



MALTA

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

MAGISTRATE DR IAN FARRUGIA LL.D

Today the 2nd day of December 2015

**THE POLICE
(Assistant Commissioner Carmelo Magri)**

Vs

GEORGE NAPIER

Comp. No. 419/2009

THE COURT;

Having seen the charges brought against **George Napier**, holder of ID Card number 29229(A), accused of having on these islands on the 19th March 2009 and previous months, committed several acts, even if at different times, which constitute violations of the same provisions of the law, and are committed in pursuance of the same design;

1. forged or altered, without the consent of the owner, the name, mark or any other distinctive device of any intellectual work or any industrial product, or knowingly makes use of any name, mark or device forged or altered, without the consent of the owner, even though by others;

2. During the same period and circumstances, forged or altered, without the consent of the owner, any design or model of manufacture, or knowingly made use of any design or model forged or altered, without the consent of the owner, even though by others;
3. During the same period and circumstances, knowingly made use of any mark, device, signboard or emblem bearing an indication calculated to deceive a purchaser as to the nature of the goods, or sell any goods with any such mark, device or emblem.
4. During the same period and circumstances, placed on the market any goods in respect of which a distinctive trade mark has been registered, after removing the trade mark without the consent of the owner thereof;
5. During the same period and circumstances, knowingly placed into circulation, sold or kept for sale or imported for any purpose of trade, any goods bearing a fraudulent imitation of any mark, device or emblem;
6. During the same period and circumstances, with a view to gain for yourself or another, or with the intent to cause loss to another, and without the consent of the proprietor, applied to goods or their packaging a sign identical to or likely to be mistaken for a registered trademark;
7. During the same period and circumstances, with a view to gain for yourself or another, or with the intent to cause loss to another, and without the consent of the proprietor, sold, offered or exposed for sale or distributed goods which bear, or the packaging of which bears, such a sign;
8. During the same period and circumstances, knowingly received or purchased any property which has been misapplied or obtained by means of any offence, whether committed in Malta or abroad or knowingly took part in any matter whatsoever, in the sale or disposal of the same;

The Court is hereby being requested that, in addition to any punishment to which the person convicted for these offenses may be sentenced, order the forfeiture in favour of the Government of the proceeds of the offence.

The Court is also being requested that, in pronouncing judgement or in any subsequent order, sentence the person convicted to the payment, wholly or in part, to the registrar, of the costs incurred in connection with the employment in the proceedings of any expert or referee as stated in Art. 533 Chapter 9 of the laws of Malta.

Having seen all the documents exhibited in the acts of these proceedings;

Having seen the consent for summary proceedings issued by the Attorney General dated 4th May 2009 (vide *folio* 13);

Having examined all testimonies of witnesses produced;

Having examined the written submissions filed by the prosecution and the defence; the Court takes this opportunity to express its appreciation for the great effort put in by both the prosecution and the defence in their respective written submissions. Their detailed appreciation of facts and legal arguments are worthy of judicial praise.

Considers;

What follows is a summary of the facts as they result beyond reasonable doubt from the evidence produced in these proceedings. There is no contestation between the prosecution and the defence as to these resulting facts.

Way back in early 2009 '*Playmobil Malta Ltd.*' for geobra Brandstätter GmbH & Co.KG, through their representative namely Anna Agius, complained that a number of individuals who resided in Malta were conducting unauthorized advertising and selling of modified '*Playmobil*' products and parts thereof through the 'ebay' website. Amongst these abusers, Anna Agius identified a seller who had a product page styled as '***Dode'n Pen Toy Shop***' and who was conducting this illegal activity by displaying the logo of the *Playmobil Fun Park*.

The same Anna Agius further complained that this particular seller was displaying modified models with novelty parts which were still on the production line and were not yet placed on the local market. Furthermore, certain modified models represented violence and acts of violence. One good example of this irregularity was the introduction of a four model set referred to as the 'Cruel Knights'. These customized models demonstrated four different knights armed with different forms of weaponry and also handling severed model-heads with blood smeared on them. These body parts were either held in the knight's hands or stuck up onto a lance.

Complainant observed that contrary to the company's main objectives, primarily those of teaching children through their toy-products, these knights were mainly serving to induce violent behaviour in kids' mentality and therefore potentially tainting the company's public image. In view of these issues, complainant company requested the police to investigate these circumstances (vide written complaint a *folio 28*).

Investigations into this complaint revealed that the person responsible for the alleged unauthorised adverts and selling of the 'Cruel Knights' was George Napier, the accused. As part of the investigations, a search was conducted at his residence located at 'Iz-zinja Flats' No.1, Triq il-Kappara, Marsascala.

Same investigations led to an equipped workshop, structured to modify '*Playmobil*' models. (vide photographs at *folios 14 to 23*). Consequently, a personal computer and a large quantity of models, accessories and parts thereof were seized from the possession of the accused.

In view of all this, accused was interrogated and actually released a written and signed statement (vide *folio 29 et.seq*). Accused declared that for a period of approximately eighteen months prior to March 2009, he had modified and customised '*Playmobil*' models without being authorized by the company ('*Playmobil Malta Ltd*'). Accused also admitted that he advertised and sold his finished goods and parts thereof through his 'ebay' product page namely '***Dode'n Pen Toy Shop***'. Accused pointed out that he generally bought the models and parts thereof from the Sunday car-boot sale, held at Razzett tal-Hbiberija, Marsascala and from the

Vittoriosa and Floriana Sunday open markets. He added that he also bought models from a shop which he identified as Patmar 84, Islet Promenade, St. Paul's Bay.

Witness John Richards, as Principal at the Industrial Property Registration Directorate, presented all local and European Community trademarks owned by 'Playmobil Malta Ltd.' for Geobra Brandstätter GmbH & Co. KG (vide *folio* 50 et. seq.)

During these proceedings, the accused took the witness stand and declared, *inter alia*, that he had started modifying Playmobil models as a hobby and given that there existed a large number of collectors, he decided to advertise and sell the modified models through eBay. Accused stated that he purchased whole figures and even parts from several places around the island especially from the Playmobil Fun-Park itself, were the company actually runs a shop. He confirmed that he also bought figures and parts from overseas suppliers through internet. Accused stated that he did his best to assemble parts which he dismantled from different models and created other figures to the likeness of historical figures which Playmobil did not even produce. As examples, he mentioned General Patton, William Wallace and General Custer.

Accused added that he was aware that there were many other collectors who customized and sold their created figures on eBay and so he did likewise. Moreover, he included the word Playmobil on his product-page as he found nothing irregular to make use of such a distinctive brand name on his finished products.

With regards to packaging, accused stated that he used his own type, namely the bubble wrap, or, as he referred to it as *the jiffy bag*. These bags were posted to buyers and were labelled with a return to sender note affixed to the back in case these did not reach destination. It transpired that Playmobil does not authorise anyone to sell its products in this type of packaging. Moreover, it strictly prohibits any context of violence and any use of paints that do not conform with the company's safety standards and controls. Customised Playmobil figures **must not be sold** (vide *folio* 85).

Considers;

That from an analysis of these resulting facts within the context of the charges brought against the accused, this Court declares that the prosecution managed to prove its case in terms of law with respect to charges (1), (2), (3), (4) and (5).

It clearly transpired that the accused, over a period of time, and without the consent of the owner, altered an industrial product, knowingly made use of said altered industrial product, altered and made use of same altered model of manufacture, knowingly made use of a mark or emblem calculated to deceive, placed on the market goods after removing the relative trademark and knowingly placed into circulation and kept for sale, goods bearing a fraudulent imitation of any mark, device or emblem.

On the other hand, the prosecution did not manage to produce sufficient proof to sustain, in terms of law, charges number (6) and (7).

Furthermore, there isn't sufficient evidence to show, both the material and the formal elements required to declare the accused guilty under Article 334 of Chapter 9 of the Laws of Malta (charge number [8]).

Considers;

That in terms of punishment or sanction to be meted out to the accused, this Court is taking into particular consideration the fact that the accused co-operated fully during the investigations and such co-operation was instrumental for the police to further its investigations and bring other people to justice, the fact that the conduct sheet of offender is intact, and the fact that it all started from the satisfaction of this particular hobby that the offender had. In view of the above, it is this Court's opinion that, having regard to all the circumstances of the case, the nature of the offences and the character of the accused, it is inexpedient to inflict punishment.

THEREFORE, THE COURT, having seen Articles 17, 18, 31, 298(1)(a)(b)(c)(d)(f), 334 and 533 of Chapter 9 the Laws of Malta, and Articles 72(1)(a)(b) of Chapter 416 of the Laws of Malta, finds and declares offender (A) not guilty of charges (6), (7) and

(8) and is consequently being therefrom acquitted in terms of law; (B) guilty of charges (1), (2), (3), (4) and (5) and consequently discharges the offender subject to the condition that he commits no offence for a period of three (3) years from today, and this in terms of Article 22 of Chapter 446 of the Laws of Malta. In terms of said Article 22 of Chapter 446, the Court explained to the offender in ordinary language that if he commits another offence during the period of conditional discharge, the offender will be liable to be sentenced for the original offence/s.

Futhermore, in terms of Article 533 of Chapter 9 of the Laws of Malta, offender George Napier is ordered to pay to the Registrar the sum of €405.33 representing costs incurred for the expert report (document 16).

The Court orders that a copy of this judgement be communicated to the Registrar of Courts.

Dr Ian Farrugia LL.D

Magistrate

Marica Mifsud
Deputy Registrar