



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 28 ta` April 2016

Kawza Nru. 8
Rikors Nru. 424/14 JZM

Ballut Blocks Services
Limited (C8360)

kontra

F.G.S. Construction Limited
(C17794)

Il-Qorti :

I. Preliminari

Rat ir-rikors li kien prezentat fis-16 ta` Mejju 2014 li jaqra hekk –

Illi l-esponenti hija kreditrici tas-socjeta` intimata fl-ammont ta` €107,173.03,, oltre l-imghaxijiet legali u l-ispejjez gudizzjarji u dan in forza ta` sentenza, li ghaddiet in gudikat, fl-ismijiet "Ballut Blocks Services Limited v. F.G.S. Construction Limited" (PA 966/2011 MC) deciza fis-26 ta` April 2012, u dana kif jirrizulta mill-annessa kopja ta` l-istess sentenza Dok BBS1 u t-taxxa relattiva Dok BBS2.

Illi kif ser jigi ppruvat waqt is-smigh ta` dawn il-proceduri is-socjeta` intimata ma tistax thallas id-djun taghha u l-esponenti tifhem li l-istess socjeta` intimata hija insolventi inter alia ai termini tal-Artikolu 214(2)(a)(ii) tal-Att dwar il-Kumpanniji b`applikazzjoni tal-Artikolu 214(5)(a) tal-istess Att.

Illi s-socjeta` intimata ilha f`dan l-istat ta` insolvenza ghal zmien twil u dan kif jafu, jew kif ghandhom ikunu jafu d-diretturi taghha.

Illi l-esponenti tissottometti li dawn in-nuqqasijiet, flimkien ma` nuqqasijiet ohra fit-tregija tas-socjeta` intimata li ser jigu pruvati tul it-trattazzjoni ta` dawn il-proceduri, saru u ghadhom qed isiru bl-iskop li b`hekk is-socjeta` intimata teludi l-obbligi taghha skond il-ligi.

Illi x-xoljiment tas-socjeta` intimata huwa rikjest mic-cirkostanzi premessi f`dan ir-rikors, liema cirkostanzi huma wkoll serji u gravi ai termini tal-Artikolu 214(2)(b)(iii) tal-Att dwar il-Kumpanniji.

Ghaldaqstant in vista tal-premess, is-socjeta` esponenti titlob bir-rispett illi din l-Onorabbli Qorti, prevja li jinghataw id-dikjarazzjonijiet u l-provvedimenti kollha opportuni, joghghobha :

1. *Tiddikjara u tiddeciedi illi s-socjeta` intimata m`hijiex fqaghda li thallas id-djun taghha ai termini ta` l-Artikolu 214(2)(a)(ii) tal-Kap.386 tal-Ligijiet ta` Malta ;*

2. *Tiddikjara u tiddeciedi illi jezistu ragunijiet gravi bizejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tas-socjeta` intimata ai termini ta` l-Artikolu 214(2)(b)(iii) tal-Kap.386 tal-Ligijiet ta` Malta ;*

3. *Tahtar minnufih fil-mori ta` dawn il-proceduri amministratur provvisorju sabiex jamministra l-affarijiet tas-socjeta` intimata u dan taht u skond id-disposizzjonijiet kollha li din l-Onorabbli Qorti jidhrilha opportun li taghti ;*

4. *Tordna x-xoljiment u l-istralc konsegwenzjali tas-socjeta` intimata a tenur ta` l-Artikolu 214(2)(a)(ii) u/jew l-Artikolu 214(2)(b)(iii) tal-Kap.386 tal-Ligijiet ta` Malta ;*

5. *Taghti kull provvediment opportun sabiex jinhatar stralcjarju u jigi kondott l-istralc konsegwenzjali tas-socjeta` intimata ai termini tal-Kap.386 tal-Ligijiet ta` Malta.*

Bl-ispejjez u b`rizerva ghal kwalsiasi azzjoni ulterjuri spettanti lis-soicjeta` esponenti inter alia ai termini tal-Artikoli 303, 315 u 316 tal-Att dwar il-Kumpanniji.

Rat id-dokumenti kollha li kienu esebiti mir-rikorrenti mar-rikors taghha.

Rat id-digriet taghha tal-11 ta` Gunju 2014 fejn ordnat in-notifika tar-rikors promotorju lill-kumpannija intimata, tatha zmien ghoxrin (20) jum biex twiegeb, u appuntat il-kawza ghas-smigh ghall-udjenja tat-30 ta` Gunju 2014 fid-9.00 a.m.

Rat illi l-kumpannija intimata kienet notifikata bl-atti skond il-ligi, izda ma pprezentatx risposta.

Semghet ix-xiehda ta` Etienne Zammit fl-udjenja tat-8 ta` Jannar 2015.

Semghet ix-xiehda tal-Av. Dr. Alexia Aquilina u tal-Av. Dr. Amanda Poole fl-udjenza tad-19 ta` Frar 2015 u rat id-dokumenti li pprezentaw ix-xhieda.

Rat in-nota guramentata (u dokumenti annessi maghha) ipprezentati mill-Av. Dr. Alexia Aquilina fil-25 ta` Frar 2015.

Semghet ix-xiehda tal-Awditur Jean Pierre Cauchi fl-udjenza tal-10 ta` Marzu 2015 u rat id-dokument prezentat mix-xhud.

Semghet ix-xiehda ta` Dennis Vassallo u ta` A C Enterprises Limited fl-udjenza tal-11 ta` Mejju 2015, u rat in-nota b`dokumenti li pprezentat is-socjeta` rikorrenti fl-istess udjenza.

Semghet ix-xiehda tal-Av. Dr. Stephen Thake u tal-Av. Dr. Joseph Fenech fl-udjenza tat-30 ta` Gunju 2015.

Semghet ix-xiehda ta` Isaac Attard, Joseph Bonello, Rita Caruana u Marcus Bonnici fl-udjenza tat-2 ta` Novembru 2015 u rat id-dokumenti li kienu prezentati fl-istess udjenza.

Semghet ix-xiehda ta` Angelo Bartolo, Conrad Grima u Johanna Bartolo fl-udjenza tat-18 ta` Jannar 2016 u rat id-dokumenti li kienu prezentati fl-istess udjenza, fosthom ix-xiehda bl-affidavit tal-Av. Dr. Nicolai Vella Falzon.

Semghet ix-xiehda ta` Anthony Wareing fl-udjenza tal-11 ta` Frar 2016 u rat id-dokumenti prezentati mix-xhud fl-istess udjenza.

Semghet ix-xiehda tal-Av. Dr. Stephen Thake fl-udjenza tat-3 ta` Marzu 2016 u rat id-dokumenti prezentati mix-xhud fl-istess udjenza.

Rat id-digriet li tat fl-istess udjenza fejn halliet il-kawza ghas-sentenza ghal-lum.

Rat l-atti l-ohra tal-kawza.

II. Il-kredituri

Fil-kors tal-gbir tal-provi, ir-rikorrenti ma ressqitx biss il-prova tal-kreditu taghha kontra s-socjeta` intimata izda gabet `il quddiem il-prova ta` kredituri ohra sabiex issostni t-talbiet taghha. Il-Qorti sejra tirreferi ghal dawn il-provi :-

1) Is-socjeta` rikorrenti

Etienne Farrugia – Kontrollur Finanzjarju – xehed illi s-socjeta` ntimata ghandha dejn kapitali ta` **€107,173.03c** versu s-socjeta` rikorrenti. Id-dejn ilu dovut mill-2009. Ballut Blocks Services Ltd ghamlet kawza kontra s-socjeta` ntimata biex tithallas il-kreditu taghha u l-kawza kienet deciza favur ir-rikorrenti fis-26 ta` April 2012. Minkejja s-sentenza, l-intimata baqghet ma hallset xejn.

Kompla jghid illi mal-presentata tal-kawza sar mandat ta` sekwestru kawtelatorju kontra l-intimata. Deciza l-kawza saret nota fit-18 ta` Mejju 2012 sabiex il-mandat minn kawtelatorju jsir eżekuttiv. Saret in-notifika tal-intimata bil-procedura tal-pubblikazzjoni (fol 30 u fol 35).

2) Vassallo Concrete Services Ltd

Dennis Vassallo - direttur tal-kumpannija Vassallo Concrete Services Ltd – xehed illi s-socjeta` tieghu kienet tissupplixxi lis-socjeta` intimata b` ammont ta` xoghol li baqa` qatt ma thallasx.

Qal illi saret kawza segwita b`mandat ta` sekwestru.

Stqarr illi mill-ammont dovut ta` €15,483, il-kumpanija tieghu thallset parti zghira. U fadal bilanc ta` **€11,500** li ghadu dovut sal-gurnata tal-lum.

3) **Bank of Valletta plc**

Johanna Bartolo mill-Bank of Valletta plc xehdet illi l-Bank of Valletta huwa kreditur tal-intimata fl-ammont ta` **€513,481.33c.**

Dwar dan id-dejn saret kawza li kienet ghadha pendenti.

Qalet illi ma sarux mandati kawtelatorji.

4) **Blokrete Limited**

Av. Dr. Joseph Fenech, - direttur ta` Blokrete Limited – xehed illi l-intimata ghandha taghti lil Blokrete Limited ammont bilancjali ta` **€8,391.80.**

5) **Rite Mix (Gatt Bros) Limited**

Isaac Attard *accountant* ta` Right-Mix Gatt Brothers Limited xehed illi l-intimata kienet tiehu xoghol ta` *ready mix concrete* minghand Right-Mix Gatt Brothers Limited.

Qal illi l-ahhar pagament sar fis-7 ta` Frar 2011.

Qal illi l-bilanc dovut huwa ta` **€14,321.50c.**

Stqarr illi ghalkemm sar mandat ta` sekwestru ezekuttiv, ma sar l-ebda hlasijiet.

6) **Wembley Crane Hire Limited**

Joseph Bonello - Direttur Manigerjali ta` Wembley Crane Hire Limited – xehed illi l-intimata giet provduta b` numru ta` *cranes* biex tkun tista` tahdem.

Billi ma sarx hlas tas-servizz, kien ipprezentat il-mandat ta` sekwestru nru. 3038/12 ezebit (fol 125) ghall-ammont shih ta` **€1,641.77**. Cio` nonostante, Wembley Crane Hire Limited ma thallset xejn.

7) **Elmo Insurance Limited**

Irrizulta li Elmo Insurance Limited ipprezentat mandat ta` sekwestru nru 2823/2011 kontra s-socjeta` intimata (fol 122) u mandat ta` qbid nru 841/13 (fol 128).

8) **All Diesels Limited**

Irrizulta li All Diesels Limited ipprezentat mandat ta` sekwestru nru. 2923/2012 kontra s-socjeta` intimata (fol 133).

9) **United Equipment Company (UNEC) Limited**

Marcus Bonnici *sales manager* xehed illi kienu saru xogholijiet ta` tiswijiet fuq xi trakkijiet tal-kumpannija intimata.

Qal illi l-kont tela` ghal **€3218.82c**.

Kompla jghid li saret kawza (fol 210) u anke mandat ta` qbid kawtelatorju (fol 339 et seq).

Ighid illi l-ammont ghadu dovut.

Ma kienx hemm ezekuzzjoni tal-mandat ghar-raguni ndikata fir-riferta ta` l-istess mandat.

10) Cementstone Manufacturing Co Ltd

Av. Dr. Stephen Thake – Company Secretary – xehed illi Cementstone Manufacturing Company Limited kienet bieghet merkanzija lill-intimata fl-ammont ta` **€6,918.50c.**

Saret kawza kontra s-socjeta` intimata.

Kif ukoll mandat ta` sekwestru kontra l-istess kumpannija.

Qal illi l-kreditu baqa` ma thallasx kif ma thallsux l-imghaxijiet dovuti u l-ispejjez gudizzjarji.

11) B & B Construction Limited

Angelo Bartolo direttur xehed illi B & B Construction Limited kienet u ghadha kreditur tas-socjeta` intimata.

Qal illi nghatat sentenza favur B & B Construction Limited u kontra l-intimata fit-12 ta` Dicembru 2011.

Il-kreditu kanonizzat kien ta` **€24,783.99c.**

Billi ma kienx hemm appell, kien ipprezentat mandat ezekuttiv kontra s-socjeta` intimata segwit mir-registrazzjoni ta` ipoteka legali.

Ma sar l-ebda hlas.

12) Il-Fajsu Company Limited

Rita Caruana xehdet illi Il-Fajsu Company Limited tbiegh materjal tal-bini.

Ghandha tiehu mis-socjeta` intimata s-somma ta` **€8,358.31c.**

Saret kawza kontra l-intimata li kienet deciza favur il-kreditrici fit-30 ta` Ottubru 2012.

Dan minkejja ma thallas xejn mill-ammont dovut.

Ma saru l-ebda mandati kontra l-intimata.

13) A.C. Enterprises Limited

Anton Camilleri direttur xehed illi kienet inghatat sentenza favur AC Enterprises Ltd kontra s-socjeta` intimata fil-15 ta` Jannar 2013.

Ghalkemm ipprova javvicina lir-rapprezentant tas-socjeta` intimata dan qallu li huwa fallut.

14) V & J Grima Limited

Conrad Grima direttur xehed illi s-socjeta` intimata kienet tiehu *fuel* minghand is-socjeta` V & J Grima Limited.

Il-kont taghhom tela` ghal **€24,982.25c.**

Sar mandat ta` sekwestru kawtelatorju fl-24 ta` Gunju 2015.

U kawza li kienet deciza favur tagghom fl-4 ta` Dicembru 2015.

L-ammont dovut ghadu mhux imhallas.

15) Vella Falzon Building Supplies Limited

Av. Dr. Nicolai Vella Falzo direttur xehed illi Vella Falzon Building Supplies Limited ghandha debitu ta` **€609.57c** kontra l-intimata.

Qal illi fix-xahar ta` April 2013 saret ittra ufficjali a tenur ta` l-Artikolu 166A tal-Kap 12.

Billi s-socjeta` intimata ma tat l-ebda twegiba ghad li kienet notifikata, il-kreditu ta` Vella Falzon Building Supplies Limited sar esekuttiv.

Qal illi ghalkemm l-ammont ghadu dovut, thassar mill-kotba tal-kumpannija bhala *bad debt*.

16) Bonello Service Station Limited

Anthony Wareing ghas-socjeta` kreditrici xehed illi l-intimata ghandha taghti **€18,939.06c** lil Bonello Service Station Limited.

Minn dan l-ammont ma thallas xejn.

17) Attard Blue Mix Concrete Supplies Limited

Av. Dr. Stephen Thake xehed illi l-kumpannija kreditrici ghamlet mandat ta' sekwestru eżekuttiv għal **€89,204.37** in eżekuzzjoni ta' sentenza mogħtija fis-16 ta' Mejju 2013.

L-ammont għadu mhux imhallas għalkemm kienet insinwata ipoteka generali.

III. Dritt

Qabel tghaddi sabiex tqis il-mertu, il-Qorti jidhrilha li jkun opportun jekk tagħmel analizi ta' d-disposizzjonijiet li, fil-fehma tagħha, huma attwali u rilevanti għall-vertenza.

1) **L-Art 218(1) tal-Kap 386**

Riferibbilment għall-mertu tal-kaz, persuna li tkun trid titlob ix-xoljiment u l-istralc ta' kumpannija, trid toqghod għal dak li jipprovdi l-Art 218(1) tal-Kap 386 li jaqra hekk –

Talba lill-qorti (aktar 'il quddiem imsejha "rikors għal stralc") għal -

(a) stralc ta' kumpannija mill-qorti skont l-artikolu 214(1)(a) ;

(b) xoljiment u stralc ta' kumpannija mill-qorti skont l-artikolu 214(2)(a) ; jew

(c) xoljiment u stralc ta' kumpannija skont l-artikolu 214(2)(b),

għandha ssir b'rikors li jista' jsir jew mill-kumpannija wara decizjoni tal-laqgħa generali jew mill-bord tad-diretturi tagħha jew minn xi detentur ta' obligazzjoni, kreditur jew kredituri, jew minn xi kontributorju jew kontributorji :

Izda rikors skont il-paragrafi (b) jew (c) jista' wkoll isir minn xi azzjonist jew direttur tal-kumpannija.

Fil-kaz tal-lum, ir-rikorrenti mexxiet bl-istanza tax-xoljiment u tal-istralc tal-intimata ghaliex fir-rikors promotur tikkontendi illi hija kreditur tal-istess.

Fil-kors ta` dan il-procediment, ir-rikorrenti gabet il-prova li hija kreditur ta` l-intimata.

Ghalhekk ghandha *locus standi* sabiex tippromwovi l-azzjoni.

2) Il-bazi tal-azzjoni

Ir-rikorrenti qeghda titlob ix-xoljiment u l-istralc tal-intimata abbazi :

- tal-Art 214(2)(a)(ii) tal-Kap 386 li jirreferi ghall-Art 214(5) tal-istess Att ; *u*
- tal-Art 214(2)(b)(iii) tal-Kap 386.

3) L-Art 214(2)(a)(ii) u l-Art 214(5) tal-Kap 386

Bl-Art 214(2)(a)(ii) il-ligi taghti lill-Qorti **diskrezzjoni** li xxolji u tistralcja kumpannija *jekk il-kumpannija ma tkunx tista' thallas id-djun taghha.*

Dan is-subinciz (ii) irid jinqara flimkien ma` l-Art 214(5) li jistabilixxi meta kumpannija skond il-ligi taghna ghandha titqies li ma tkunx tista' thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti mil-ligi –

(a) *jekk id-dejn dovut mill-kumpannija jkun baqa' ma thallasx ghal kollox jew f`parti wara erbgha u ghoxrin gimgha mill-ezekuzzjoni ta' titolu ezequttiv kontra l-kumpannija b`xi wiehed mill-atti ezequttivi msemmijin fl-artikolu 273 tal-Kodici ta' Organizzazzjoni u Procedura Civili ; jew*

(b) *jekk ikun ippruvat ghas-sodisfazzjon tal-qorti li l-kumpanija ma tkunx tista' thallas id-djun taghha, meta din tqis ukoll il-passiv kontingenti u prospettiv tal-kumpanija.*

Ir-rikorrenti qeghda ssostni l-pretensjoni taghha kemm abbazi tal-paragrafu (a) kif ukoll abbazi tal-paragrafu (b) tal-Art 214(5).

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpaniji, il-qafas maghzul kien dak tal-Companies Act Ingliza 1985.

Fil-ligi Ingliza, ix-xoljiment u l-istralc ta` kumpaniji kien trattat f`legislazzjoni *ad hoc* u cioe` l-Insolvency Act 1986.

Meta fl-1995 saret il-ligi taghna l-gdida dwar il-kumpaniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att tal-1995.

Fil-ligi taghna, li *kumpanija ma tkunx tista' thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess fl-Art 214(5).

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha.

Il-koncett ta` insolvenza fil-ligi taghna huwa aktar ristrett minn dak tal-ligi Ingliza ghalkemm hemm *overlaps*.

Fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad hekk –

There are two principal, although not exclusive or exhaustive, tests of insolvency : a company is insolvent if it unable to pay its debts as they fall due (“cash flow insolvency”) ; it is also insolvent if its liabilities exceed its assets (“balance sheet insolvency”) ...

(i) **L-Art 214(5)(a)**

B`mod aktar strett, fil-ligi taghna dak previst mill-Art 214(5)(a) jixbah il-koncett ta` *cash flow insolvency* fil-ligi Ngliza.

Fil-kaz ta` *cash flow insolvency* din il-Qorti tghid illi filwaqt fil-ligi taghna huwa specifikat **bil-preciz** x` m`ghandhiex taghmel kumpannija debitrici sabiex ma tkunx meqjusa li ma tistax thallas id-djun taghha, fil-ligi Ngliza il-kriterju huwa aktar generiku ghax ikun hemm dik it-tip ta` insolvenza *if it unable to pay its debts as they fall due*.

Din il-Qorti sejra taghmel riferenza ghad-dottrina dwar il-ligi Ngliza, ghax tiswa biex tkun tista` tasal, abbazi tal-fatti ta` kull kaz, inkluz dak tal-lum, mhux daqstant biex tghid jekk jirrizultax ppruvat dak stipulat fl-Art 214(5)(a), izda biex tasal ghal decizjoni dwar jekk ghandhiex tghaddi ghax-xoljiment u l-istralc ta` kumpannija.

Fil-**Boyle & Birds` Company Law** (op. cit.) ikompli jinghad hekk –

Failure to pay a debt which is due and not disputed amounts to evidence of cash flow insolvency. Thus a company which has a policy of late payment of bills could find itself the subject of a petition for a winding-up order or administration order. Such a petition will not be struck out at an early stage as a form of improper pressure and an abuse of the process of the court, because, as Staughton LJ explained in Taylor`s Industrial Flooring (1990. BBC 44 at 51) creditors, not late payers, are more worthy of insolvency law`s protection.

“Many people today seem to think that they are lawfully entitled to delay paying their debts when they fall due or beyond the agreed period of credit, if there is one ... This can cause great hardship to honest traders, particularly those engaged in small businesses recently started. Anything which the law can do to discourage such behaviour in my view should be done.”

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (pubblikat minn Pearson Longman – 2003) pg 17

jinghad hekk dwar *cash flow insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

The court, in examining whether a company is suffering cash flow insolvency, will consider whether the company is actually paying its debtors. Courts must take into account what current revenue the company has as well as what the company can procure by realising assets within a relatively short time ... A company can rely upon money which might be obtained from the sale of assets or upon money which might be obtained on the strength of its assets ... It is possible that sometimes a debtor might be able to establish solvency by demonstrating that funds can be obtained through an unsecured loan. In considering whether a person or a company is insolvent, the debtor's whole financial position must be studied ... and a temporary lack of liquidity does not necessarily mean that the company is insolvent ...

At one time courts were rather strict on what they required to be established before they were willing to deem a person or a company insolvent, but in more recent times they have become more liberal as far as creditors are concerned and have held that a debtor is insolvent if a creditor is able to prove that he or she has not paid an undisputed debt after a demand has been made ... and this is the case even if there is other evidence which suggests that the value of the assets outweighs liabilities ...

Whether a company is cash flow insolvent is principally a question of fact and one which may be established in any number of ways, such as the existence of a large number of outstanding debts and unsatisfied judgments ... or there is lack of assets on which execution can be levied ...

It has been said that a debtor is not regarded as solvent just because if sufficient time were granted the debts could be paid off ...

(ii) L-Art 214(5)(b)

Fit-test bl-Ingliz **L-Art 214(5)(b) tal-Kap 386** jaqra hekk :-

For the purposes of subarticle (2)(a)(ii), a company shall be deemed to be unable to pay its debts ...

if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

Fl-Insolvency Act 1986 tar-Renju Unit, insibu disposizzjoni li TIXBAH dik tal-ligi taghna, ghalkemm mhijiex l-istess.

Il-Qorti qeghda tirreferi ghall-**Art 123(2)** tal-Insolvency Act 1986 li jaqra hekk –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Il-Qorti diga` rrilevat illi d-disposizzjoni fil-ligi taghna TIXBAH PERO` MHIJIEX IDENTIKA ghal dik tal-ligi Ingliza.

Id-divergenza bejn iz-zewg legislazzjonijiet hija li filwaqt li fil-kaz taghna l-mizura hija semplici :

u cioe`

the company is unable to pay its debts account being taken also of contingent and prospective liabilities of the company.

Fil-kaz tal-ligi Ingliza, il-kriterju huwa divers ghaliex il-Qorti tkun trid tqis illi :

the value of the company`s assets is less than the amount of its liabilities ...

billi tiehu kont tal- ... *contingent and prospective liabilities.*

Ghal din il-Qorti, id-differenza mhijiex ta` *drafting* izda ta` sostanza.

Fl-istess waqt, il-Qorti hija tal-fehma li xorta wahda ghandha tfittex sintesi bejn id-disposizzjoni tal-ligi taghna u dik tal-ligi Ingliza. U s-sintesi hija kostitwita mill-koncett ta` *contingent and prospective liabilities.*

Il-Qorti sejra tirreferi ghal dak li tghid id-dottrina fl-Ingilterra dwar il-materja li tikkostitwixxi l-mertu tal-istanza tal-lum.

Bid-debiti riservi, u tenut kont tad-**disparita`** fid-disposizzjonijiet ta` bejn il-ligi Ingliza u dik taghna, il-Qorti sejra tirreferi ghal dak li tghid id-dottrina Ingliza dwar dak li huwa maghruf bhala ***balance sheet insolvency*** meta abbinat mal-**Art 123(2)** tal-Insolvency Act 1986 tar-Renju Unit.

Fil-Pag 19 tal-ktieb **Insolvency Law – Corporate and Personal** (2003 – Pearson Longman) Andrew R Keay u Peter Walton ighidu dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that “liabilities” is a broadened term compared with “debts” [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. “Liabilities” is defined for the purposes of winding up in rule 13.12 (4) to mean “a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution”. Then rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) Roy Goode ighid hekk –

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 sa 136, l-awtur jittratta n-nozzjoni ta' **contingent liability** u jghid hekk –

To give the phrase “contingent liability” any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

... in considering whether there is a contingent liability the court has regard to the existing commercial situation, not merely an existing legal obligation. In this regard, assistance can be derived from Financial Reporting Standard 12 which defines a contingent liability in the following terms :

(a) “A possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the entity’s control ; or

(b) a present obligation that arises from past events but is not recognised because :

(i) it is not probable that a transfer of economic benefits will be required to settle the obligation ; or

(ii) the amount of the obligation cannot be measured with sufficient reliability.”

... the term “contingent liabilities” is ultimately not a term of art and its precise meaning will depend on its context. The court is thus entitled to have regard to commercial realities ...

Fil-Pag 136 u 137, l-awtur jittratta n-nozzjoni ta' **prospective liability** u jghid hekk –

... The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly

become due in the future, either on some date which has already been determined or some date determinable by reference to future events.”

... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

Dak previst minn din id-disposizzjoni jabbina ruhu ma` *balance sheet insolvency*.

Dan l-abbinament jista` jsir minhabba d-dicitura tad-disposizzjoni rilevanti tal-Insolvency Act 1986 (li hija kwazi identika ghal taghna) u cioe` l-**Art 123(2)** li taqra hekk –

A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.

Fil-ktieb **Insolvency Law – Corporate and Personal** ta` Andrew Keay u Peter Walton (op. cit.) pg 19 jinghad hekk dwar *balance sheet insolvency* kif mifhuma fil-kuntest tal-Insolvency Act 1986 –

In determining whether the assets are outweighed by the liabilities a court is able to take into account contingent and prospective liabilities, but not contingent and prospective assets [Byblos Bank SAL v. Al-Khudhairy (1986) 2 BCC99, 549 (CA)] It has been said that “liabilities” is a broadened term compared with “debts” [Re A debtor (No 17 of 1966) (1967) Ch 590 ; (1967) 1 All ER 668]. “Liabilities” is defined for the purposes of winding up in rule 13.12 (4) to mean “a liability to pay money or money`s worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment and any liability arising out of an obligation to make restitution”. Then rule 13.12 (3) states that it is immaterial whether the liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion.

Clearly with this test it is only possible to take into account the assets owned by the company including the uncalled capital of the company [Re National Livestock Insurance Co (1858) 26 Beav 153 ; 53 ER 855 ...

Dwar l-Art 214(5)(b) din il-Qorti diversament presjeduta (**PA/GV**) fis-sentenza taghha tat-28 ta` Mejju 2003 fil-kawza “**Axel John International AB vs Aluminium Extrusions Limited**” qalet hekk –

Din il-kondizzjoni tista' tigi verifikata permezz tal-balance sheets wara li jigi kunsidrat jekk l-assets are less than its liabilities. Izda ... it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets over a lengthy period (Re : European Life Assurance Society 1869 LR 9 Eq 122). Ghalhekk ma hemmx raguni ghaliex il-kredituri ghandhom joqghodu jistennew sakemm il-kumpanija tbiegh l-assets taghha biex forsi xi darba jithallsu.

Fil-Pag 114 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (ippubblikat minn Sweet & Maxwell) l-awtur Roy Goode ighid hekk –

The idea underlying this test ... is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities can ultimately be met only by the realisation of its assets and these are insufficient for the purpose ...

Fil-Pag 130 ikompli hekk –

The mere excess of liabilities over assets is not in itself determinative. What has to be shown is that by reason of the deficiency of its assets the company has reached the point of no return.

Fil-Pag 134 ighid –

To give the phrase “contingent liability” any meaning we must restrict it to a liability or other loss which arises out of an existing legal obligation or state of affairs but which is dependent on the happening of an event which

may or may not occur. Many of the cases have stressed the need for the liability to arise out of an existing obligation.

Fil-Pag 136 ighid –

The phrase “prospective liability” is neither a legal nor an accounting term of art. It has been judicially defined as : “ ... a debt which will certainly become due in the future, either on some date which has already been determined or some date determinable by reference to future events.” ... it has been described ... as unmatured liability which will inevitably ripen into a debt with the passage of time. Such a definition encompasses all forms of debitum in praesenti, solvendum in futuro including an indisputable claim for unliquidated damages which remains only to be quantified and will result in a debt far more than a nominal amount. “Prospective liability” thus embraces both future debts, the sense of liquidated sums due, and unliquidated claims.

4) **L-Art 214(2)(b)(iii)**

Skont din id-disposizzjoni, *kumpannija **ghandha** tkun xolta bil-qorti fil-kaz illi l-qorti tkun tal-fehma li hemm ragunijiet gravi bizejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpannija.*

Is-sinjifikat tad-disposizzjoni huwa car.

Tithalla lill-Qorti diskrezzjoni wiesa` sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi “gravi bizejjed”.

Jekk tistabilixxi l-gravita`, allura minn hemm 'il quddiem il-Qorti ma jibqgħalhiex aktar diskrezzjoni u tkun obligata (ghandha**) taghmel id-dikjarazzjoni ta` xoljiment u konsegwenti stralc tal-kumpannija.**

Il-Kap 386 ma jagħtix tifsira ta` x`hinuma “*ragunijiet gravi bizejjed*”.

Ghalhekk il-Qorti m`ghandha tiskarta xejn.

Sabiex tistabilixxi jekk fatti jew cirkostanzi humiex gravi bizzzejjed, m`ghandhiex toqghod fuq grajjiet li jkun sehew sad-data tal-presentata tar-rikors promotur tal-azzjoni, izda ghandha taghti piz ukoll ghal kull ma jigri anke wara, sa ma tigi biex taghti d-decizjoni taghha.

Fl-**Art 122 tal-Insolvency Act 1986** tar-RU, hemm elenku tac-cirkostanzi li jwasslu ghax-xoljiment u ghall-istralc ta` kumpannija.

Fl-Insolvency Act 1986 ma hemmx disposizzjoni identika ghal dik li tirrizulta fl-Art 214(2)(b)(iii) tal-Kap 386.

Il-wahda li tqarreb l-aktar lejha hija l-**Art 122(1)(g)** li tghid :

the court is of the opinion that it is just and equitable that the company should be wound up.

Huwa evidenti anke mad-daqqa t`ghajn li d-disposizzjoni taghna hija aktar stretta fis-sens illi fil-kaz taghna l-Qorti ghandha xxolji u tistralcja meta fil-fehma taghha ikunu jirrizultaw **ragunijiet gravi bizzzejjed**. Fil-ligi Ngliza, il-kriterju li fuqu l-Qorti trid tibni l-fehma taghha huwa dak tal-**gustizzja u l-ekwita`**.

L-istrettezza tad-disposizzjoni taghna taghmel hafna sens anke ghaliex jekk il-Qorti tesprimi l-fehma li hemm ragunijiet gravi bizzzejjed, allura minn hemm tkun **obbligata** tordna x-xoljiment u l-istralc tal-kumpannija.

Il-Qorti tghid li r-riferenza ghall-**Art 122(1)(g)** tal-Insolvency Act 1986 hija utili ghaliex il-linja li hadu l-Qrati Inglizi biex ighidu x`hinu *just and equitable* ghall-fini ta` *winding up* tghin biex tiftah tieqa lill-Qrati taghna ghall-interpretazzjoni ta` x`jistghu jkunu *ragunijiet gravi bizzzejjed*.

Kull kaz ghandu l-istorja tieghu u ghalhekk il-Qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` kull kaz.

IV. Konsiderazzjonijiet

Sabiex tevita kull kontroversja, il-Qorti sejra toqghod fuq id-disposizzjoni tal-Kap 386 li jekk l-esitu favorevoli tal-istanza tal-lum ikun favorevoli ghar-rikorrenti tobbliga lill-Qorti li xxolji u tistralcja [senjatament l-Art 214(2)(b)(iii)].

Ghalhekk taghzel illi tqis id-disposizzjonijiet l-ohra citati mir-rikorrenti BISS jekk ma tkunx sodisfatta bl-ezami tal-fatti ghall-fini tal-Art 214(2)(b)(iii).

Il-kwadru ta` fatti ppruvati li johrog mill-provi mhux felici xejn ghas-socjeta` ntimata.

Fl-ewwel lok, ghal din il-Qorti, ma jaghmel l-ebda sens minn kull aspekk illi kumpannija li suppost qeghda titmexxa tajjeb, jew li hija finanzjarjament affidabbli, tigi notifikata bi procediment hekk serju bhal dan tal-lum, b`konsegwenzi daqstant gravi, u mqar taghmel l-icken sforz biex tiddefendi ruhha.

Din il-Qorti tinsab rinfaccjata b`ghadd gmielu ta` kredituri, li lkoll semgħet il-Qorti stess viva voce, jikkonfermaw li ghas-servizzi resi lill-intimata baqghu minghajr raguni ta` xejn mingħar hlas.

Jinsorgi l-kwesit :

Dik is-socjeta` li mhijiex kapaci thallas imqar l-icken dejn tagħha, u li tagħzel li mqar tiddefendi ruhha fi procediment intiz sabiex ixoljiha jew jistralcjaha timmerita li tibqa` tithalla topera ghas-skapitu u riskju ta` kredituri futuri.

Ir-risposta ta` din il-Qorti hija certament : LE.

Din il-Qorti tghid dan b`responsabilita`.

In-negozju mhuwiex facli.

L-insidji tan-negozju *sono dentro l`angolo*.

Pero` mhuwiex accettabbli ghal din il-Qorti illi socjeta` kummercjali bhal dik intimata tumilja ruhha b`mod illi litteralment “*tiddobba*” u thalli lil kull min jafda fiha b`*xiber imnieher* kif ighid ben tajjeb l-ilsien Malti.

L-intimata kellha l-opportunita` kollha li tigi quddiem din il-Qorti fejn filwaqt li taccetta li baqghet inadempjenti versu r-rikorrenti u kredituri ohra tipprova tissoddisfa lill-Qorti illi ma kienx jimmeritaha li tigi xjolta u stralcjata.

Din il-Qorti m`ghandhiex prova ta` x`assi ghandha l-intimata llum, u li jekk ghandha, hemmx minnhom disponibbli biex jinbieghu halli thallas lill-kredituri taghha fi zmien ragonevolment qasir.

Lanqas ghandha prova tad-dhul tal-intimata.

Jew prova li l-fatt illi ma hallsitx lir-rikorrenti u lil kredituri ohra kienet minhabba problema temporanja ta` nuqqas ta` likwidita`.

B`kuntrast mal-inerzja tal-intimata u tad-diretturi taghha, il-Qorti ghandha l-prova nkonfutabbli li l-intimata baqghet ma hallsitx id-debiti.

Ghalhekk mill-kumpless tal-provi akkwiziti, il-kwadru li johrog huwa li l-intimata mhijiex f`qaghda li thallas id-djun taghha, u li tkun gustifikata u ragonevoli din il-Qorti li tiddikjara x-xoljiment u l-istralc taghha.

Billi hija gravi hafna l-qaghda tas-socjeta`, din il-Qorti - minghajr l-icken esitazzjoni - tghid illi c-cirkostanzi kontemplati bl-Art 214(2)(b)(iii) huma ampjament ippruvati u konsegwentement sejra tordna x-xoljiment u l-istralc taghha, bla ma ghandha ghalfejn tqis ir-ragunijiet l-ohra li wasslu lis-socjeta` rikorrenti sabiex tmexxi bl-azzjoni tal-lum.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar l-istanza tar-rikorrenti billi :-

1) Tastjeni milli tiehu konjizzjoni ulterjuri tal-ewwel u t-tielet talbiet.

2) Tilqa` t-tieni talba.

3) Tilqa` r-raba` talba abbazi tal-Art. 214(2)(b)(iii) tal-Kap 386.

4) Riferibbilment ghall-hames talba, tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpanija F.G.S. Construction Limited (C17794), bis-setghat u bid-dmirijiet kollha li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

5) Bla hsara ghall-generalita` ta` dawk is-setghat u dmirijiet:

(a) wara li jikseb dikjarazzjoni dwar il-qaghda tal-kumpanija ntimata, kif irid l-Art 226 tal-Kap 386 tal-Ligijiet ta` Malta, jaghmel rapport lill-Qorti, kif irid l-Art 227 tal-Kap 386 tal-Ligijiet ta` Malta ;

(b) jagħmel verifika ta` l-assi u tad-djun tal-kumpannija ntimata u, jekk ikun il-kaz, dwar il-gradwazzjoni tad-djun ;

(c) jiehu taht il-kustodja jew kontroll tieghu l-assi kollha tal-kumpannija ntimata, kif ighid u jrid l-Art 237 tal-Kap 386 tal-Ligijiet ta` Malta ;

(d) jagħmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess tal-kumpannija ntimata ;

(e) jirrelata dwar il-mizuri mehtiega għall-harsien tal-assi li fadal tal-kumpannija ntimata ;

(f) jipprezenta r-rapport mhux aktar tard mid-29 ta` Lulju 2016.

6) Bl-applikazzjoni tal-Art 236(2) tal-Kap 386 tal-Ligijiet ta` Malta, tordna lill-kumpannija rikorrenti sabiex thallas l-ispejjez kollha ta` dan il-procediment, inkluzi l-ispejjez u d-drittijiet kollha tal-istralcjarju, kif ukoll l-ispejjez l-ohra tal-istralc.

Thalli l-istralc għall-udjenza ta` nhar il-Hamis, 29 ta` Settembru 2016 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur