with Golub the sale of the vessel. Golub was very apologetic for the rough ride that plaintiff was being given especially since he was mediating between the two shareholders. He discussed his remuneration with Golub. He also discussed the bonus that had been promised by Biagini and Golub on the sale of the vessel. Golub assured plaintiff that his due from that sale would be 10% and not 5% as promised by Biagini. The matter was raised several times but was never reduced in writing.

Plaintiff stated that around this time, he approached Joe Sammut and requested him to prepare an audit of the company. He informed Biagini that he had identified an individual who would be willing to work on the accounts. He handed documents to Sammut. Plaintiff advised Biagini that Sammut required further documents as soon as possible. Sammut prepared a trial balance for the years in question, without the expenses incurred by Biagini. It was only on 16 November 2007 that Biagini sent the requested documents. On the 8 December 2007, Biagini informed him that there were a number of buyers interested in the vessel. Biagini told him that he was going to ask Dr Diacono to prepare a resolution that would authorise Biagini the sale of the vessel, without the need to consult Golub on the matter. He explained that the resolution would included specific conditions like for instance that the sale price would not be less than US\$ 700,000. Around the 10 January 2008, the need was felt to change the registered address of the company. Biagini decided to use the address of Joe Sammut as the registered address of the company. On the 14 January 2006, Sammut emailed him the balances according to the accounts he had prepared, asked all parties to confirm them. On the 30 January 2008, Biagini emailed back stating that it was best if all sat together to organize the expense details correctly and to ensure that all other items were in place. Because of that reaction, the accounts for 2004, 2005, 2006 and 2007 were never closed. On the 13 February 2008, plaintiff received an email from Biagini informing him that he had reached a settlement with Golub that he would be buying the shares held by Golub ; Dr Diacono would be preparing the necessary documentation. Biagini

advised that he was coming over to Malta to sort out the accounts and to meet a potential buyer ; it was agreed to organize a teleconference between Biagini and himself on the 15 February 2008. The teleconference did take place with the participation of Biagini, Golub, Diacono and himself. The matters discussed related to the transfer of shares from Golub to Biagini. Biagini was informed that all documentation in respect of the company had been given to plaintiff. All was agreed for the transfer of shares to be effected.

Plaintiff testified that on the 18 February 2008, he received an email from Biagini enquiring about the signatories at the Bank and informing him that the vessel was to be sold the next day. He was dismayed at such short notice as plaintiff had advised Biagini and Diacono that he was going to be outside Malta until the 25 February 2008. His signature was required for the sale as he was the sole director of the company. Plaintiff could not understand how the company was planning to sell the vessel without his signature as sole director. To his surprise, the sale was going to proceed without documents that were in his possession. On the 22 February 2008, he received an email from Biagini stating that the vessel had been sold, the company had been restructured and that he had been removed from the post of Director. He was required to hand any documentation in his possession and that once this was done, the necessary arrangements were going to be made to ensure that the success fee would be transferred to him. He was informed that he had to hand over the documentation to Diacono who was to commence the procedures for the liquidation of the company. Plaintiff reminded Biagini that he was owed an amount in respect of Director's fees which amount to US\$ 110,446. On the 25 February 2008 Biagini confirmed that he would instruct Dr Diacono to prepare a bank draft and that the payment would be a settlement against what was owed to him. Plaintiff's understanding was that he would be receiving a sum of money as part settlement of all the amounts owed to him, with the payment of the success fee remaining outstanding. Some confusion arose because in his email he had indicated an amount and in Biagini's reply a different amount resulted which did not correspond to the sum plaintiff had indicated.

Plaintiff stated that he phoned Biagini on the 27 February 2008 and told him that the sum owed to him was US\$ 110,460 not US\$ 11,044.60, and that the success fee for the sale of the boat amounting to 10% had to be settled together

together with his fees as director. Biagini sent an email directing plaintiff to deal with Dr Diacono and not with him. Biagini made it clear that he did not intend honouring any commitments that had been made by Golub on behalf of the company. Plaintiff was shocked with that reaction on the part of Biagini. From then on, the matter was referred to the lawyers.

On **cross examination**, plaintiff stated that his first contact with Biagini was on the 1 July 2004. Between July 2004 and September 2005, he exchanged an email with Biagini ; there were no phone calls with him in that period. A formal meeting of the board of directors or of the shareholders of Ganymede Limited was being organized by KPMG but it was never held. As director, he did not call for a board meeting. No resolutions were taken by the company. He was involved in the negotiations relating to the purchase of the yacht in the sense that he was present and that the funds to finance the purchase went through his personal bank account. He was involved in preparatory paperwork necessary for S & D yachts to proceed including the registration and the bill of sale ; the registration itself was made by S & D Yachts. With regard to the registration, the problem was that the previous owner of the boat was not organised in his paperwork ; it was only after that the previous owner put his house in order that registration could take place. And the matter took time. He not informed by Biagini that there was a very tight time frame for the sale of the vessel to take place.

On **re-examination**, plaintiff stated that the vessel was registered before January 2006. He stated that there was a meeting between Golub, Biagini and himself to determine the company set-up and to clarify pending matters. Another meeting was the held where the shares held by Golub were transferred to Biagini. On the 15 February 2008, a telephone conference was held in Munich between Biagini and his lawyers, Golub and his lawyers and plaintiff. It was a meeting of the board of directors and of the shareholders of Ganymede Limited.

Pierre Portelli – an accountant employed with KPMG – stated that he was in charge of the issues involving Ganymede Limited. Plaintiff had

approached him to find out whether KPMG could take care the formation of a company in Malta with a view to register a vessel, and whether once the company was formed, KPMG could assist with the company's compliance with Maltese law. The shareholders of Ganymede were defendants Golub and Biagini while plaintiff was the sole director. The company was registered in a short time because at that particular time there was in operation a scheme introducing reductions in VAT on vessels. Witness recalled quite clearly the difficulties he encountered to retrieve information from the company and its shareholders. KPMG operates a due diligence procedure whereby when it accepts clients, it asks for documents on the beneficial owners. From Mr Golub, the required documents were quick to arrive, but from Mr Biagini, they received the documents after a year. As he knew plaintiff, KPMG made an exception to its clients' acceptance procedure despite that delay.

Witness pointed out that KPMG met with difficulties to prepare the financial statements of the company due to lack of documents. KPMG was consistently requesting documentation from plaintiff and the shareholders about the business of the company but that information was not being provided. Plaintiff had advised him that he did not possess the documents they required and the matter was therefore referred to the shareholders. Witness states that plaintiff made efforts to obtain the documents. KPMG managed to prepare the annual return for transmission to the Registrar of Companies. That matter did not require much input from the shareholders because the document is signed and filed by the director. As regards the financial statements for filing with the Registrar of Companies and the tax returns for presentation to the Department of Inland Revenue, these could not be processed and filed as KPMG did not have information from the shareholders.

Witness states that KPMG communicated with the shareholders through email or fax but there was no response. KPMG terminated its engagement in June 2006 due to lack of co-operation by the shareholders and because it found out that there were disputes between the shareholders. KPMG prepared a statement of account and as there were some moneys which were deposited with KPMG. KPMG was paid for its services and the balance of funds held was transferred to the company. That was the end of the engagement. Plaintiff had him if he could recommend anyone else to do the job which KPMG had been

doing until then and he suggested to plaintiff that he should contact Mr. Donald Sant.

Roland Darmanin Kissaun explained that Mr Mohammed Ghandour had contacted him for the formation of Moonlight Yachts Limited. He explained that Ghandour was buying a yacht and he requested witness to prepare a bill of sale and incorporate the company. At the time of giving witness, he did not have contact with Mr Ghandour. Nor was his bill settled. The company was still registered at his business address. The address was just for mailing purposes. He had no information at all as to whether the yacht was still owned by Mr Ghandour or the company. He stated that the most recent mail he received for Moonlight Yachts Ltd was the subpoena for Mr. Ghandour to testify in this suit. Witness stated that every year he receives the renewal office registration certificate for the boat. His only involvement was the bill of sale and with the receipt of mail. He did pay the bill which he received from the Malta Maritime Authority for payment of the renewal of the Maltese registration ; he was refunded only a part of his remittance. To his knowledge, the yacht was still registered in the name of Moonlight Yachts Ltd with the Malta Maritime Authority. Mr Ghandour is the shareholder and director of Moonlight Yachts Ltd. When he completed the bill of sale, there was present Mr Ghandour and a representative of the company which was sending the boat, and a representative of KPMG. The bill of sale between Ganymede Ltd and Mr Ghandour was effected on the 21 February 2008. That bill of sale was followed by another when the boat was transferred from Mr Ghandour to Moonlight Yachts Ltd which was formed on 22nd February 2008. He met Mr Ghandour only once. He paid all dues for the following year but only half the dues for thge year after that. He communicated with Mr Ghandour via email.

John Biagini testified that he was the sole director and company secretary of Ganymede Limited, which is a company incorporated in Malta. For a time, plaintiff was director, he was a 50% shareholder and the remaining 50% of the shares were owned by Benjamin Golub. He is resident in the USA and does not speak Maltese. In 2003, he was approached by his friend Golub who discussed with him the possibility of jointly buying a motor yacht that was under construction in Egypt. He was informed that the owner had run out of funds to complete the project. Biagini and Golub went to Egypt in January 2004 and

Kopja Informali ta' Sentenza

purchased the yacht for of US \$1,550,000. The name of the yacht was *Elin*. As the yacht was not registered, they agreed to register the vessel in Malta. Golub informed him that a Maltese company had to be set up and that it would be this company who would be the owner of the yacht. He agreed, the company was incorporated and named Ganymede Limited. The company needed a director and upon Golub's suggestion, plaintiff was appointed. Plaintiff's remuneration was never discussed at that point and Golub did not fix any remuneration for plaintiff. In all emails which were exchanged between himself and plaintiff, plaintiff never stated that Golub had agreed on his fee.

Defendant Biagini stated that he was informed that plaintiff's involvement in the operation of the company would be minimal as Ganymede Limited was created simply to own the yacht until it was completed and sold to third parties. In March 2004 Golub verbally confirmed to him that plaintiff's role would be minimal. At the time of plaintiff's appointment as director, he was not acquainted with plaintiff and simply relied on Golub's choice. The purchase of the yacht was finalised in Malta in early 2004. He transferred all funds necessary to sustain the expense of purchase. In August or September 2005, he found out that Golub had swindled him when it resulted that Golub had helped himself to the funds that had been transferred and which were intended for the funding of the yacht. He telephoned plaintiff and talked to him about the situation. In an email of the 7 September 2005, Mansfeld brought up the subject of his remuneration and stated that he did not have any separate agreements with Golub. He set out a trip in October 2005 wherein in Sweden he met Golub's brothers to press them to get Golub to meet with him. In Egypt he met the boat builder. In Germany and in Malta, he hired law firms to advise him on how to recover the money Golub had misappropriated. In Malta he met Mansfeld in the presence of staff from KPMG and Dr Jotham Scerri Diacono. Mansfeld was friendly but had limited information ; after all his appointment as director was really a paper requirement. Up to February 2008 Ganymede Limited had KPMG's address as its registered.

Biagini explained that in the meeting in question, it resulted that Mansfeld as director was not in possession of complete accounts. Neither did he attend to other company requirements for which he was responsible, such as a company minute book for directors` and shareholders' meetings. Nor did he

ensure the creation of a company's combined register. Mansfeld did chase him for information to handle the company's accounts but because Golub did not communicate with him, the accounts could not be taken care of. Golub avoided contact because he became aware that Biagini was chasing him to explain what he had done with his money. He insisted that he never refused to collaborate with KPMG or Mansfeld when they requested information from him. He was always ready to provide any information which was requested of him. It was he who settled promptly all invoices with KPMG. He recalled only one instance where there was a delay in the exchange of information and this was due to the fact that KPMG sent their correspondence to his address in Nevis, British West Indies and not to his USA address.

Biagini stated that while in Malta in October 2005, he asked the law firm Ganado & Associates to investigate the status of the boat's sale, the transfer of title, and related issues. He was informed that the various aspects of the sale/registration process were incorrect or incomplete. The *Elin* was still registered in the name of the selling company despite that Ganymede Limited had acquired the yacht. Mansfeld and Golub should have been aware of the error. Had it not been for him, the vessel would have remained registered in the official ship's register at the Registry of Shipping in the name of the seller. It was clear that plaintiff had failed seriously in his duty as director of Ganymede Limited.

Biagini stated that Mansfeld and himself exchanged emails and telephone calls in order to draw up Ganymede's financial statements, but the situation had reached a deadlock as Golub was not cooperating. In November 2005, Mansfeld asked for US\$ 10,000 which represented legal and accounting expenses, which request was accepted even though he was reluctant to pay Golub's share. At the time legal action was instituted against Golub with regard to the misappropriation of funds ; Golub eventually settled out of court. As opposed to what was stated by Mansfeld, Biagini affirmed that he did not visit Malta with Golub in October 2005.

Kopja Informali ta' Sentenza

Biagini pointed out that he established an escrow account in his name with KPMG, from which approved invoices would be paid for Ganymede's expenses after Mansfeld presented invoices to Dr Scerri Diacono who would view and approve them prior to informing KPMG to have the invoices paid. In 2006 Mansfeld raised the issue of fees for himself. Mansfeld's claim that the quantum of his fees had been agreed to by Golub was not correct. On 27 July 2006, Mansfeld sent him an email with the regard to the issue of his fees. Biagini replied that he had asked KPMG to pay him US\$500. On the 5 September 2006, he wrote to Mansfeld telling him that if he should be paid anything, that payment should be effected out of the proceeds of the sale of the yacht. On 20 September 2006, he emailed Mansfeld and told him that he would not pay any fees but that he would instead pay a success fee upon the sale of the yacht. He reiterated this fact in an email of the 17 October 2006. On the 17 January 2007, Mansfeld threatened to resign if Biagini and Golub did not clarify their position by the 17 February 2007. Biagini confirmed his position on various occasions afterwards. On the 15 February 2008, he concluded an out of court settlement with Golub wherein Golub agreed to return a part of the money that he had taken belonging to Biagini, and that he would give Biagini all his shares in the company together with a specified sum. Prior to that, on the 17 January 2008, he emailed Mansfeld informing him that he had a buyer for the yacht who made an offer in the range of US\$ 600,000 to US\$ 650,000. Although Mansfeld had informed him that he had replaced Golub's name with his, as regards the company's signatories on its bank account, it transpired that in the run up to the sale, the only two authorized signatories were plaintiff's and Golub's. He questioned the reason for this in an email he sent dated 18 February 2008, to which he did not receive a reply.

Biagini testified that because of the change in shareholding of the company, and since the sale of the vessel could not be disrupted in the way that Mansfeld was attempting to do, he filed the papers in the Registry of Companies to effect a change in shareholding, directorship and company secretariat. He was registered as the company's sole director. There was no manoeuvre to defraud anyone but had he not proceeded with the sale, the company and himself as sole shareholder would have suffered a huge financial loss. Plaintiff was acting against the interest of the company. The yacht was sold on the 21 February 2008 for the price of US \$600,000 to a buyer from Egypt. The sale took place at the offices of S & D yachts in Malta. Mansfeld did not participate at all in finding the buyer or in the conclusion of the sale. It is not true that a few days after the sale, he instructed his lawyers to issue a bank draft for US \$110,446 in

favour of plaintiff. On the 6 March 2008, he was informed by Bank of Valletta plc that Ganymede Limited had its account blocked by a garnishee order issued at the request of Mansfeld. Mansfeld had blocked the sum of US\$ 263,685.54 as compensation for his services as director. He contested plaintiff's claim as plaintiff did not carry out any work and there were matters which he completely failed to do. Mansfeld failed to produce any significant director's activities and also gave him advice that was of dubious ethical value. Mansfeld refused to issue a power of attorney in favour of a designated person from Ganado & Associates. On or about the 6th July 2006, Mansfeld in a telephone conversation had suggested a scheme whereby a new company would be created and make a low ball offer to buy the yacht; as director with Golub's power of attorney, plaintiff could accept the offer and sell him the yacht and then he could sell the yacht to a bona fide buyer and avoid having Golub see the real buying price. He was frankly alarmed with that suggestion.

Biagini insisted that he did not instruct Mansfeld to sign a mortgage over the vessel in his favour. As regards auditor Sammut's involvement, he stated that his office was terminated as he did not turn up for an important meeting in February 2008. In an email sent to him, Sammut admitted that he could not provide his services on that occasion. Biagini was surprised that Sammut was claiming payment of services which he clearly did not provide. Mansfeld had no agreement with Ganymede Limited regarding fees. He had told Mansfeld that he was willing to suggest to Golub that Ganymede Ltd would pay Mansfeld a 5% success fee based on the sale of the price of the yacht. As plaintiff had instituted this suit, the offer was withdrawn. On 24 April 2007, Mansfeld wrote to him telling him that he had discussed the matter with Golub, and that Golub had accepted that his fee would be regulated with the sale of the yacht. He states that he acted fairly and always informed Mansfeld what was happening. Ganymede Limited was incurring annual bank charges of €800 for a bank guarantee in the amount of €100,000 because of the garnishee order. He also offered out of good faith to pay Mansfeld in full and final settlement 5% of the sale price of the vessel but no reply was given.

On **cross-examination**, Biagini stated that he met Mansfeld a few months after the yacht was purchased. The discussions at the time were only about the yacht and related to the auditors. Mansfeld located the accounting firm

for the company and handled money for the first instalment of the purchase of the yacht. He is unsure of Mansfeld's involvement at that time as he had given a limited power of attorney to Golub but Mansfeld had to take care of all things that were necessary to be done in Malta to establish the company and to effect the purchase and registration of the yacht. The company was to pay plaintiff for work which he would have carried out as director. KPMG never asked him for any information about Mansfeld. Plaintiff sent him a number of emails in connection with requests sent to him by KPMG. He did not receive anything from KPMG, as they were sending their emails to the wrong address. After replying to Mansfeld's emails and giving him the correct address, he received from communications from KPMG. The only thing that Golub told him was that he would pay Mansfeld a minimum amount at the end without specifying any amounts or other details. At one time, Golub and himself had asked KPMG how much should Mansfeld be paid and the reply was LM50 a month. He requested KPMG to pay Mansfeld US\$500 dollars but KPMG never did that. He first heard the figures claimed by plaintiff in the lawsuit.

Biagini confirmed that he knew Donald Sant as he was the new auditor of the company. He confirmed that in emails from the auditors Joseph Sammut and Donald Sant, the fee of Lm700 or Lm750 a month due to Mansfeld was mentioned. His reaction was that he thought that Mansfeld was looking for an auditor who was willing to put something in writing that would put pressure on him. He questioned Golub about this but got no reply. He did not expect a reply from Golub because at that time, he was suing him for misappropriation of funds in connection with the purchase of the yacht.

Biagini confirmed that he knew that Mansfeld was going to be away for a month and this at the time when the sale of the yacht was imminent and also that Mansfeld's job included the keeping of the documents of the company. He had offered to pay his flight to Malta at his personal expense. He discovered that the registration of the vessel was not even finalised and that the document was not available. He presumed that this was lost and did not verify if Mansfeld held it in his possession as at that time, as he did not trust Mansfeld.

Biagini stated that the vessel was registered in the company's name about two years after the company was registered. The bill of sale stated that the sale was subject to a memorandum of agreement.

On **re-examination**, witness confirmed that he informed Mansfeld in an email of the selling price of the vessel.

Benjamin Golub stated that he met Biagini and decided to try and build a boat and perhaps sell it. He knew Mansfeld before he met Biagini. He had difficulties with Biagini and thus transferred his shares to him in February 2008. He had 50% of the shares in Ganymede Limited. The company needed to have a director who was resident in Malta or who had an address in Malta and Mansfeld accepted the post. Mansfeld had to cater for all responsibilities including tax issues. As regards remuneration, KPMG had told them that there must be a director's salary. They proposed payment in favour of plaintiff of LM1,500. They considered the fee as excessive and they agreed to a monthly fee of Lm750. As the salary was reduced, they promised to pay plaintiff an extra 10% on the sale of the vessel.

Golub stated that he was aware that the vessel was sold by Biagini. He had seen the boat advertised for sale on the internet for US\$ 1,500,000 and at one point : four or three million dollars. He received no part of the proceeds of the sale. Mansfeld was not paid his salary. Nor was he paid the commission.

On **cross-examination**, Golub confirmed that Biagini knew about the commission of the 10% to be paid to Mansfeld when the boat was sold. Golub did not know the price for which the vessel was sold. He confirmed that a meeting was held in Munich. Biagini was on a phone conference with Mansfeld, with Biagini's lawyer in Malta, with Biagini's lawyer in Munich and his lawyer. At that meeting they referred to the papers belonging to Ganymede Limited that

were in the director's possession. As soon as Biagini took over the shares, it was his responsibility to pay any dues due by Ganymede Limited. The registration certificate of the vessel was in Mansfeld's possession and during the telephone conference, it was made clear that the documents were in Mansfeld's possession. The agreement regarding Mansfeld's remuneration was concluded in the presence of KPMG in 2004. KPMG had made it clear that there had to be a salary given to the director. The issue of the 10% success fee was discussed during a dinner held between him, Mansfeld and Biagini. The 10% success fee was never put down in writing but the Lm750 was put on paper by KPMG.

III. Considerations

The Court underlines the fact that the parties agree that plaintiff was not paid for any of his services. There is also agreement between the parties that plaintiff was appointed sole director of defendant company since its registration on the 26 March 2004 up until his removal from office on the 18 February 2008. The parties however dissent as to what services he did actually carry out and what remuneration was agreed for his services. There is an objective understanding that the appointment of plaintiff as director had to be remunerated as it was not gratuitous in nature. Had even one to accept that, as being claimed by Biagini, that plaintiff was only lending his name and address, and effectively doing practically nothing, he would still have been entitled to claim payment.

Where issues of conflict in evidence arise, our Courts have been consistent in their approach and considerations. This Court makes reference to the judgement given by the Court of Appeal in its Inferior Jurisdiction in re '**Maria Xuereb et vs Clement Gauci et**' on the 24 March 2004 :-

"Huwa pacifiku f'materja ta' konflitt ta' versjonijiet illi l-Qorti kellha tkun gwidata minn zewg principji fl-ewalwazzjoni tal-provi quddiemha :

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

2. *Fin-nuqqas, li tigi applikata l-massima "actore non probante reus absolutur".*

Ara a propozitu sentenza fl-ismijiet "Fogg Insurance Agencies Limited noe vs Maryanne Theuma", Appell, Sede Inferjuri, 22 ta' Novembru 2001.

Fi kliem iehor il-Qorti ghandha tezamina jekk xi wahda miz-zewg verzjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita` u speċjalment dawk tal-konsistenza uverosimiljanza, ghandhiex teskludi lill-ohra, anke fuq il-bilanc tal-probabilitajiet u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant (Kollez. Vol L pII p440)."

The same principles were underlined in the judgement of this Court (PA/TM) of the 30 October 2003 in re "George Bugeja vs Joseph Meilak" :-

"Jinsab ravvisat fiddecizjoni fl-ismijiet "Farrugia vs Farrugia", deciza minn din il-Qorti fl-24 ta' Novembru, 1966, li "il-konflitt fil-provi huma haga li l-Qrati jridu minn dejjem ikunu lesti ghalha. Il-Qorti ghandha tezamina jekk xi wahda miz-zewg versjonijiet, fid-dawl tas-soliti kriterji tal-kredibilita' u speċjalment dawk tal-konsistenza u verosimiljanza, ghandhiex teskludi lil-lohra, anke fuq il-bilanc tal-probabilitajiet, u tal-preponderanza tal-provi, ghax dawn, f'kawzi civili, huma generalment sufficjenti ghall-konvinciment tal-gudikant".

Fil-kamp civili ghal dak li hu apprezzament tal-provi, il-kriterju ma huwiex dak jekk il-gudikant assolutament jemminx l-ispjegazzjonijiet forniti lilu, imma jekk dawn l-istess spjegazzjonijiet humiex, fic-cirkostanzi zvarjati tal-hajja,

verosimili. Dan fuq il-bilanc tal-probabilitajiet, sostrat baziku ta' azzjoni civili, in kwantu huma dawn, flimkien mal-proponderanza tal-provi, generalment bastanti ghall-konvinciment.

*Ghax kif inhu pacifikament akkolt, ic-certezza morali hi ndotta mill-preponderanza tal-probabilitajiet. Dan ghad-differenza ta' dak li japplika fil-kamp kriminali fejn il-htija trid tirrizulta minghajr ma thalli dubju ragjonevoi. Kif kompli jinghad fl-imsemmija kawza “**Farrugia vs Farrugia**”, “mhux kwalunkwe tip ta' konflitt ghandu jhalli lill-Qorti f'dak l-istat ta' perplessita' li minhabba fih ma tkunx tista' tiddeciedi b'kuxjenza kwieta u jkollha taqa' fuq ir-regola ta' in dubio pro reo”.*

(see also : “**Kmandant tal-Forzi Armati ta' Malta vs Francis Difesa**” – PA/PS - 28 May 2003 ; and “**Emanuel Ciantar vs David Curmi noe**” – PA/PS - 28 April 2003 ; and “**Enrico Camilleri vs Martin Borg**” – Court of Appeal – 17 March 2003).

Against this background of judgements, the Court finds it objectively very hard to believe the version given by Biagini in the sense that the issue of remuneration of plaintiff was never discussed with him. It has resulted that defendant is a person extremely conversant in business , and very alert as to what was happening, especially when he started involving himself more and more into the matters relating to defendant company. The Court finds it very hard to believe Biagini when he stated that the remuneration issue was never discussed, or that when discussed with Golub, it was only mentioned that it would be minimal, with no other details being revealed or dealt with. It is also hard also to believe that plaintiff would have continued to renders services – minimaal or otherwise – without knowing his remuneration, taking into account the responsibilities at law to which he was exposed through his sole directorship of a company with foreign resident shareholders and totally dependent on them for funding and financing of the activities of the company and its dues at law.

When one compares one the one hand the version of events given by plaintiff and the one given by Golub (which version in its essence gives support to the version given by plaintiff) and on the other the version of facts given by Biagini, it is the former which convince this Court that they more akin to what actually happened. In the opinion of the Court, there are certain issues which tend to highlight that Biagini's version lacks credibility. The Court refers to Biagini's declaration that the certificate of registration of the vessel was lost, a matter which he could have checked without difficulty with plaintiff to determine whether it was in his possession. The Court also refers to Biagini's insistence that he never knew of the remuneration which was agreed to be paid to plaintiff until the court case was filed and to his acceptance later on during cross-examination that he was informed of it by various emails. In his evidence at folio 380 et seq, in the other proceedings relating to the garnishee order, Biagini had already acknowledged the fact that Mansfeld had mentioned this amount of remuneration in various emails. Other instances concern the issue that Biagini stated that he always co-operated with KPMG whereas it transpired otherwise from the evidence of KPMG's representative and also from the very fact that KPMG terminated their services as a result of all this lack of co-operation.

The Court is also reluctant to believe Biagini's version more so in the light of the fact that Biagini and defendant company ended up not paying auditor Joseph Sammut for his services. Nor did they co-operate with auditor Donald Sant. The argument brought forth by Biagini that Joseph Sammut never completed his work is clearly not acceptable as anyone who renders a service, be it completed or not, is entitled to remuneration. It seems that in his mind, Biagini was arguing on the same lines as he did with regards to plaintiff's post – 'Plaintiff is doing minimal things; simply lending his name. So consequently he should not be paid or paid in a minimal amount dictated by me.' The Court also refers to the document at folio 407 of the acts of the suit wherein in an email,, Biagini admits that "Dietmar, all of us can only get this mess behind us and collect what's due us (and your 5% success fees) if we can make this a smooth transaction". This phrase shows that Biagini was accepting that plaintiff had to collect what is due to him, over and above the success fee.

The Court is aware that there are discrepancies in the evidence given by plaintiff. For instance, defendant company and defendant John Biagini outline that plaintiff firstly stated that he only met Biagini on the 1 July 2004 and then later on in his re-examination stated that a meeting was held prior to the registration of the company (which was 26th March 2004) with both Golub and Biagini. The Court however understands that plaintiff made it clear that he was speaking with Golub about the procedure of registration and setting up of the company and that at the time Golub had Biagini's power of attorney (which existence and validity was confirmed by Biagini himself when he testified that he did not know what was happening at the initial stages as he left all in the hands of Golub). To this Court these are details that do not alter in any manner whatsoever its views on veracity of evidence.

Plaintiff also mentions that the retainer of Lm700 monthly was intended for the holding of the posts of director and company secretary. Later in his evidence, he only mentions the post of director and the Lm700 as being the payment for such a post. However, the Court finds this as no discrepancy at all. The retainer of Lm700 monthly was the remuneration which was decided to be given to plaintiff. The Court is also aware that the version given by Golub does not coincide precisely with the evidence given by plaintiff. However this affects only certain details but not the substance. In its essence, both versions coincided in the sense that a remuneration was fixed at the stage when KPMG was involved in the setting up of the company and that the 10% commission on the sale price of the vessel was also agreed upon. However, the Court finds the version of Golub more credible than that of defendant Biagini. It is true that due to the existing clashes between Golub and Biagini, Golub might have had mixed feelings about testifying, but being himself a defendant, he could have easily have opted to confirm Biagini's version in the sense that no remuneration was ever fixed, hence aiding himself and the other defendants. However, Golub gave out the version which in the opinion of the Court was indeed the correct one in the sense that indeed a remuneration was fixed, notwithstanding that this may have repercussions on himself too.

Consequently, the Court accepts that the plaintiff was to be paid Lm700 monthly for his services. The Court has also taken notice of the arguments raised by defendant Biagini and the defendant company wherein they argued

that no letter of engagement was produced. However, the Court is of the opinion that the evidence brought is sufficient to prove that the remuneration payable amounted to Lm700 monthly. The defendant company and Biagini also argue that according to the articles of association of the company, the regulations contained in Part 1 of the First Schedule of the Companies Act 1995 applied and that these regulations state that the remuneration of directors shall from time to time be determined by the company in general meeting. The Court understands that from the acts of the case, it transpired that no official general meeting occurred. However, as has already been outlined, it is obvious that the plaintiff had to be paid for his services. There had to be at foremost a remuneration fixed, which the Court believes was fixed at Lm700 monthly. The regulations as such refer to the fact that the remuneration had to be determined from time to time, in the sense that it was adjustable, could be increased or reduced during the duration of the office. In this case, such an adjustment was never effected but that does not mean that there was never a remuneration established and that the remuneration in its original state had to be established *ad validitatem* in a general meeting.

The Court makes reference also to the various exhibits produced by defendant Biagini regarding emails exchanged wherein it results that plaintiff had mentioned to Biagini that the remuneration was about Lm700 monthly and that Biagini had never as such accepted or turned down this amount but simply stated in one of his emails that he would only be willing to pay plaintiff if Golub pays out the remaining 50% share as at that point in time, it was only himself who was paying and forking out the money. Even though these emails may seem to imply that the remuneration was not fixed in a decisive manner, the Court is still morally convinced that there indeed was an agreement on a monthly remuneration of Lm700 in favour of plaintiff. The whole string of emails was not presented and thus the Court cannot determine in precise terms the true and correct context in which these emails were exchanged. The Court cannot certainly and reasonably be expected to give a proper interpretation of the emails without placing them in their whole context and scenario. Yet again, the Court firmly believes that there was indeed an agreement as to the remuneration and defendant Biagini was simply prolonging such payment in order to first effect the sale of the vessel. .

Having accepted that plaintiff's version is more consistent to the facts and circumstances of the case, the Court also accepts that the plaintiff was entitled, in addition to a remuneration for his post as director and company secretary, to a success fee of 10% on the sale of the vessel, in line with the version given both by plaintiff and by defendant Golub. It has emerged from the various exhibits that Biagini had offered 5% success fee from the sale of the vessel whereas Golub had offered also another 5% so that the success fee was to amount to 10% from the sale of the vessel. Plaintiff insists that the selling price of the vessel was not US\$ 600,000 as alleged by defendant Biagini. Plaintiff in fact argues that the yacht was acquired for US\$ 1,197,000 and that various works were carried out on the vessel and thus the value should have increased. Plaintiff also refers to the evidence given by Golub wherein he stated that the scrap metal value of the vessel was €400,000 to €500,000 and that the vessel was put for sale for the price of €1.4 million to €1.3 million. Hence, plaintiff insists that if the vessel was sold for such a low value, the company would have made a net loss. On the other hand, Biagini rests on the bill of sale of the vessel which stated that the price was US\$ 600,000. He also stated in his note of submissions that the vessel was sold at a loss of over US\$ 597,000.

Against a background of conflicting evidence, the Court has to look out for the best credible evidence available. The Court does have a document that puts the selling price at the figure of US\$ 600,000. Plaintiff was kept by Biagini completely out of the negotiations that lead to the sale. In fact plaintiff was presented with a *fait accompli*. For evidence on the sale plaintiff had to rely on others. It has resulted that together with the bill of sale, there was a memorandum of understanding, which could have contained conditions to the sale. This memorandum was not produced as evidence. The court is aware of the fact that a bill of sale of a vessel need not indicate exactly the consideration paid for the transfer of the vessel. Plaintiff points out that, in the bill of sale exhibited, the consideration was indicated as one euro. In an email sent by Biagini and exhibited at folio 417, it emerged that in October 2007, Biagini had made it clear that the offers were to be expected around US \$ 1 million to US € 1.1 million. Reference is also made to the exhibit at folio 421 wherein Biagini had also suggested that there be a separate resolution outlining that the selling price to be at least US \$ 700,000. Taking into account the circumstances how the sale was effected, in particular the haste to sell put in by Biagini, it is the considered opinion of the Court that at a price of US\$ 600,000 the company would have sold at a considerable loss. However the quick manner how Biagini handled the sale implies that he had found a right price to the right purchaser. Without being

merely speculative, and adhering strictly to the *arbitrio boni viri* principle in the absence of other credible, the Court is of the view that the success fee of 10% due to plaintiff should be calculated on a sale price of US\$ 700,000 – rather than the price of US\$ 600,000. Therefore a sum of US\$ 70,000 is due to plaintiff.

As regards the **counter-claim** raised by defendants Ganymede Limited and Biagini, the Court have not proved according to law that plaintiff was responsible for shortcomings which caused damages to the defendant company. Defendants Biagini and Ganymede had the burden of proving the damages they sustained and the shortcomings caused by plaintiff. Ganymede and Biagini failed in their discharge of the onus of proof. What has resulted from the acts of this case is that the company was fined by the regulatory authorities for not filing its financial statements. Contrary to what was stated, the evidence brought by plaintiff, especially that provided by KPMG, Donald Sant and Joseph Sammut, showed that it was Biagini's fault and lack of compliance that made it extremely difficult for the company to finalise its accounts. It was also due to lack of co-operation on the part of defendant Biagini's part that caused the company damages as it was fined on several occasions as evidenced by the representative of MFSA.

A shortcoming which was pointed out by defendant company and defendant Biagini is that it took almost two years for the director to register the vessel in the name of defendant company. However, plaintiff had immediately made it clear that the registration of the vessel was being taken care of by S & D Yachts Limited and that he co-operated and gave full assistance to them, but due to unforeseen problems with the documentation of the previous owners, the registration could not be effected immediately. On the other hand, defendant Biagini also stated that he suffered damages as he had to incur the expenses to service the bank guarantee. This is yet again unfounded as this bank guarantee was effected so that the garnishee order could be withdrawn. The expenses relating to such a guarantee cannot be considered as damages in the absence of tangible evidence that the filing of the warrant was frivolous or vexatious.

Ganymede and Biagini also stated that the vessel was sold urgently and at a loss so as to minimise further penalties and losses sustained by the company as a result of plaintiff's mismanagement. The Court does not endorse this claim. It was always quite clear in Biagini's intent that the vessel had to be sold. That was the aim from the start for the agreement with Golub. Such aim persisted up until the sale was eventually concluded. The Court does not believe that the vessel was sold out for the reasons outlined by defendant Biagini and defendant company. It was sold as it had originally been intended and in a quick and speedy manner after that defendant made sure that he had all shares of the company in his hands and that he was the sole director of the company.

Two issues still need to be addressed by the Court.

First : the issue as to who is responsible for the payment of plaintiff's remuneration and commission. The Court points out that plaintiff was an officer of the company. The performance of his obligations, and therefore settlement of his dues, were consequential to that office. Therefore both as regards plaintiff's monthly remuneration, and as regards the commission on the sale of the vessel, the obligations for payment were undertaken by the company through the full acceptance and endorsement of its two shareholders. The obligation remained however a company obligation that related on the one hand to its operation and direction, and on the other to the disposal of its assets. Payment of the remuneration and commission due to plaintiff were not personal obligations of the shareholders but obligations of the company duly approved by both shareholders.

Second : the issue of payment of interest. Plaintiff is claiming interest with effect from the date when the amounts were due to the plaintiff and from the date when the vessel was sold. It is the considered opinion of this Court that as far as plaintiff's demand relates to the remuneration due to plaintiff as director and company secretary, interest is due from the date of service of the sworn application on the company since a specific amount was claimed. As regards the commission, interest is due from the date of this judgement since in

his demand plaintiff requested payment of an amount to be liquidated by the Court. And said liquidation is being effected today.

Judgement

For the reasons above, this Court is hereby deciding the suit between the parties as follows –

Rejects the pleas entered specifically by defendant Ganymede Limited (C33570).

With regard to plaintiff's first demand, declares defendant Ganymede Limited (C33570) to be a debtor of plaintiff for the amount of seventy five thousand and five Euro seventy six cents (€75,005.76) in settlement of deceased Dietmar Mansfeld's services as director and company secretary of said defendant company for the period between April 2004 and February 2008.

With regard to plaintiff's second demand, orders defendant Ganymede Limited (C33570) to pay plaintiff the said amount of seventy five thousand and five Euro seventy six cents (€75,005.76) with legal interest from the date of service of the sworn application on said defendant company until the date of effective payment.

With regard to plaintiff's third demand, declares defendant Ganymede Limited (C33570) to be a debtor of plaintiff for the payment of a commission due to deceased Dietmar Mansfeld on the sale of the vessel details of which result in said third demand.

With regard to plaintiff's fourth demand, liquidates and determines the commission to be settled by defendant Ganymede Limited (C33570) in favour for plaintiff on the sale of said vessel in the amount of fifty one thousand seven hundred and twenty nine Euro twenty three cents (€51,729.23) equivalent to seventy thousand United States Dollars (US\$ 70,000).

With regard to plaintiff's fifth demand, orders defendant Ganymede Limited (C33570) to pay plaintiff the amount of fifty one thousand seven hundred and twenty nine Euro twenty three cents (€51,729.23) as detailed above, with legal interest with effect from today until the date of effective payment.

Rejects the pleas submitted by defendants John Biagini and Benjamin Golub where and insofar as they are inconsistent with the acceptance by this Court of plaintiff's demands.

Accepts plaintiff's pleas to the counter-claim entered by defendants Ganymede Limited (C33570) and John Biagini.

Rejects the counter-claim entered by defendants Ganymede Limited (C33570) and John Biagini.

Orders defendant Ganymede Limited (C33750) to pay all costs of plaintiff both relating to the demands, and to his defence against the counter-claim.

Orders the defendants to bear their own costs.

< Sentenza Finali >

-----TMIEM-----