



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 30 ta` Marzu 2017

Kawza Nru. 12
Rikors Nru. 625/16 JZM

Rikors ta` Trudy Kerr (ID 51243A) ghan-nom u in rapprezentanza tas-socjeta` rikorrenti The Creative Partners, u b`digriet moghti fil-15 ta` Novembru 2016 zdieđu l-kliem "Limited (C-52346)" wara l-kliem "The Creative Partners".

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fis-26 ta` Lulju 2016 li jaqra hekk :-

1. *ILLI llum il-gurnata l-esponenta Trudy Kerr hija d-Direttrici ewlenija tal-imsemmija socjeta` The Creative Partners Limited (C-52346), liema socjeta` hija registrata mal-Awtorita` ta` Malta dwar is-servizzi finanzjarji ; DOK A*

2. *ILLI bejn Gunju tas-sena elfejn u ghaxra (2010) u April tas-sena elfejn u tlettax (2013), l-imsemmija socjeta` rikorrenti dahlet f`diversi abbligi/djun ta` natura finanzjarja ma` terzi persuni, u dan minghajr il-kunsens jew approvazzjoni tal-imsemmija esponenta Trudy Kerr ;*

3. *ILLI dawn l-imsemmija djun sehhe meta s-socjeta` rikorrenti kienet ghadha f`idejn l-imsemmija esponenta Trudy Kerr flimkien ma` Abel Philip Rogers (ID 51654A) u Hilary Clare Rogers (ID 35345A) ;*

4. *ILLI fil-bidu tas-sena elfejn u tlettax (2013) Hilary Clare Rogers irrezenjat minn Direttur u ftit taz-zmien wara, precizament f`Awwissu tal-istess sena, Abel Rogers tnehha minn Direttur tal-imsemmija socjeta` mill-esponenti Trudy Kerr, u dan minhabba l-agir skorrett, sleali u illecitu da parti ta` Abel Philip Rogers u Hilary Clare Rogers bhala Diretturi tal-imsemmija socjeta` rikorrenti, konsegwenza ta` liema agir, l-istess ikkawzaw dannu irrevokabbli lis-socjeta` rikorrenti ;*

5. *ILLI minhabba agir skorrett, sleali u illecitu da parti ta` Abel Philip Rogers (ID 51654A) u Hilary Clare Rogers (ID 35345A), id-debituri tas-socjeta` rikorrenti, u cioe` is-socjetajiet imsemmija Network Publications, Acumum, OK Ltd, u MyMe, naqsu illi jonoraw l-obbligi taghhom fil-konfront tal-imsemmija socjeta` rikorrenti, liema pagament jammonta in toto ghal hamest elef mija u tmienja u sittin ewro u tmenin ewro cents (€5,860.80), u dan kif jinsab muri f`dokument anness u mmarkat **DOK B** ;*

6. *ILLI l-esponenti a nom tas-socjeta` rikorrenti ghamlet diversi attentati sabiex tipprova tighor l-ammonti dovuti lis-socjeta` rikorrenti kif ukoll tara kif se thallas lill-kredituri kollha tal-istess socjeta` pero` hija ma waslitx li tkopri d-djun kollha, avolja ppruvat, u ghalhekk qed tiddikjara li tinsab fi stat ta` falliment u li n-negozju issa ilu sospiz ghal perjodu bla waqfien ta` aktar minn erbgħa u ghoxrin (24) xahar ;*

7. *ILLI s-socjeta` rikorrenti dahlet f`diversi djun u li sa fejn taf l-esponenti id-dejn dovut mis-socjeta` huma dawk li jinsabu murija fid-dokument anness u mmarkat **DOK C**;*

8. *ILLI s-socjeta` rikorrenti ghandha wkoll djun ma` Golden Gate, Paul Mifsud u Nexus Ltd ;*

9. *ILLI l-ammont dovut lill-imsemmija soċjeta` Golden Gate jammonta għal elf ewro seba` mija sitta u tmenin ewro cents (€1,768.68);*

10. *ILLI l-ammont dovut lill-imsemmi Paul Mifsud jammonta għal elf seba` mija u erbghin ewro (€1,740.00);*

11. *ILLI l-ammont dovut lill-imsemmija soċjeta` Nexus jammonta għal hames mija għaxar ewro u tmintax-il ewro cents (€510.18);*

12. *ILLI barra l-imsemmija dejn, hemm ukoll somma ta` cirka sitt elef disa` mija għaxar ewro u erbghin ewro cents (€6,910.40) li qed tigi mitluba mill-Kummissarju tat-Taxxi Interni skont kif jirrizulta mid-dokument anness u mmarkat bhala **DOK B**;*

13. *ILLI l-esponenti thoss li għalkemm is-soċjeta` rikorrenti għandha tigbor ammont ta` flus minghand id-debituri tal-istess soċjeta` ma għandhiex assi sufficjenti biex tissodisfa id-djun ;*

Għaldaqstant in vista tal-premess, l-esponenta qed titlob bir-rispett lil din l-Onorabbli Qorti, prevja li jinghataw id-dikjarazzjonijiet u l-provvedimenti kollha opportuni, li joghghobha :-

1. *Tiddikjara u tiddeciedi li s-soċjeta` rikorrenti mhijiex f`qaghda li thallas id-djun tagħha ai termini tal-Artikolu 214(2)(a)(ii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

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

3. *Tordna x-xoljiment tas-soċjeta` rikorrenti a tenur tal-Artikolu 214(2)(a)(ii) u/jew l-Artikolu 214(2)(b)(iii) tal-Kap. 386 tal-Ligijiet ta` Malta.*

4. *Tahtar minnufih amministratur/kuratur sabiex jamministra l-affarijiet tas-soċjeta` intimata u dan taht u skont id-disposizzjonijiet kollha li din l-Onorabbli Qorti jidrilha opportun li tagħti.*

Rat il-verbal tal-udjenza tat-18 ta` Ottubru 2016 fejn, b`riferenza ghall-Art 214(2)(a)(ii) tal-Kap 386, ir-rikorrenti pprecizat illi Creative Partners Limited ma tistax thallas id-djun taghha, abbazi tal-Art 214(5)(b) tal-Kap 386.

Semghet ix-xhieda u rat il-provi l-ohra li tressqu fil-kors tal-kawza.

Rat illi l-kawza thalliet ghal-lum sabiex taghti provvedimenti.

Rat l-atti l-ohra tal-kawza.

II. Provi

1. Xiehda

Ir-rikorrenti kkonfermat il-fatti li johorgu mir-rikors promotur.

Xehdet illi wara li giet Malta fl-2006 bdiet tahdem bhala *creative director* ma` JCA Limited.

Fl-2010, bdiet tahdem ma` The Creative Partners bhala *sole trader*. Bazikament kienet tiehu xoghol bhala persuna *self employed*.

Lejn l-ahhar ta` l-2010, iltaqghet ma` Abel Rogers u Hilary Rogers ; sar ftehim bejniethom li jiffurmaw kumpannija.

Fit-22 ta` Marzu 2011, kienet fformata *limited liability company* bl-isem ta` "The Creative Partners Limited".

Id-diretturi taghha kienu hi, Abel Rogers, Hilary Rogers.

Abel Rogers kellu jiehu hsieb il-*website* u l-*online communications* flimkien ma` l-*accounts*.

Hilary Rogers kellha tiehu hsieb il-*PR* u *Social media*.

Hija kellha tiehu hsieb il-*graphic design, communications and client relations*.

It-tlieta flimkien stabbilew salarju ta` kull xahar, li kien ikopri t-taxxa u s-sigurta` soċjali.

Abel Rogers kellu jiehu hsieb ta` dan kollu.

Gara illi matul l-2011 u 2012, Hilary Rogers kellha *bipolar condition* li ma kinitx kompatibbli mal-kundizzjonijiet tax-xoghol. Kienet tahdem hafna u bla nifs ghal tlitt gimghat, imbaghad ma tidhirx ghal gimgha jew gimghatejn, u kienet tispicca tixrob hafna. Ir-relazzjoni li kellha ntemmet, u spiccat tghix fuq il-post tax-xoghol.

Qalet illi ftit taz-zmien wara, kien deciz mit-tlett diretturi li l-kumpanija ma setghetx thallas salarju ta` EUR 5,250 kull xahar (wara li titnaqqas it-taxxa) u ghalhekk naqqsu s-salarji ghal EUR 1,500 fix-xahar. Fl-14 ta` Gunju 2012, Hilary Rogers iddikjarat li kienet sejra tirrizenja minn direttur ; ghall-bidu baqghet impjegata, izda wara hames xhur marret tahdem ma` kumpanija ohra.

Komplet tixhed illi fl-istess zmien. Network Publications li kienet tinghata servizzi minghand The Creative Partners Limited irrifjutat li thallas is-somma ta` EUR 3,886.92 li kienet dovuta. Kljenta ohra s-socjeta` Acumum ukoll irrifjutat li thallas is-somma dovuta ta` EUR 906.24c. Matul l-2012, The Creative Partners Limited kellha krediti favur tagghom ta` EUR 6,000.

Komplet tghid li f'April 2012, irrizulta li Abel Rogers kien qed jikkontribwixxi ghal cirka EUR 300 fix-xahar ta` *billable work* fuq perijodu ta` sitt xhur u li kien hemm diversi debiti dovuti mill-kumpanija li ma gewx imhallsa, minkejja li Abel Rogers kien qal verbalment li kienu thallsu. Minkejja din is-sitwazzjoni, Rogers baqa` jithallas is-salarju fl-intier tieghu.

Imbaghad Settembru 2012, Mark Fothergill inhatar direttur, u l-unika azzjoni li ghamel dan, kien li vvota sabiex Abel Rogers jitnehha minn

direttur. Fil-fatt Abel Rogers irrizenja minn direttur fix-xahar ta` Jannar 2013.

Stqarret illi meta ghamlet verifika tad-dokumenti tal-kumpannija, sabet - b` mod evidenti - li Abel Rogers ma kienx ha hsieb l-accounts tal-kumpannija u kien addirittura amministra hazin il-fondi tal-kumpannija. Matul l-2013, saret analizi tal-qaghda finanzjarja prekarja tal-kumpannija u kienu determinati erba` kredituri principali taghha : id-Dipartiment tat-Taxxi Interni, Golden Gate Company Limited, Paul Mifsud u Printex Limited. Wara li Abel Rogers tnehha minn direttur, bdiet tiehu hsieb it-tmexxija tal-kumpannija, u b`hekk il-kumpannija ma nkorrietx aktar dejn.

Qalet illi The Creative Partners Limited ippruvat thallas id-djun billi nnegozjat ftehim mal-kredituri taghha ; fil-fatt intlahqu arrangamenti biex l-ammonti dovuti jithallsu ratealment kull xahar matul iz-zmien. Il-kredituri principali kienu sejrjn jithallsu flimkien l-ammont ta` EUR 858 fix-xahar. Peress illi hi ma kenitx cittadina Maltija, ma setghetx tinghata *credit terms, overdraft facilities* jew self bankarju iehor ; dan il-fattur kompli jitfa lura l-qaghda tal-kumpannija.

Kompliet tghid illi matul l-2014 u l-2015, baqghu jsiru l-hlasijiet lill-kredituri, u l-paga fix-xahar nizlet ghal anqas minn EUR 1,000. Ippruvat tesplora possibilitajiet ohra sabiex tiggenera salarju ahjar ghaliha tramite *media work* addizzjonali, izda l-klijenti baqghu jhallsu tard, anke sa sitt xhur wara, waqt li l-kredituri baqghu jinsistu ghal hlas.

Sostniet li fil-bidu tal-2016 is-sahha ta` missierha marret ghall-aghar u ma setghetx tkompli thallas is-somma ta` EUR 858 fix-xahar lill-kredituri. Ippruvat taghmel arrangamenti godda dwar it-termini tal-pagament, u sahsitra offriet xi servizzi li Joinwell (li kienet il-proprjetarja ta` Printex)

Minhabba l-qaghda hazina tal-kumpannija, ma kellhiex alternattiva hlief li taghti bidu ghall-procediment tal-lum. Il-kumpannija ghalqet b`madwar EUR 5,000 f`invoices mhux imhallsa favur taghha, u b`EUR 10,000 dejn dovut lill-kredituri taghha.

L-Awditur Clint Camilleri xehed illi huwa ma hax hsieb l-*audits* tal-kumpannija The Creative Partners Limited ghaliex kien talab *release* mill-awditur ta` qablu Paul Mifsud izda dan irrifjuta li jaghti tali *release*. Ipprezenta email li baghat Paul Mifsud.

Qal illi in vista tal-posizzjoni li ha Paul Mifsud, huwa ma ghamilx *audits*.

Spjega li fl-email tieghu, Paul Mifsud ghamel referenza ghal *financial statements* li kien ipprepara ghall-2012 ; in partikolari ghaz-zewg notamenti li hemm a fol 63 tal-process.

Qal illi mill-*management accounts* li ghaddiet Trudy Kerr, irrizulta li l-qaghda finanzjarja tas-socjeta xejn ma hija felici. Hemm zbilanc fis-sens li jekk il-kumpannija jirnexxielha tigbor li dak li ghnaha tiehu minghand id-debituri taghha, xorta wahda mhux ser ikollha bizzejjed fondi biex thallas lill- kredituri taghha.

Sostna li ghalkemm il-kumpannija kienet qeghda taghmel negozju kienet qeghda taghmel dan bit-telf. Ghalhekk is-socjeta` sejra tkompli bin-negozju taghha, il-qaghda kienet se ssir aktar gravi peress li kienu ser jizdiedu l-kredituri. Sabiex is-sitwazzjoni tmur ghall-ahjar u n-negozju taghha jkun sostenibbli, kellha bzonn taghmel profitt u mhux telf.

Qal ukoll li ma kienx *cash injections* minghand l-azzjonisti biex il-kumpannija tkompli tahdem bi profitt.

Fisser illi huwa jafx x`kienet il-qaghda tal-kumpannija qabel sari l-procediment tal-lum. Lanqas ma seta` jghid jekk kienux saru l-*accounts* tal-2016. Kien jaf fic-cert li Paul Mifsud ma kienx thallas tas-servizzi tieghu.

2. Dokumenti

Kienu prezentati bhala prova dawn id-dokumenti :-

memorandum u *articles of association* ta` “The Creative Partners Limited” (Dok A a fol 3 et seq) ;

lista ta` debituri ta` “The Creative Partners Limited” (Dok B a fol 18 sa fol 30) ;

lista ta` kredituri ta` “The Creative Partners Limited” (Dok C a fol 31 sa fol 35) ;

abridged financial statements ta' The Creative Partners Limited li dahlu fir-Registru tal-Kumpanniji fis-26 ta' Ottubru 2012 u li jkopru z-zmien bejn it-22 ta' Marzu 2011 u l-31 ta' Dicembru 2011 (Dok TK2 a fol 49 sa fol 58) ;

abridged financial statements tal-istess kumpannija li dahlu ghand fir-Registru tal-Kumpanniji fit-28 ta' Novembru 2013 u li jkopru z-zmien sal-31 ta' Dicembru 2012 (Dok TK3 a fol 59 sa fol 68) ;

draft financial statements tal-istess kumpannija ghas-sena li ghalqet fil-31 ta' Dicembru 2013 (Dok TK 4 a fol 69 sa fol 78) ; u

draft financial statements tal-istess kumpannija ghas-sena li ghalqet fil-31 ta' Dicembru 2014 (Dok TK 5 a fol 79 sa fol 88).

III. Locus standi

Qabel tqis il-mertu tal-istanza odjerna, il-Qorti trid taccerta ruhha li r-rikorrenti ghandha *locus standi* skont il-ligi.

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-laqgha generali jew mill-bord tad-diretturi taghha jew minn xi detentur ta' obbligazzjoni, 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 r-rikorrenti pprezentat l-azzjoni ghan-nom u in rappresentanza ta' The Creative Partners Limited.

Mill-*memorandum* jirrizulta li Trudy Kerr hija direttur (fol 7). Kienet fil-bidu u hekk jidher li ghadha sal-lum

Skont il-klawsola 7 tal-*memorandum* jista` jkun hemm *not less than one director and not more than three directors*.

Skont il-klawsola 9 tal-*memorandum*, ir-rappreżentanza legali u gudizzjarja tal-kumpannija *shall be vested in any one of the directors*.

Billi r-rikorrenti hija direttur, u qeghda tibbaza t-talbiet taghha skont l-Art 214(2)(a)(ii), l-Art 214(5)(b) u l-Art 214(2)(b)(iii) tal-Kap 386, ghandha *locus standi* sabiex tippromwovi l-azzjoni tal-lum.

IV. L-Art 214(2)(a)(ii) tal-Kap 386

Skont l-**Art 214(2)(a)(ii) tal-Kap 386**, *kumpannija tista` xxolji u tkun stralcjata mill-qorti ... jekk ... il-kumpannija ma tkunx tista` thallas id-djun taghha*.

Il-Qorti tirrileva illi meta tfassal il-mudell ghal-ligi taghna l-gdida dwar il-kumpanniji, il-qafas maghzul 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 fl-1995 saret il-ligi taghna l-gdida dwar il-kumpanniji li hadet post il-Commercial Partnerships Ordinance 1962, id-disposizzjonijiet li jolqtu x-xoljiment u l-istralc kienu integrati fl-Att XXV tal-1995, illum Kap 386.

Fil-ligi taghna, li *kumpannija ma tkunx tista` thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess. Infatti fl-Art 214(5) il-ligi tistabilixxi liema huma c-cirkostanzi fejn kumpannija titqies li ma tkunx tista` thallas id-djun taghha ghall-finijiet tal-Art 214(2)(a)(ii). Ghalhekk l-Art 214(2)(a)(ii) ma jistax jinqara minghajr ma ssir riferenza ghall-Art 214(5).

V. L-Art 214(5) tal-Kap 386

Tnejn huma c-cirkostanzi definiti mil-ligi meta kumpannija ghandha titqies li ma tista` thallas id-djun taghha –

(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 ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi 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.*

Ghall-kaz tal-lum, id-disposizzjoni rilevanti hija l-Art 214(5)(b).

VI. L-Art 214(5)(b) tal-Kap 386

Fil-ligi Ingliza, l-insolvenza (jew li kumpannija ma tistax thallas id-djun taghha) hija trattata b`mod aktar wiesgha milli kif titqies fil-ligi taghna fejn l-istat ta` insolvenza ghandu tifsira aktar ristretta.

Dwar il-posizzjoni fil-ligi Ingliza, fit-Tmien Edizzjoni (2012) ta` l-ktieb **Boyle & Birds` Company Law** (pubblikat minn Jordans) pg 859 jinghad –

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”) ...

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 mhijex 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` MHIJIEK IDENTIKA ghal dik tal-ligi Ingliza.

Id-divergenza bejn iz-zewg ligijiet hija li filwaqt li fil-kaz taghna l-kriterju huwa fis-sens illi *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 broad 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.

Dwar l-Art 214(5)(b) din il-Qorti diversament presjeduta (**PA/GV**) fid-decizjoni 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-kumpannija tbiegh l-assets taghha biex forsi xi darba jithallsu.

VII. L-Art 214(2)(b)(iii) tal-Kap 386

Id-disposizzjoni tghid hekk :

*“kumpannija **ghandha** (enfasi ta` din il-Qorti) tkun xolta bil-qorti jekk ... il-qorti tkun tal-fehma li hemm ragunijiet gravi bizzejjed li jiggustifikaw ix-xoljiment u konsegwentement l-istralc tal-kumpannija”.*

Fil-provvediment li tat din il-Qorti fil-11 ta` Dicembru 2014 fil-kawza **“Charles Grech & Company Limited (C2473) v. Firm Camilleri Bros. (Marketing) Company Limited et”** inghad hekk dwar l-Art 214(2)(b)(iii) tal-Kap 386 :-

“Is-sinjifikat tad-disposizzjoni huwa car. Tithalla diskrezzjoni wiesa` lill-Qorti sabiex tistabilixxi hi jekk fil-fehma taghha jirrizultawx fatti u cirkostanzi “gravi bizzejjed” li jwassluha sabiex taghmel id-dikjarazzjoni ta` xoljiment u stralc. Fil-Kap 386 ma hemmx tifsira ta` “ragunijiet gravi”. Il-Qorti ghalhekk ma ghandha tiskarta xejn. M`ghandhiex tillimita l-esercizzju tad-diskrezzjoni taghha ghal fatti jew cirkostanzi li jkunu sehhew sad-data tal-presentata tar-rikors izda ghandha taghti piz ghal kull ma jigri anke wara sa ma tigi biex taghti d-decizzjoni taghha.

Fl-Art 122 tal-Insolvency Act 1986 tar-Renju Unit, hemm elenku tac-cirkostanzi fejn kumpannija tista` tigi xjolta u stralcjata mill-Qorti. Disposizzjoni identika ghal taghna fl-Art 214(2)(b)(iii) tal-Kap 386 ma hemmx fl-Insolvency Act 1986. Il-wahda li tqarreb l-aktar lejha hija l-Art 122(1)(g) li jghid : ‘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 xxolji u tistralcja meta fil-fehma taghha ikun hemm ragunijiet gravi bizzejjed, waqt li fil-ligi Ingliza, il-kriterju li fuqu l-Qorti trid tibni l-fehma taghha huwa dak talgustizzja u l-ekwita`. U l-istrettezza tad-disposizzjoni taghna taghmel hafna sens anke ghaliex jekk il-Qorti tesprimi l-fehma li hemm ragunijiet gravi hija obbligata tordna x-xoljiment u l-istralc tal-kumpannija ; hemm m`ghandhiex aktar diskrezzjoni.

Dan premiss, 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`inhu just and equitable ghall-fini ta` winding up tghin biex tiftah tieqa lill-Qrati taghna ghall-interpretazzjoni ta` x`inhuma ragunijiet gravi bizzejjed. Kull kaz ghandu l-istorja tieghu u ghalhekk il-Qorti trid tibni l-fehma taghha fuq il-fatti u cirkostanzi ta` l-kaz.”

Fl-istess sens kienu l-provvedimenti li tat din il-Qorti fil-15 ta` Dicembru 2015 fil-kawza “**Maltese Cross Financial Services Limited v. X**”, fil-15 ta` Settembru 2014 fil-kawza “**Ivan Calleja v. M.I.M.S. Supplies Limited**” u fis-17 ta` Gunju 2014 fil-kawza “**Tina Petersone et v. Norvik (Malta) SICAV p.l.c. et.**”

Fil-kawza “**Maurice Camilleri et noe vs Frederick Frendo noe et noe**” deciza minn din il-Qorti (**PA/DS**) fl-4 ta` Lulju 2003 kien inghad illi :-

“... l-artikolu ... jhalli diskrezzjoni wiesgha fidejn il-Qorti biex tiddetermina jekk jezistux cirkostanzi li jistghu jitqiesu ‘gravi bizzejjed’ biex iwassluha li tiddeciedi favur ix-xoljiment ta` kumpannija. X`jikkostitwixxu ‘ragunijiet gravi’ l-ligi ma tghidilniex u ghalhekk dan irid jigi determinat mill-Qorti a bazi ta` l-apprezzament li hi taghmel tal-fatti kollha tal-kaz.”

VIII. Risultanzi

Mill-provi jirrizultaw dawn il-fatti :-

Fit-22 ta` Marzu 2011, kienet iffurmata The Creative Partners Limited. Skont ir-rikorrenti, id-diretturi u l-azzjonisti kienu tlieta : hi, Hilary Rogers u Abel Rogers.

Fis-17 ta` Awissu 2012, Hilary Rogers irrizenjat minn direttur, minn *company secretary* u minn *legal and judicial representative* (ara l-Form K a fol 12).

Fl-istess data, sar trasferiment ta` l-ishma li kienu ta` Hilary Rogers ghal fuq Trudy Kerr u Abel Rogers (ara l-Form T a fol 15).

Fis-26 ta` Dicembru 2012, Abel Rogers irrizenja mill-karigi tieghu (ara l-Form K a fol 13).

Fl-istess data sar trasferiment ta` l-ishma li kellu Abel Rogers favur Trudy Kerr (ara fol 16).

F`April 2015 kien hemm bdil fil-*memorandum* u fl-*articles of association* (ara d-dokument a fol 17).

Il-*memorandum* u l-*articles of association* attwali huwa esebit a fol 3 et seq.

Abbazi tal-*memorandum* u l-*articles of association* jirrizulta illi :-

a) Illi l-ghan principali ta` l-kumpannija huwa “*to provide services in marketing, communication, PR, design, media, events, business strategy and consultancy, to individuals, partnerships, corporations, limited and unlimited companies and all other associations including charitable societies and clubs.*”

b) Illi l-kumpannija hija *a private exempt single member company*.

c) Illi l-*Authorized share capital* huwa ta` EUR 1,200 diviz fi 1,200 sehem ordinarju ta` EUR 1 kull sehem-il wiehed.

d) Illi l-*Issued Share Capital* huwa ta` EUR 1,200 diviz fi 1,200 sehem ordinarju ta` EUR 1 kull sehem. Thallas 25% tal-*issued share capital*.

e) Illi l-ishma huma kollha registrati fl-isem ta` Trudy Kerr,

Skont jekk tkompli bl-attivitaghha bi profitt, il-kumpannija tehtieg *working capital* li jrid jigi jew minn *a fresh injection of capital* mill-azzjonista li pero` ma kienx hemm, jew minn flus provenjenti minn facilitajiet bankarji lokali ma setghux jinkisbu billi Trudy Kerr mhijiex cittadina ta` Malta (kliem l-istess rikorrenti).

Il-Qorti tghid ukoll li ghandha bzonn ta` bdil fil-*business plan* taghha fis-sens illi ssib mod kif tiddiversifika l-prodott taghha. Ma jaghmel ebda sens li tmexxi attivitaghha kummercjali biex tiffund il-flus u mqar tiggbor il-krediti. Din il-kostatazzjoni tal-ahhar saret ukoll mill-Awditur Clint Camilleri fid-deposizzjoni tieghu.

Jidher illi Trudy Kerr ittenta ssalva r-reputazzjoni taghha mal-kredituri bil-hlas ta` pagamenti mensili bit-tama li l-kumpannija tirpilja pero` jidher li t-tentattiv taghha kien insuccess. Ix-xejra negattiva tal-kumpannija kompliet tant li kienet kostretta tirrikorri ghar-rinnegozjar tar-*repayment terms* talba li kienet respinta bil-konsegwenza li kellha twaqqaf il-hlasijiet.

Milli rrizulta, ma jidhirx li hemm assi bizzejjed sabiex jaghmlu tajjeb ghad-dejn.

Il-kumpannija tiehu minghand : Network Publications - EUR 3,886.92c fol 25 sa fol 30) ; Acumum - EUR 906.24c (fol 22 sa fol 24) ; Ok Ltd - EUR 115.64c (fol 21) ; u MyMe - EUR 260 (Vide Dok fol 19 u 20). B`kollox : EUR 5,168.80c (Dok B a fol 18).

Ghandha taghti : Dipartiment tat-Taxxi Interni - EUR 6,910.40c circa ; Golden Gate - EUR 1,768.68 (fol 32 u 330 ; Paul Mifsud - EUR 1,740 (fol 35) u Nexus - EUR 510.18c. B`kollox : EUR 10,929.26c (ara fol 31).

Mid-dokumenti tal-kontabilita` jirrizulta –

a) Illi ghas-sena li ghalqet 31 ta` Dicembru 2011 (ara Dok TK 2 a fol 49 et seq) il-kumpannija ghamlet telf ta` EUR 1,714. Fid-data tal-*financial statements* , il-*liabilities* kienu jaqbzu l-assi bi EUR 1,414. Intqal li “*the financial statements have been prepared on a going concern basis which assumes that the company will continue in operational existence for the foreseeable future. The validity of this assumption depends on the company’s shareholders continuing their financial support by providing adequate and continued financial support to the company to ensure that the company will be able to meet all of its liabilities as and when they fall due ... The directors believe that it is appropriate for the financial statements to be prepared on a going concern basis because he has received undertakings form the shareholders to continue to financially support the company which will help to ensure that it will be able to meet all of its liabilities as and when they fall due.*”

b) Illi ghas-sena li ghalqet 31 ta` Dicembru 2012 (ara Dok KT3 a fol 59 et seq) il-kumpannija kellha *current liabilities* ta` EUR 32,990 mentri fl-2011, kellha *current liabilities* ta` EUR 28,569 (fol 68). Kien hemm profit ta` EUR 2,408 (fol 65) biex b`hekk il-bilanc fl-ahhar tar-*retained earnings* kien ta` EUR 694 (fol 65). Fil-pagna 3 ta` dan id-dokument (a fol 63), hemm imnizzel illi “*Included in trade and other payables is an amount of EUR 4,657*

owed to the company by third parties. The only direct confirmation obtained did not agree with the balance due in the company's accounts whereas on the remaining amounts due, no confirmation was obtained. Thus, the evidence available to me in respect of title and valuation was limited. There were no other alternative audit procedures that I could adopt to assure myself as to the accuracy, completeness, existence and valuation of the payable amount as at the statement of financial position date. The system of control over expenditure transactions on which I sought to rely is such that I could only perform restricted audit procedures to obtain reasonable assurance on the completeness, existence and accuracy of the amounts recorded."

c) Illi ghas-sena li ghalqet 31 ta` Dicembru 2013 (ara Dok KT4) gie pprezentat *draft annual report* fejn jinghad illi kien hemm *accumulated losses amounting to EUR 8,913*" li kienu ser jitmexxew ghas-sena finanzjarja ta` wara (fol 70 u fol 73). Il-*current liabilities* kien EUR 42,949 (fol 73 u fol 77). Is-*shareholder's loan* telghet ghal EUR 12,726 meta jitqies illi fl-2012, kienet EUR 4,568. Hemm notament li *shareholder's loan is unsecured, interest free and has no fixed date for repayment*.

d) Illi ghas-sena li ghalqet 31 ta` Dicembru 2014 (ara Dok KT 5) id-*draft annual report* ighid illi kien hemm *accumulated losses* ta` EUR 12,669 (fol 83) *current liabilities* ta` EUR 47,081 (fol 83 u fol 87) u *shareholder's loan* ta` EUR 21,588.

Wara li hasbet fit-tul, u hadet kont ta` kollox, il-Qorti ssib illi s-socjeta` in kwistjoni mhijiex f`qaghda li thallas id-djun taghha kif previst mill-Art 214(5)(b) tal-Kap 386.

Li sejra tara l-qorti huwa jekk hemmx lok għax-xoljiment u l-istralc taghha skont l-Art 214(2)(a)(ii) tal-Kap 386.

Il-Qorti taghmel riferenza ghal Pg 913-914 ta` Boyle & Birds` Company Law – 8th Edition – 2011 :

... winding up is a collective procedure for the benefit of creditors generally and it does not benefit specific creditors individually (F. Oditah "Winding Up Recalcitrant Debtors" 1995 LMCLQ 107) ...

Fil-kaz tal-lum, il-qorti sabet li l-uniku azzjonista u direttur tas-socjeta` litteralment qatghet qalbha li tista` ddawwar il-prospetti tas-socjeta` lejn il-posittiv. Mhijiex sejra tkun il-qorti li ttawwal aktar

l-agunija tas-socjeta` bla bzonn meta ma hemmx rieda li t-tmexxija taghha taqdef kontra l-kurrent bil-ghan li taqleb ghal pagna gdida. Ghal din il-qorti, ix-xoljiment u l-istralc taghha huma fatt inevitabbli.

Billi l-qorti qeghda tezercita d-diskrezzjoni taghha u qeghda tordna x-xoljiment u l-istralc tal-intimata abbazi tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386, ma tarax il-htiega li tmur ghal analizi ta` jekk l-Art 214(2)(b)(iii) tal-Kap 386 huwiex ippruvat ukoll fil-kaz tal-lum.

Provvediment

Ghar-ragunijiet kollha premessi, il-Qorti qeghda tipprovdi dwar it-talbiet tar-rikorrenti billi :-

Riferibbilment ghall-ewwel talba, tiddikjara illi fir-rigward tal-kumpannija The Creative Partners Limited (C-52346) jirrizultaw ippruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(ii) u tal-Art 214(5)(b) tal-Kap 386 tal-Ligijiet ta` Malta.

Tastjeni milli tiehu konjizzjoni ulterjuri tat-tieni talba.

Riferibbilment ghat-tielet talba, tordna x-xoljiment tal-kumpannija The Creative Partners Limited (C-52346) kif previst mill-Art 214(2)(a)(ii) tal-Kap 386 b`effett mis-26 ta` Lulju 2016, kif irid l-Art 223(1) tal-Kap 386.

Tordna wkoll l-istralc taghha.

Riferibbilment ukoll ghat-tielet talba, tahtar lir-Ricevitur Ufficjali bhala stralcjarju bis-setghat u bid-dmirijiet kollha li huma stabbiliti fil-Kap 386 tal-Ligijiet ta` Malta.

Bla hsara ghall-generalita` tas-setghat u tad-dmirijiet, tordna lill-istralcjarju sabiex -

- a) jaghmel verifika ta` l-assi u tad-djun tas-socjeta` de qua.

- b) jagħmel il-gradwazzjoni tad-djun.
- c) jiehu taht il-kustodja jew kontroll tieghu l-assi tal-kumpannija de qua.
- d) jagħmel jew jiddefendi kull azzjoni jew procediment legali iehor fl-isem u fl-interess tal-kumpannija de qua.
- e) jagħmel rapport bil-miktub lill-Qorti dwar il-qaghda tal-intimata mhux aktar tard mit-30 ta` Mejju 2017.

Tordna li l-ispejjez ta` dan il-procediment, inkluzi d-drittijiet u l-ispejjez tal-istralcjarju, għandhom jithallsu mir-rikorrent Trudy Kerr de proprio u mill-kumpannija The Creative Partners Limited (C-52346) *in solidum* bejniethom, u dan bl-applikazzjoni tal-Art 236(2) tal-Kap 386.

Thalli l-istralc għall-udjenza ta` nhar it-Tlieta 13 ta` Gunju 2017 fid-9.00 a.m.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur