



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum it-Tnejn 31 ta` Ottubru 2016

Kawza Nru. 18
Rik. Nru. 93/16 JZM

Control System Limited
(C34557)

kontra

X

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fit-3 ta` Frar 2016 li jaqra hekk :-

1. *Illi dan ir-rikors qiegħed isir a tenur tal-Artikoli 214(1)(a) u 214(2)(a)(ii) tal-Att Dwar il-Kumpanniji (Kap. 386 tal-Ligijiet ta` Malta), u fih qiegħed jintalab l-istralc tas-socjeta` rikorrenti minhabba l-insolvenza tal-istess ;*

2. *Illi s-socjeta` rikorrenti giet kostitwita fis-6 ta` Settembru 2004 bhala Kumpannija ta` Responsabbilta` Limitata ;*

3. *Illi l-unika direttur tas-socjeta` rikorrenti huwa Andrei Mokh Bogdanovich (detentur ta` passaport Spanjol bin-numru XDC143165), filwaqt li Wave Bet Holding GmbH (bin-numru ta` registrazzjoni FN 96468s) u Wettpunkt International Holding Limited (bin-numru ta` registrazzjoni C27580) huma l-unici azzjonisti tal-kumpannija rikorrenti, kif muri fid-dokument hawn anness u mmarkat bhala Dok CSL 1 ;*

4. *Illi l-istatut tas-socjeta` rikorrenti qed jgi anness ma` dan ir-rikors u mmarkat bhala Dok CSL 2 ;*

5. *Illi s-socjeta` rikorrenti ghaddiet rizoluzzjoni straordinarja hawn annessa u mmarkata bhala Dok CSL 3, fejn ghar-ragunijiet kollha premessi gie deciz li s-socjeta` rikorrenti tigi xolta u konsegwentement stralcjata minn dina l-Onorabbli Qorti skont l-Art. 214(1)(a) u/jew l-Art. 214(2)(a)(ii) u dan a tenur tal-Art. 218(1) tal-Att Dwar il-Kumpanniji ;*

6. *Illi jkun ghaqli wkoll illi pendenti d-decizjoni finali ta` din il-Qorti jigi appuntat amministratur provvizorju sabiex jamministra s-socjeta` rikorrenti.*

Ghaldaqstant, u in vista tas-suespost, ir-rikorrenti umilment titlob illi dina l-Onorabbli Qorti joghgobha, prevja kwalsiasi dikjarazzjoni necessarja u opportuna, u ghar-ragunijiet premessi :

1. *Tordna illi s-socjeta` Control System Limited tigi xolta u konsegwentement stralcjata minn dina l-Onorabbli Qorti abbazi tal-Art. 214(1)(a) u/jew l-Art. 214(2)(a)(ii) u dan a tenur tal-Art. 218 (1) tal-Att dwar il-Kumpanniji, bl-ispejjez a karigu tal-istess socjeta` rikorrenti ; u*

2. *Tordna li sakemm tinghata decizjoni finali jigi appuntat amministratur provvizorju sabiex jiehu hsieb l-amministrazzjoni tal-istess socjeta` rikorrenti.*

Rat id-dokumenti li kienu prezentati mar-rikors promotur.

Rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat in-nota ta` osservazzjonijiet tar-rikorrenti.

Rat id-digriet li tat fl-udjenza tat-30 ta` Gunju 2016 fejn halliet il-kawza ghal-lum sabiex taghti provvediment *in difett ta` ostakolu*.

Rat l-atti l-ohra tal-kawza.

Rat li ma kien l-ebda ostakolu sabiex taghti provvediment llum.

II. Xhieda

L-Awditur Paul Giglio xehed illi huwa kien l-awditur tas-socjeta` Control System Limited sa minn mindu kienet kostitwita. Ikkonferma r-rapport ta` l-awditur anness mad-dikjarazzjoni finanzjarja annwali tas-socjeta` Control System Limited ghas-sena 2014.

Jixhed illi skont dik id-dikjarazzjoni, jirrizulta li s-socjeta` kellha passiv nett ta` EUR 2,088,526 sal-31 ta` Dicembru 2014.

Ighid illi l-*statement of affairs* tas-socjeta` relattiv ghat-30 ta` Novembru 2015 ma kienx uditjat. Dan premess, jirrizulta li fit-30 ta` Novembru 2015, is-socjeta` kellha passiv nett ta` EUR 984,743. Ikkonferma li fis-sostanza dak il-prospett kien korrett.

Stqarr illi d-debitur principali tas-socjeta` Control System Limited, u cioe` Zartello Limited, kienet rinfaccjata bi problemi finanzjarji bil-konsegwenza li s-somma ta` EUR 7,335,674 dovuta lis-socjeta` rikorrenti minn Zartello Limited ma tistax tithallas.

Spjega li kellu jsir *provision for a bad debt* bir-rizultat li l-passiv nett tas-socjeta` Control System Limited zdiel ghal EUR 8,320,417.

Ighid illi l-konsegwenza ta` dan kien illi l-*statement of affairs* kellu jinbidel fis-sens illi kellu tkun senjalata z-zieda fil-passiv nett ; din kienet l-unika bidla fl-*statement*.

Andrei Mokh Bogdanovich xehed li huwa l-uniku direttur ta` Control System Limited. Kien appuntat fid-9 ta` Settembru 2015.

Ighid illi s-socjeta` kien iffurmata fis-6 ta` Settembru 2004 mis-segwenzi azzjonisti : (i) Wettpunkt International Holding Limited (illum maghrufa bhala Wave Bet Holding Limited) li hija *private limited liability company* registrata Malta bin-numru C27580 li kellha 1,499 ishma ; (ii) u Hannes Bohine bil-passaport Awstrijak nru A0055627 li kellu sehem wiehed.

Fisser illi Wave Bet Holding Limited hija *fully owned subsidiary* ta` Wave Bet Holding GmbH (gia` maghrufa bhala Hannes Bohine Gesellschaft m.b.H.) li hija kumpanija registrata l-Awstrija bin-nru ta` registrazzjoni FN 96468s. Wave Bet Holdings GmbH kienet taghmel parti minn FGS Group li kienet taqa` taht il-kumpanija F.G.S Intercopo Holding GmbH li hija grupp ta` kumpaniji mill-Awstrija proprjeta` ta` Hannes Bohine.

Qal illi fis-17 ta` Jannar 2011, Hannes Bohine ttrasferixxa is-sehem li kellu fi Control System Limited lil SPORT 7 Zeitungsverlags GmbH li hija *subsidiary* ta` F.G.S. Intercopo Holding GmbH.

Ikompli jghid illi fl-2011, l-*indirect ownership* ta` Wave Bet International Limited ghadda minn FGS Group ghal ghand Global Bet Holding GmbH.

Ifisser illi fit-22 ta` Awissu 2014, F.G.S. Intercopo Holding GmbH kienet amalgamata ma` Hannes Bohine Gesellschaft m.b.H. li hija 100% *subsidiary* ta` F.G.S. Intercopo Holding GmbH. Bhala konsegwenza, lil Hannes Bohine Gesellschaft m.b.H. kien assenjat kull ma kellha F.G.S.

Intercorpo Holding GmbH inkluzi l-ishma fi SPORT 7 Zeitungsverlags GmbH.

Ighid illi fit-23 ta` Settembru 2014, SPORT 7 Zeitungsverlags GmbH kienet amalgamata ma` Hannes Bohine Gesellschaft m.b.H u b`hekk saret proprjetarja tas-sehem li SPORT 7 Zeitungsverlags GmbH kellha f`Control System Limited.

Kompla jispjega li fl-2015, l-*indirect ownership* ta` Control System Limited ghadha ghand Global Bet Investment GmbH u sussegwentement ghand Mokh Beteiligungs GmbH li hija finalment proprjeta` tieghu.

Ighid illi Hannes Bohine Gesellschaft m.b.H bhala Wave Bet Holding GmbH li hija attwalment *wholly owned subsidiary* ta` Mokh Beteiligungs GmbH.

Jixhed illi l-attivitaj` principali ta` Control System Limited hija li taghti servizzi ghal *betting* u *gaming activities* tal-grupp Mokh Beteiligungs GmbH. Is-socjeta` hija IP *holder* ta` sistema ta` *software* li kienet *sub-licensed* lil diversi klijenti. Il-klijenti ewlenin kienu jinsabu fi Spanja u Gibilta.

Qal illi fit-22 ta` Dicembru 2008, Wave Bet International Limited dahlet fi *joint venture agreement* ma` Zartello Limited, kumpannija registrata Gibilta bl-ufficju registrat taghha 124, Irish Town, Gibilta. Zartello Limited hija *a wholly owned subsidiary* ta` Control System Limited. L-attivitaj` principali ta` Zartello Limited hija l-*marketing, promotion, technical support, supply of information* u *procurement of software*. Fl-istess data, Control System Limited ghamlet *support service agreement* ma` Zartello Limited fejn Control System Limited tat licenzja ghas-*software* taghha lil Zartello Limited, liema *software* kien intuza minn Wave Bet International Limited skont il-*Joint Venture Agreement*.

Ighid illi sat-30 ta` Novembru 2015, Zardella Limited kellha taghti lil Control System Limited l-ammont ta` €7,335,674.

Ifisser illi fl-2010, kienet qamet kwistjoni fir-rigward tal-mizati li Control System Limited kellha thallas lil wiehed mis-*software suppliers*

taghha - Xion IT Systems AG. Spjega li s-*software* kien krejat minn Xion IT Systems AG izda dik is-socjeta` kienet waqqfet taghti dak is-servizz, waqt il-pendenza ta` kawza li kellha ma` Control System Limited. Il-konsegwenza ta` dan kienet illi s-sistema tas-*software* kellha titmexxa minn terzi li kienu *software developers*. Dawn ic-cirkostanzi ghamluha diffiqli ferm ghall-kumpanija biex ikollha klijenti godda.

Qal illi Control System Limited ghamlet kawza ghad-danni kontra Xion IT Systems AG. Il-kawza kienet deciza fit-28 ta` Ottubru 2015 mis-Circuit Court ta` Korneuburg fl-Awstrija. Il-kawza kienet deciza favur Xion IT Systems AG. Bis-sentenza, Control System Limited kellha thallas €900,359. Spjega li Control System Limited hadet parir legali dwar jekk ghandhiex tappella. Il-parir li kellha kienet illi ma tappellax.

Fisser illi Control System Limited ma baqghetx *a going concern* bil-konsegwenza kien hemm *substantial impairment* fl-assi tal-kumpanija. Qal ukoll illi minhabba l-ispejjez kbar relatati mas-*software* u l-manutenzjoni tieghu, Control System Limited sabet problemi finanzjarji, tant li kellha titlob l-ghajjnuna lil grupp ta` Mokh Beteiligungs GmbH.

Qal illi n-nuqqas ta` manutenzjoni tas-sistema ta` s-*software updated* u l-htiega li jkunu attirati klijenti godda wassal ghall-insolvenza ta` Control System Limited.

Spjega li fid-dokumenti finanzjarji li jkopri s-sitwazzjoni sat-30 ta` Novembru 2015, Control System Limited kellha passiv nett ta` €984,743. Fis-sitwazzjoni li kienet ma setghetx thallas id-djun taghha.

Qal illi Zartello Limited kellha problemi finanzjarji billi ma kenitx hallset is-somma ta` €6,667,204 li kienet dovuta minn Wave Bet International Limited, bil-konsegwenza li l-passiv nett ta` Control System Limited baqa` jizdied. Gara li Control System Limited kellha tiehu minghand Zartello Limited is-somma ta` €7,335,674. L-effett ta` dan kien illi l-passiv net ta` Control System Limited zdied ghal €8,320,417 fil-31 ta` Mejju 2016.

Ikkonferma d-dokumenti finanzjarji tas-socjeta` sal-31 ta` Mejju 2016.

B`riferenza ghar-rizoluzzjoni li skattat il-procedura tal-lum, stqarr illi fir-rizoluzzjoni kien hemm zball fis-sens li kien indikat illi l-attiv nett ta` Control System Limited kien ta` €1,659,164. Fisser illi abbazi tal-*audited financial statements* tas-socjeta` li ghalqu fil-31 ta` Diembru 2014, jidher li kien hemm passiv nett ta` €2,088,526. Ghall-bija kkonferma l-kontenut tar-rizoluzzjoni.

III. Locus stanti

Qabel tghaddi biex tqis il-mertu tal-istanza odjerna, il-Qorti tghid illi persuna li tkun trid titlob ix-xoljiment u l-istralc ta` kumpannija, trid toqghod ghal dak li jipprovdi l-**Art 218(1) tal-Kap 386** li jaqra hekk –

Talba lill-qorti (aktar `il quddiem imsejha "rikors ghal stralc") ghal -

(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),*

ghandha 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, jirrizulta li kienet il-kumpannija rikorrenti stess li hadet id-decizjoni li tmur ghax-xoljiment u l-istralc.

Ghalhekk ir-rikorrenti ghandha locus standi sabiex tippromwovi l-istanza tal-lum.

IV. L-Art 214(1)(a) tal-Kap 386

Ir-rikorrenti qeghda titlob li tkun xjolta u stralcjata skont l-**Art 214(1)(a) tal-Kap 386** fejn *kumpannija tirrizolvi b`rizoluzzjoni straordinarja li ghandha xxolji u tkun stralcjata mill-qorti.*

Ir-Registratur tal-Kumpanniji kien notifikat fid-9 ta` Frar 2016 b`kopja tar-rikors promotur skont l-**Art 218(8) tal-Kap 386**.

Jirrizulta l-kumpannija rikorrenti kienet registrata bin-nru C 34557 fis-6 ta` Settembru 2004 u kkonformat ruhha mal-Kap 386. Skont il-*memorandum* u l-*articles of association*, jirrizulta illi l-oggetti principali tas-socjeta` huma :-

(a) *to develop, acquire, own, hold, lease, sell, dispose of, and otherwise deal in computer software and hardware systems in any field including but not limited to the gaming industry ;*

(b) *to enter into any agreement, including but not limited to service, maintenance and hosting agreements., in order to facilitate or enhance the preceding object and furthermore to provide any kind of support services in the field of the remote gaming business ;*

(c) *to obtain in the name of the company all types of licences and rights; and to acquire and invest or hold shares in companies, partnerships or other entities and to participate in the management thereof ;*

(d) *to do any other act which is ancillary or related to any of the above objects.*

Jirrizulta illi l-*issued share capital* li huwa *fully paid up* huwa maqsum in kwantu ghal 1,499 *ordinary shares* ghand is-socjeta` Maltija bl-isem ta` Wettpunkt International Holding Limited (C 27580) u sehem wiehed (1) ghand is-socjeta` estera Wave Bet Holding GmbH (FN 96468s). L-azzjonisti tal-lum huma l-istess li kieku meta kienet kostitwita r-rikorrenti (Dok CSL 1 a fol 4). Andrei Mokh Bogdanovich huwa d-direttur tar-rikorrenti.

Skont il-klawsola 16(2) ta` l-*articles of association*, ix-xoljiment tas-socjeta` jrid isir permezz ta` *rizoluzzjoni straordinarja*. Skont il-klawsola 16(4) *rizoluzzjoni straordinarja shall be deemed to have been validly carried*

only if consented to by a member or members entitled to attend and vote at the Meeting and holding seventy-five per cent (75%) in nominal value of all the shares represented and entitled to vote at the meeting.

Il-Qorti rat ir-risoluzzjoni tat-23 ta` Dicembru 2015 (DokCSL 3 a fol 40) u hija tal-fehma illi tikkwalifika bhala risoluzzjoni straordinarja skont l-*articles of association* tar-rikorrenti, u kwindi hija bizzejjed biex twassal ghax-xoljiment tal-kumpannija. Ir-risoluzzjoni hija ffirmata minn Andrei Mokh Bogdanovich ghan-nom ta` l-azzjonisti kollha. Fiha jinghad illi fit-30 ta` Novembru 2015, il-kumpannija kellha passiv nett ta` €984,743 u li ma kinitx fil-qagħda li thallas id-djun tagħha. Il-kontenut ta` r-risoluzzjoni kien ikkonfermat bil-gurament mill-istess Andrei Mokh Bogdanovich, li waqt id-deposizzjoni tieghu ppreciza li kien hemm zball fiha fis-sens li skont il-*financial statements* għas-sena li għalqet fil-31 ta` Dicembru 2014 kien hemm passiv u mhux attiv nett kontra dak li kien dikjarat. Il-veracita ta` tali premessi magħmula kemm fir-risoluzzjoni u kif ukoll fir-rikors promotur kienu ukoll ikkonfermati mill-kontenut stess tad-dokumenti eżebiti mnejn jirrizulta illi fit-30 ta` Novembru 2015, il-kumpannija kellha passiv nett ta` €936,188.56c waqt illi fil-31 ta` Mejju 2016 kellha passiv nett ta` €8,320,417.

Il-Qorti hija tal-fehma illi, fil-kuntest tal-fatti u tac-cirkostanzi ta` dan il-kaz, kif jirrizultaw mill-provi, huma sodisfatti r-rekwiziti tal-Art 214(1)(a) tal-Kap 386 u għalhekk ir-rikorrenti għandha tigi xjolta u stralcjata. Fl-ambitu tal-Art 214(1)(a), il-Qorti m`għandhiex diskrezzjoni. Ippruvat dak li jrid l-Art 214(1)(a), il-Qorti trid tghaddi ghax-xoljiment u għall-istralc.

V. L-Art 214(2)(ii) u l-Art 214(5)(b) tal-Kap 386

Ir-rikorrenti talbet ukoll lill-Qorti sabiex tordna x-xoljiment u l-istralc tagħha anke abbazi tal-Art 214(2)(ii) u tal-Art 214(5)(b) tal-Kap 386.

Il-Qorti sejra tghaddi biex tqis din it-talba.

Skont l-Art 218(1) tal-Kap 386 talba lill-qorti ... ghax-xoljiment u stralc ta` kumpannija mill-qorti skont l-artikolu 214(2)(a) ... għandha ssir b`rikors li jista` jsir ... mill-kumpannija wara decizjoni tal-laqgħa generali.

Fil-kaz tal-lum, ir-rikorrenti ghandha *locus standi* biex tmexxi bl-azzjoni skont l-Art 214(2)(a)(ii).

Diversament mill-Art 214(1)(a), fl-Art 214(2)(b)(ii) il-ligi taghti lill-Qorti diskrezzjoni li xxolji u tistralcja kumpannija jekk issib li *ma tkunx tista` thallas id-djun taghha.*

Id-disposizzjoni trid tinqara flimkien ma` l-**Art 214(5)** li jistabilixxi meta skont il-ligi taghna, kumpannija ghandha titqies li ma tkunx tista` thallas id-djun taghha.

Tnejn huma c-cirkostanzi definiti fil-ligi :-

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

jew

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

Fil-kaz tal-lum, ir-rikorrenti qeghda toqghod fuq ic-cirkostanza (b) biss.

Il-Qorti tirrileva illi meta tfassal il-mudell għal-ligi taghna l-gdida dwar il-kumpanniji sabiex tiehu post il-Commercial Partnerships Ordinance 1962, il-qafas magħzul kien dak tal-Companies Act Ingliza 1985.

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

Meta sar l-Att XXV tal-1995 dwar il-Kumpanniji, ix-xoljiment u l-istralc kienu integrati permezz ta` disposizzjonijiet fl-Att stess.

Fil-ligi taghna, li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu **sinjifikat preciz u definit.**

Fil-ligi Ingliza, il-posizzjoni hija aktar wiesgha. Il-koncett ta` insolvenza fil-kaz 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”) ...

Dan premess, il-Qorti sejra tghaddi ghall-konsiderazzjoni tal-Art 214(5)(b) tal-Kap 386.

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 Ingliza 1986, 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 ligijiet 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.

Fil-kaz tal-lum, irrizulta li d-deposizzjoni ta` Andrei Mokh Bogdanovich u ta` l-Awditur Paul Giglio tirrispekkja fedelment dak li jirrizulta mill-*financial statements* tar-rikorrenti fid-data tal-31 ta` Dicembru 2014, u l-*statement of affairs* taghha sal-31 ta` Mejju 2016. Abbazi ta` l-*financial statements* il-kumpannija kellha passiv nett ta` €2,088,526. Inoltra jidher li kien hemm *contingent liabilities* ta` madwar €900,359. Infatti fin-nota nru 17 ta` l-*financial statements* jinghad :-

“In 2010 a dispute with Xion, a software company arose. This disputed was taken up to court and should reach a decision in the coming months. The lawyers believe that in any case the company will still have to reimburse Xion for their fees for which Xion is claiming EUR 561,034 whilst the company had included in trade and other payables EUR 473,965. Together with interest and penalties the company will most likely have to pay EUR 900,359.”

Irrizulta li bid-decizjoni li nghatat fil-pendenza ma` Xion, il-Qorti ordnat lis-socjeta` rikorrenti sabiex thallas lil Xion is-somma ta` €900,359. Irrizulta wkoll li kellu jsir provvedimenti dwar *bad debt* li kellha r-rikorrenti ma` Zartello Limited, bir-rizultat jkun li l-passiv nett zdieg ghal €8,320,417.

Tajjeb jinghad li r-rikorrenti mhijiex topera. Ma jirrizulta li ghandha dhul. Huwa bil-wisq evidenti li r-rikorrenti tinsab minn taht usejra tibqa` hekk. Barra minn hekk ir-rizoluzzjoni straordinarja hija mera tal-fatt li l-azzjonisti mhux se johorgu xejn aktar minn bwiethom sabiex itellghu r-rikorrenti fil-wicc. Qiesu li fl-ahjar interess taghhom u tar-rikorrenti jkun mill-aktar opportun jekk il-kumpannija tkun ordnata xxolji u tistralcja bi provvedimenti tal-qorti.

Fil-fehma tal-Qorti, ir-rekwiziti tal-Art 214(5)(b) huma ppruvati.

Accertat din il-prova, il-Qorti sejra tara jekk ghandhiex tezercita d-diskrezzjoni taghha li tordna x-xoljiment u l-istralc tar-rikorrenti.

Hija l-fehma konsiderata tal-Qorti illi s-socjeta` ma ghandhiex intenzjoni illi tghin ruhha u tipprova topera sabiex tinsorgi. Ma hu qed isir xejn mill-azzjonisti ghall-fini ta` risanament. Is-socjeta` waqfet ghal kollox mill-esercizzju tan-negozju li ghalih kienet kostitwita. L-istampa li tohrog mill-*financial statements* hija negattiva. Kif diga` kellha okkazjoni tghid fi provvedimenti precedenti taghha, din il-Qorti terga` ssostni li kumpannija li ma taghmilx negozju hija entita` bla ruh. Kumpannija li ma tiggenerax attivita` ekonomika ma jistax ikollha dhul, u minghajr dhul, ma tista` qatt thallas id-dejn taghha. Per konsegwenza, din il-Qorti sejra wkoll tezercita d-diskrezzjoni taghha u sejra tordna x-xoljiment u l-istralc tal-intimata ukoll abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talba tas-socjeta` rikorrenti billi :

Riferibbilment ghall-ewwel talba, tiddikjara li fir-rigward tal-kumpannija rikorrenti Control System Limited (C34557) jirrizultaw pruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(1)(a), tal-Art 214(2)(a)(ii), u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

Riferibbilment ukoll ghall-ewwel talba, tordna x-xoljiment u l-istralc tal-kumpannija rikorrenti Control System Limited (C34557) b`effett mit-23 ta` Dicembru 2015 skont it-tieni proviso ta` l-Art 223(1) tal-Kap 386.

Tahtar lir-Ricevitur Ufficjali bhala stralcjarju tal-kumpannija rikorrenti Control System Limited (C34557) bis-setghat u bid-dmirijiet kollha stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

Bla hsara ghall-generalita` ta` dawk is-setghat u dmirijiet, l-istralcjarju ghandu –

1) jaghmel verifika aggornata ta` l-assi u tad-djun tal-kumpannija rikorrenti Control System Limited (C34557) u dwar il-gradwazzjoni tad-djun.

2) jiehu taht il-kustodja jew kontroll tieghu l-assi tal-kumpannija rikorrenti Control System Limited (C34557).

3) jaghmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess ta` l-kumpannija rikorrenti Control System Limited (C34557).

4) jipprezenta rapport sa zmien xahrejn mil-lum.

Tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni talba.

Bl-applikazzjoni tal-Art. 236(2) tal-Kap 386, tordna lill-kumpanija Wettpunkt International Holding Limited (C27580) bhala azzjonista tal-kumpanija rikorrenti Control System Limited (C34557), lill-kumpanija Wave Bet Holding GmbH (FN96468s) bhala azzjonista tal-kumpanija rikorrenti Control System Limited (C34557), u lill-istess kumpanija rikorrenti Control System Limited (C34557) sabiex *in solidum* bejniethom ihallsu l-ispejjez kollha ta` dan il-procediment, kif ukoll l-ispejjez kollha tal-istralc, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju.

Thalli l-istralc ghall-udjenza ta nhar il-Hamis 26 ta` Jannar 2017 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur