MALTA

QORTI CIVILI
PRIM' AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MC KEON

Seduta tat-30 ta' Novembru, 2010

Citazzjoni Numru. 765/2009

FirstUnited Insurance Brokers Limited (C22502)

kontra

Karl Farrugia Wismayer

Il-Qorti :

Rat ir-rikors mahluf prezentat fl-4 ta’ Awissu 2009 li jaqra hekk -

1. Illi l-imsemmi Salvino Mifsud Bonnici (il-persuna li halfet ir-rikors) *huwa debitament awtorizzat sabiex jirrapprezenta lis-socjeta’ esponenti f’dawn il-proceduri skond il-‘memorandum and articles’ tal-istess socjeta’ esponenti ;*

2. Illi nhar is-26 ta' Lulju, tas-sena 2007 is-socjeta' esponenti mpjegat lill-intimat fuq kuntratt ta' xoghol ghal zmien indefinit bil-pattijiet u kundizzjonijiet hemmhekk pattwiti u li kopja tieghu qed tigi hawn annessa u mmarkata Dok. 'A' ;

3. Illi fost il-kundizzjonijiet indikati fl-imsemmija skrittura jinghad espressament illi l-intimat kien qieghed jintrabat illi, f'kaz li l-impjieg tieghu jigi terminat ghal kwalunkwe raguni mis-socjeta' esponenti jew minnu stess, ghal zmien erba' u ghoxrin xahar mit-terminazzjoni tal-impjeg tieghu "he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the Employer or may be a client of the Employer" (klawsola 13(a) tal-kuntratt sopracitat) ;

4. Illi fl-istess kuntratt ta' xoghol jinghad illi, f'kaz ta' ksur tal-kundizzjoni surreferita, l-intimat ikun qieghed jirrendi ruhu responsabbli favur is-socjeta' esponenti ghal kumpens tad-danni sopportati mill-istess socjeta' esponenti u li gew likwidati fl-istess kuntratt fis-somma ta' hamest elef lira Maltin (Lm5,000) ghal kull darba li tinkiser tali kundizzjoni (klawsola numru 13(b) tal-kuntratt sopracitat) ;

5. Illi l-intimat irrizenja minn mas-socjeta' esponent nhar is-6 ta' Marzu, 2009 ;

6. Illi, kif ser jigi pruvat matul it-trattazzjoni ta' din il-kawza, fix-xhur immedjatament wara din id-data l-intimat avvicina kemm klijenti u kif ukoll impjegati tal-istess socjeta' esponenti u dan b'ghanijiet illi jmorru kontra l-istess klawsola numru 13(a) tal-kuntratt ta' xoghol tieghu fosthom dawk illi jisraq klijenti u wkoll impjegati tas-socjeta' esponenti u li jfixkel ir-relazzjoni tas-socjeta'

rikorrenti ma' l-istess bi ksur car tal-klawsola numru 13(a) fil-kuntratt ta' xoghol surreferit ;

7. Illi ghaldaqstant isegwi illi l-intimat irrenda ruhu responsabbli fil-konfront tas-socjeta' esponenti ghall-kumpens tad-danni sopportati minnha kif likwidati favur is-socjeta' esponenti a tenur ta' l-istess kuntratt surreferit.

Ighid ghalhekk l-intimat, prevja kwalsiasi dikjarazzjoni necessarja u opportuna u ghar-ragunijiet premessi, ghaliex m'ghandhiex din il-Qorti tiddeciedi billi :

1. Tiddikjara li l-intimat kiser il-kundizzjoni kontenuta fil-klawsola numru 13(a) tal-kuntratt ta' xoghol datat 26 ta' Lulju, 2007 hawn sopracitata ;

2. Tiddikjara illi bl-agir tieghu l-intimat gie li rrenda ruhu responsabbli fil-konfront tas-socjeta' esponenti ghall-kumpens tad-danni sopportati minnha u wkoll kif prelikwidati fil-klawsola numru 13(b) fil-kuntratt ta' xoghol surreferit ghal kull kaz ta' ksur tal-klawsola numru 13(a) tal-kuntratt sopracitat kif jigi dikjarat minn din il-Qorti skond l-ewwel talba ;

3. Tillikwida, okkorrendo bin-nomina ta' perit nominandi, id-danni sofferti mis-socjeta' esponenti bhala konsegwenza tal-agir tal-intimat a tenur tal-klawsola 13(b) tal-kuntratt ta' xoghol surreferit ghal kull kaz ta' ksur tal-klawsola numru 13(a) tal-kuntratt sopracitat kif jigi dikjarat minn din il-Qorti skond l-ewwel talba ;

4. Tikkundanna lill-istess intimat sabiex ihallas lill-esponenti l-ammont hekk likwidat.

Bl-ispejjez u bl-imghaxijiet sad-data tal-pagament effettiv kontra l-intimat minn issa ngunt ghas-subizzjoni.

Rat id-dikjarazzjoni guramentata tal-kumpannija attrici, il-lista tax-xhieda ndikati minnha u l-elenku tad-dokumenti minnha esebiti.

Rat ir-risposta tal-konvenut prezentata fl-<u>14 ta' Settembru 2009</u> fejn bil-gurament tieghu jghid hekk –

Illi in iure l-klawzola kontrattwali citata bhala l-bazi tat-talba attrici mhix azzjonabbli ghaliex hija llegali, u dak li huwa llegali ma jista' qatt ikun is-suggett ta' kuntratt skond kif jipprovdi l-artikolu 985 tal-Kap. 16. Illi tali llegalita' tiskaturixxi mill-artikolu 19 tal-Kap. 485 illi jipprovdi li klawzola kontrattwali li tipprovdi lill-principal id-dritt li jinfliggi multa fuq impjegat, tehtieg il-permess preventiv tad-Direttur tax-Xoghol, liema permess ma jezistix. Fil-gurisprudenza gie wkoll assodat illi dan japplika anke ghal klawzoli li jidhlu fl-effett wara t-terminazzjoni tal-impjieg, ghaliex kuntratt irid jinqara quid unum ;

Illi minghajr pregudizzju u subordinatament, l-istess klawzola citata hija wkoll kontra l-ordni pubbliku billi hija "in restraint of trade", u waqt it-trattazzjoni tal-kawza ssir riferenza ghall-gurisprudenza "in subiecta materia", u ghalhekk hija ghal darb'ohra nulla u nvalida u "pro non scripta" ai termini tal-artikolu 985 gja citat ;

Illi minghajr pregudizzju u subordinatament, in facto, l-allegazzjonijiet tas-socjeta' attrici fil-paragrafu 6 tar-rikors guramentat huma generici u l-esponent jirriserva li jwiegeb fid-dettal ghal kull imputazzjoni preciza li tista' talvolta ssirlu, izda jiddikjara minn issa illi tali imputazzjonijiet, huma x'inhuma, ser jirrizultaw infondati fil-fatt billi ma sehh l-ebda att ta' soliciting jew interfering dapparti tal-konvenut esponent.

Salvi eccezzjonijiet ohra permessi mil-ligi.

Rat il-lista tax-xhieda ndikati mill-konvenut.

Rat il-verbal tal-udjenza tal-10 ta` Novembru 2009 (fol 20) fejn il-Qorti dderigiet lill-partijiet sabiex jittrattaw l-ewwel zewg eccezzjonijiet.

Rat li l-partijiet ghazlu li ma jressqux provi u ghazlu minflok li jressqu sottomissjonijiet bil-miktub.

Rat in-nota ta` sottomissjonijiet tal-konvenut (fol 22 sa 29).

Rat in-nota responsiva tal-kumpannija attrici (fol 31 sa 39).

Rat id-digriet taghha tat-22 ta' Gunju 2010 fejn halliet il-kawza ghas-sentenza dwar l-ewwel zewg eccezzjonijiet.

Ikkunsidrat :

Il-konvenut kien impjegat mal-kumpannija attrici skond kuntratt tax-xoghol ghal zmien <u>indefinit</u> tas-26 ta` Lulju 2007 (Dok.A – fol 6 sa 10). *Inter alia,* fil-klawsola 3 tal-kuntratt jinghad li – *The designation of the Employee shall be that of Development <u>Manager</u> or such other designation as may be confirmed at different stages of the career of the <u>manager</u>.* Mhux kontestat li l-konvenut irrizenja mill-impieg li kellu mas-socjeta' attrici fis-6 ta' Marzu 2009.

Ghall-fini tal-provvediment tal-lum, mill-kuntratt bejn il-partijiet, il-klawsola hija dik bin-**numru 13** - in partikolari il-paragrafi (a) u (b) li jghidu hekk -

(a) Should the employment of the Employee be terminated for any reason by the Employer or the Employee, the Employee undertakes as of now that for a period of twenty-four months after the termination of his employment, he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the Employer or may be a client of the Employer.

(b) In the event that a breach of sub-clause 12(a) above, the employee agrees that he will be liable for damages, which are being pre-agreed now by the parties, in the sum of Lm 5000 (five thousand Maltese Liri) for every such breach.

Min-naha taghha, il-kumpannija attrici tinsisti fuq il-legalita` tal-klawsola 13(a) u ghalhekk issostni li ghax, fil-fehma taghha, kien hemm ksur da parti tal-konvenut ta` l-obbligazzjoni nkorporata f`dik il-klawsola, ghandha tiskatta favur taghha l-penali inserita fil-klawsola konsegwenzjali 13(b). Huwa evidenti li sabiex tigi fis-sehh il-klawsola 13(b) trid tirrizulta *in primo luogo* fondata fid-dritt il-validita` tal-klawsola 13(a) li hija ghal kollox kontestata mill-konvenut, bla pregudizzju ghal kwalsiasi konsiderazzjoni ta` fatt.

U dak huwa propju li din il-Qorti sejra tiddeciedi bil-provvediment tal-lum u cioe` jekk il-klawsola 13(b) hijiex valida ghall-finijiet effetti kollha tal-ligi.

Dwar il-klawsola 13(a), il-konvenut fil-qosor ghamel dawn l-osservazzjonijiet fin-nota tieghu –

1) Il-paragrafi citati huma kontra l-ligi. Ghalhekk hemm ksur tal-Art.985 tal-Kap.16. Huma kontra l-ligi ghaliex saru bi ksur tal-Art.19 tal-Kap.452.

2) Il-konvenut jiccita favur tieghu s-sentenza ta` din il-Qorti (PA/PS) tal-31 ta` Jannar 2003 fil-kawza "**Vassallo Cesareo vs Cilia Pisani**".

3) Il-paragrafi citati huma kontra l-ordni pubbliku ghaliex huma "*in restraint of trade*".

4) Anke f `dan ir-rigward il-konvenut iccita *in extenso* minn "**Vassallo Cesareo vs Cilia Pisani**" (op.cit.)

Dwar l-istess klawsola, il-kumpannija attrici fil-qosor tghid hekk –

1. Fl-ewwel lok, il-klawsola in kwistjoni mhix kontra l-ligi–

a) Art.19 tal-Kap.452 ma japplikax ghall-kaz tal-lum.

b) Japplika ghall-kaz tal-lum il-principju tad-dritt *pacta sunt servanda*.

c) Favur it-tesi taghha, il-kumpannija taghmel riferenza ghall-Art.63 u l-Art.69 tal-Kap.13 u ghall-Art.1125 tal-Kap.16.

d) Is-sentenza "**Vassallo Cesareo vs Cilia Pisani**" (op.cit.) mhix applikabbli ghall-fattispeci tal-kaz tal-lum.

2. Fit-tieni lok, il-klawsola in kwistjoni mhix "*in restraint of trade*" u in sostenn -

a) Taghmel riferenza ghas-sentenza ta’ din il-Qorti (PA/PS) deciza fil-31 ta` Ottubru 2003 fil-kawza **“Attard vs Frendo”** fejn *inter alia* kienet citata sentenza tal-Qorti tal-Appell tal-15 ta’ Dicembru 1961 fil-kawza “**Zammit La Rosa vs Facchetti**”

b) Il-klawsola in kwistjoni mhix qeghda tipprojbixxi lill-konvenut milli jahdem ma` haddiehor izda hija ntiza sabiex thares il-kompetizzjoni gusta.

c) Is-sentenza “**Vassallo Cesareo vs Cilia Pisani**” (op.cit.) ma teskludix il-validita` ta` klawsoli bhal dik in kwistjoni entroi t-termini ben stabbiliti.

d) Il-posizzjoni sensittiva li kien jokkupa l-konvenut kien jaghti raguni lill-kumpannija attrici biex tipprotegi l-interessi taghha fis-suq.

Ikkunsidrat :

Kull kaz ghandu l-fattispece partikolari tieghu u ghalhekk kull gudizzju ghandu jinghata abbazi ta` dawk il-fattispece.

Huwa mill-aktar evidenti li l-konvenut jitfa` l-piz kollu kontra l-accettazzjoni tal-validita` tal-klawsola 13(a) fuq is-sentenza “**Vassallo Cesareo vs Cilia Pisani**” li kienet deciza fil-Prim` Istanza minn din il-Qorti diversament presjeduta (PA/PS) fil-31 ta` Jannar 2003 u konfermata mill-Qorti tal-Appell fit-3 ta` Marzu 2006.

F`dak il-kaz il-klawsola kontrattwali in kwistjoni kienet taqra hekk -

The Manager during the continuance of this agreement, or with five (5) years from the termination thereof for any reason, shall not without the consent in writing of the company either solely or jointly with, or as manager or

agent for, any other person, company or persons directly or indirectly carry on or be engaged in the same line of business in which the company is engaged at that time or to divulge any secrets entrusted to him by virtue of this appointment. In default the Manager binds himself to pay the company by way of penalty which he accepts to sumof LM20,000.

F’dak il-kaz, kemm il-Qorti tal-Ewwel Istanza kif ukoll il-Qorti tat-Tieni Istanza fil-konsiderazzjonijiet meqjusa u mirquma taghhom kellhom gustament bhala mira propju dik il-klawsola. Konsiderazzjonijiet ta` natura generali li johorgu miz-zewg sentenzi huma ta` piz ghaliex jaghtu dimensjoni ta’ hsieb ta` din il-parti tad-dritt pero` fl-istess waqt kull gudizzju tal-klawsoli *in merito* ma jistghux jigu distakkati mill-fattispece ta’ kull kaz.

Il-klawsola 13(a) fil-kaz tal-lum kienet kemxejn differenti minn dik ta` “**Vassallo Cesareo vs Cilia Pisani**”. Tal-kaz tal-lum il-konvenut kien qed jintrabat li, f’kaz li l-impjieg tieghu jigi terminat ghal kwalunkwe raguni mis-socjeta’ attrici jew minnu stess, ghal zmien erba’ u ghoxrin xahar mit-terminazzjoni tal-impjeg tieghu *“he shall not for his account or for any other person, firm or company, solicit or interfere or endeavour to entice away from the Employer any person who may be employed with the Employer or may be a client of the Employer”.*

Id-differenza **ewlenija u sostanzjali** bejn din il-klawsola, u dik ta` “**Vassallo Cesareo vs Cilia Pisani**” kienet li filwaqt li dik fil-kawza tal-ahhar kienet tirrigwarda l-ingagg futur tal-impjegat ghal zmien 5 snin (li kien Manager) *in the same line of business in which the company is engaged at that time* jew id-divulgazzjoni ta` *any secrets entrusted to him* virtu` tal-impieg tieghu, fil-kaz tal-lum *si trattava* ta’ Manager li kien qed jigi prekluz milli ghal zmien 24 xahar tieghu mit-tmiem tal-impieg tieghu “ … *shall not for his account or for any other person, firm or company, solicit or interfere or endeavour*

to entice away from the Employer ***__any person who may be employed__*** *with the Employer* ***__or__*** *may be* ***__a client__*** *of the Employer".*

Mela din il-Qorti tghid li l-klawsola 13(a) kienet intiza biex tifrex l-applikabilta` taghha fir-rigward tal-impjegati tal-principal jew fir-rigward tal-klijenti tal-principal ghal perijodu ta` 24 xahar mid-data tat-terminazzjoni tal-impieg. Ghal din il-Qorti huwa evidenti li l-klawsola 13(a) kienet intiza sabiex tiskatta l-operativita` tal-klawsola 13(b) f`kaz li tirrizulta jew wahda inkella l-ohra miz-zewg alternattivi inkella t-tnejn. L-*or* inserita fil-klawsola de quo hija sinjifikattiva.

L-awtur **__Norman Selwyn__** fil-Kapitolu 19 tal-ahhar edizzjoni tal-ktieb tieghu **__Law of Employment__ (16th Edition 2011 – Oxford University Press)** taht it-titolu "*Duties of Ex-Employees*" jittratta estensivament minn pag.534 et seq l-kwistjoni mertu ta` din il-kawza.

Minn dan il-kapitolu, din il-Qorti sejra taghmel riferenza ghal fejn l-awtur jittratta l-materja "***Existing customers and connections***" kif ukoll "***Enticing existing employees***" (minn pag.543 sa 546) ghax jidhrilha li jolqot *in pieno* l-kwistjoni li ghandha quddiemha.

Dwar "***__Existing customers and connections__***" Selwyn ighid hekk –

19.32 An employer is entitled to have a limited protection against an ex-employee dealing with existing customers for this is part of the goodwill which has been built up over the years. A covenant can restrict the right to solicit or endeavour to entice away former customers, or to have post-employment dealing such customers, but it is likely that such clauses should be limited to customers with whom the ex-employee had some dealings for otherwise the restraint is likely to be regarded as to be

*designed to prevent competition (**Marley Tile Co Ltd vs Johnson** – 1982 IRLR 75, CA)*

*... In **GW Plowman & Sons Ltd vs Ash** (1964 – 2 All ER 10 - 1964 1WLR 568 - 108 Sol Jo 216, CA) the defendant was employed as a sales representative. He covenanted not to canvass or solicit orders from any person who was a customer of the firm for a period of two years after leaving his employment. It was held that the restraint was valid, even though it extended to customers whom the employee did not know or with whom he had no contact during his employment. It was argued that the restraint was bad because it could apply to those customers who had ceased to do business with the firm but the Court of Appeal thought that an employer was entitled not to abandon hope that such customers would return to business once more ...*

*19.33 ... A restrictive covenant that prevents an employee from soliciting or accepting business from his former employer's customers will be unenforceable if it extends to customers with whom the employee personally had no dealings (**WRN Ltd vs Ayris** – 2008 – EWHC 1080 (QB) - 2008 IRLR 889 - 2008 152(23) SJLB 29)*

Meta tapplika din id-dottrina ghall-fattispece tal-kaz tal-lum, din il-Qorti tosserva li, kif redatta, il-kawsola in kwistjoni, ghar-rigward ta` klijenti tal-kumpannija attrici hija mifruxa wisq u ma taghtix garanziji favur kompetizzjoni hielsa, kif koncepita fil-ligijiet vigenti fil-pajjiz. Huwa minnu li l-konvenut kien impjegat bhala *Development Manager*. Pero` fl-istess waqt, il-fatt li ma kien hemm xejn specifiku fl-estensjoni tal-operat ta` din il-parti tal-klawsola 13(a) ma jistax jigi interpretat a favur tal-principal izda favur l-impjegat. Fi kliem aktar car, kien jinkombi lill-principal li sabiex jassikura l-effikacja tal-klawsola de qua in relazzjoni mal-impjegat de quo li jkun specifiku u jabbina dik il-klawsola mal-klijenti li maghhom il-konvenut kellu relazzjonijiet fl-interess tal-principal. Din il-Qorti tghid li l-kumpannija attrici ma tistax tinvoka l-Art.63 u 69 tal-Kap.13 u tal-Art.1125 tal-Kap.16 favur taghha ghaliex dak

li jahsbu ghalih dawn iz-zewg disposizzjonijiet ma jinvestux l-firxa tal-kwistjoni li l-klawsola de qua tinvolvi u li taghha din il-Qorti qeghda taghti l-interpretazzjoni li jidhrilha l-aktar gust fic-cirkostanzi.

Ghalhekk din il-Qorti tqis li l-klawsola in kwistjoni, fejn din tittratta l- klijenti tal-kumpannija attrici, ghandha titqies minghajr effett ghall-finijiet u effetti kollha tal-ligi.

Dwar ***Enticing exisiting employees***, Selwyn ighid hekk (pag 545) –

*19.40 A covenant which purports to restrict the right of an employee to solicit or entice other employees to leave the employer`s employment and to work for another employer is generally void. Thus in "**Hanover Insurance Brokers Ltd vs Schapiro**" (1994 – IRLR 82, CA) the defendant entered into a restrictive covenant with his employers which provided inter alia that for a period of 12 months after leaving his employment he would not ... solicit or entice any employees of the company to the intent or effect that such employee terminates that employment`. When defendant left his employment the employers sought an injunction to restrain him from acting in breach of the clause quoted. It was held that an employee has the right to work for any employer who is willing to employ him. Thus employees are not part of the assets of an employer like stock in trade or goodwill and customers. A restriction which is ought to prevent a person from poaching employees irrespective of their expertise, technical knowledge and/or juniority, and which could also apply to employees who were not in the particular employment when the defendant left was clearly a restriction against competition and therefore void (**TCS Europe UK Ltd vs Massey** – 1999 – IRLR 22).*

Din il-Qorti tghid li din id-dottrina tapplika ghall-fattispece tal-kaz tal-lum u ghaldaqstant tghid li anke fil-kuntest ta` l-impjegati tal-kumpannija attrici, il-klawsola

13(a) in kwistjoni m`ghandux ikollha effett ghall-finijiet u effetti kollha tal-ligi.

Meqjus il-premess, fl-ambitu tal-eccezzjonijiet tal-konvenut kif dedotti, din il-Qorti tghid li filwaqt li ssib li fil-klawsola in kwistjoni ma tarax li kien hemm ksur tal-ligi fit-termini specifikament esposti fl-ewwel eccezzjoni, anke ghar-ragunijiet indikati mill-kumpannija attrici fin-nota taghha, tghid li kien hemm ksur tal-principji tad-dritt esposti fit-tieni eccezzjoni tal-konvenut u senjatament li l-klawsola 13(a) tal-kuntratt de quo kif dedotta tmur kontra l-ordni pubbliku.

Ghar-ragunijiet kollha premessi, din il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi, filwaqt li tichad l-ewwel eccezzjoni tal-konvenut, tilqa` t-tieni eccezzjoni tieghu, u ghaldaqstant tichad it-talbiet attrici, bl-ispejjez kontra l-kumpannija attrici.

< Sentenza Finali >

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