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they are no more favourable than those which it is reasonable to expect the company to have offered to a person who is unconnected with the company. To determine this normality, the judges will pay heed to the terms of similar contracts, not only in the company in question but also in other companies working in the same field.

[C.A. Paris, 20 November 1998]

Silent misrepresentation

Transfer of shares, voidance, misrepresentation

A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which is one of the reasons that induces the representee to enter into the contract. A representation normally assumes an active form, but in French law, it can also be implied from silence. It is the duty of a contracting party to disclose material facts that are within his own knowledge and which might be a determining factor in the mind of the other contractor. Failure to disclose such facts gives the right to avoid the contract. Deception affords a ground for relief with mere silence, even where it is not due to misleading conduct. This is a very general rule of the law of contract, but courts apply it very often to transfers of shares.

Two would-be *pizzaïolos* had bought all the shares in a small company owning and running a pizzeria. But as soon as they took over the restaurant, they were informed that all the people who lived in the block of flats above and around the pizzeria had many times complained because the ventilation system was not up to standard and was even so utterly inefficient that they all enjoyed the smells and fumes coming from the restaurant's kitchen. Running this pizzeria without carrying out expensive improvements would have been illegal. The court decided that the company's sole purpose was to run this restaurant, but the purchasers could not possibly do so. Yet, if they had bought all the shares in the company, it was only because the vendor had not disclosed the fact that the restaurant was actually unfit. This fraudulent reticence related to a fact which, should the purchasers have been aware of it, would have led them to consider the sale very differently. The court therefore avoided the transfer of shares.

The court's actual statement was that the concealed fact would have reduced the price of the shares. This roundabout reason was useless: concealing the fact that the restaurant was unfit for business was a sufficient reason to avoid the transfer. On the contrary, talking about the price of the shares could have been counteractive. Mistakes can – as far as movable possessions are concerned – at times vitiate a contract, except where the mistake concerns the price of the thing sold.

An interesting vindication asserted by the defendant was that he had promised to pay for the company's liabilities, should the new shareholders discover that these liabilities exceeded 10.000 FF. (£1000). But the judges observed that the pizzeria's unsuitability could not be regarded as a liability. In any case, even if only actual liabilities had been concealed, this silent misrepresentation, this reticence, would still have vitiated the contract, which could have been avoided although the transferor had promised to make good these liabilities.

[C.A. Paris, 18 November 1998]
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Banking Act 1994 - New Regulations Passed

Banking Act – Criminal Offences; Unlicensed Banking, Failure to Comply With Lawful Requirement of Banking Authorities

New regulations issued by the Minister of Finance lay down penalties for criminal offences and administrative defaults.

In exercise of his powers under section 35 of the Banking Act 1994, the Minister of Finance has issued regulations laying down the penalties for criminal offences and administrative defaults in violation of the provisions of the Act. These regulations, designated the Penalties for Offences Regulations, 1999, were published in the *Official Gazette* as Legal Notice 155 some weeks ago.

Section 35 of the Banking Act lists a number of transgressions which amount to criminal offences. These offences are enforceable by prosecution before the criminal courts. They include the carrying on of the business of banking without the necessary licence from the competent authority and failure to comply with any lawful order or requirement of the competent authority or of the Financial Services Tribunal. The Act required the Minister to issue regulations prescribing penalties for these offences within parameters set out in section 35, namely a term of up to two years imprisonment and a monetary fine of up to 500,000 Maltese liri (one Maltese lira is roughly equivalent to three US dollars.) The maximum penalty has been attached to

a conviction for carrying on banking activities without a licence. Very high penalties have also been established for a bank's failure to inform the competent authority that it is likely to become unable to meet its obligations or that it is about to suspend payment.

The regulations also establish the administrative fines that the competent authority may impose on a licenceholder for breaching its licence or the provisions of the Act. These transgressions do not amount to criminal offences and the penalties may be imposed by the competent authority without recourse to a court hearing. Twenty-three administrative offences are listed in the regulations, and these include failure to pay the licence as and when due, failure to appoint an auditor, failure to submit information as prescribed, failure to comply with minimum liquidity ratio requirements. Most of the fines are chargeable on a daily default basis, but section 35 imposes a ceiling of 50,000 Maltese liri. Thus, the failure to abide with the conditions or restrictions of a licence is punishable by a fine of 100 Maltese liri for every day that the default persists. The Act provides for the possibility of an appeal by a licenceholder to the Financial Services Tribunal from a decision of the competent authority imposing an administrative penalty.

(Note: The Banking Act is currently administered by the Central Bank of Malta as competent authority appointed by the Minister of Finance. The Government's stated policy is that responsibility for banking supervision will in the near future be transferred to the Malta Financial Services Centre).

Company Law - Case Law

Protection of shareholders against unfair prejudice-order under section 402 of Companies Act 1995; 50 per cent shareholder; cause of dissolution under section 214 - grounds of sufficient gravity

Two individuals formed a company. Both held half the share capital and served as the company's only two directors. The Plaintiff was one of these shareholder-directors, and he submitted an application to the court requesting it to make such orders as it may think fit in terms of section 402 of the Companies Act 1995. Briefly, this section seeks to provide a remedy to a shareholder who complains that the affairs of a company are being conducted in a manner that was 'oppressive, unfairly discriminatory against, or unfairly prejudicial to a member or members'. The law requires the court to intervene and to issue an order if it finds that 'the complaint is well-founded and that it is just and equitable to do so'. The court may issue any order regulating the 'conduct of the company's affairs in the future', and it may even decide to order the dissolution and winding-up of the company.

During the court proceedings in this case, ample proof was provided that the two shareholder-directors had fallen out with each other leading to prolonged and serious disagreements which greatly hampered and eventually halted the company's operations.

The court established that the company had become practically inoperative and could not function as a result of the worsening relationship between the only two shareholders, which had led to several grave incidents. Conflicting instructions had been given to employees ruining relations with the company's clients. No meeting of the directors or a general meeting had ever been held. There were reciprocal accusations of wrongdoing. It was also shown that the defendant shareholder-director had set up a new company and had poached employees and clients.

The defendant conceded that the '*affectio societatis*' was completely lacking and that the parties did not trust each other. However, he pleaded that section 402 was not applicable in the circumstances for three reasons:

(a) this section was concerned with the relations between a shareholder and a company, and not the relations between a shareholder and another shareholder;
(b) the defendant company had not taken any steps that could be qualified as oppressive or unfairly discriminatory against or prejudicial to a shareholder;
(c) this section does not extend to instances where the shareholder has equal shareholding as the defendant.

The court disagreed with defendant and held that a remedy under section 402 was available to 'any member of the company' who suffers prejudice as a result of the manner in which the company, through its directors, was conducting its business. The court found that the failings of the company's board of directors had directly caused the closure of the company's operations, and that the company had - owing to the behaviour of its shareholders and its directors - failed to protect and to promote its own interests, thereby also endangering the legitimate interests and expectations of the shareholders.

Accordingly, the court ordered the dissolution and winding-up of the defendant company, and appointed a liquidator. It is interesting to note that at no stage of the proceedings was any reference made to section 214 of the same Act, which lists the causes

of dissolution. This section allows the court to order the dissolution and winding -up of a company 'where it is of the opinion that there are grounds of sufficient gravity to warrant the dissolution and consequent winding-up of the company'.

C. Busuttil vs. E. Busuttil and Continental Postform Limited, Civil Court, 13th October 1999, app. 1012/98/RCP

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Publication of Consultation Paper Generates Debate on E-Commerce Regulation

E-Commerce – electronic signatures, electronic contracts

In August of this year the Irish Department of Public Enterprise published outline legislative proposals on electronic signatures, electronic contracts and related matters. One of the first EU member States to take steps towards legislating in the area, the proposals hint at a 'light regulatory' touch.

In an enterprising approach, the Department invited submissions from the public on the draft proposals. They received detailed observations from a cross section of the business, legal and consumer sectors. They are presently considering these views in depth and are expected to publish an e-commerce Bill early in 2000.

Legal Recognition of Electronic Contracts

The Government proposes to place electronic contracts, signatures and writing on the same legal footing as those in paper form. The parties may disapply the provision in their contracts. It is of course debatable whether all contracts would be amenable to this provision. Certain agreements such as those requiring a note of terms under the Statute of Frauds Act, 1695 may not be appropriate in electronic format.

One of the most controversial provisions in the draft is the proposed definition of when a contract is concluded. The draft provides that a document will be taken to have been 'delivered' when the electronic communication by which the document is sent leaves an information system under the control of the sender; and will be taken to have been received when the electronic communication by which the document is received enters an information system under the control of the recipient. This will not apply where the parties agree otherwise or where the 'contrary can be proved'. Acceptance of any offer, amendment, cancellation or revocation will be of legal effect when expressed by means of electronic communications.

Although this provides some clarification in relation to offer and acceptance sent electronically, it does not solve the legal problem of whether acceptance of a contract, entered into through electronic means, is effected once the acceptance is sent (the postal rule) or whether it is effected once received. It appears that acceptance will take effect if, when sent by the offeree, it enters into an information system under the control of the recipient. Thus, there is no requirement for the offeror to have *actual* receipt of the acceptance. In the absence of a technological fault preventing the message of acceptance entering into the information system controlled by the offeror, it would appear that the contract is created by the electronic assent of the offeree. It is envisaged that the Bill , when published, will provide clarification in this regard and may come closer to the wording of article 11 of the EU Directive on Legal Aspects of Electronic Commerce in the Internal Market.

Carve-outs

The draft proposals, in line with initiatives at EU level, provide for certain exemptions from the e-commerce regime. The proposal exempts:

(a) The creation, execution or revocation of
  (i) a will, a codicil, or any other testamentary instrument;
  (ii) trust;
  (iii) a power of attorney;
(b) dealings in real estate and
(c) court documents, such as affidavits, which need to be sworn.

There has been general support for these categories of exemption. However, there has been some interesting and constructive debate on whether or not the department ought to 'seize the day' and use the publication of the Bill as a platform for debate on the need for modernization in these areas of legal practice. Change in these areas would necessitate major infrastructure changes. However organizations such as the land registry have shown some enthusiasm and appetite to embrace change in the short term. It may be therefore that the Bill will propose a short term exemption period or provide for a short review time .

Electronic Signatures

The draft proposals accept current encryption technology, and are flexible enough to cover future technological advances. The draft provides that an electronic signature or an advanced (encrypted)