



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 30 ta` Marzu 2017

Kawza Nru. 14
Rikors Nru. 450/16 JZM

Alessandro (ID 232775M)
u Anouschka (ID 556275M)
konjugi Farrugia

kontra

2A Co. Ltd (C44598)

Il-Qorti :

I. Preliminari

Rat ir-rikors prezentat fis-6 ta` Gunju 2016 li jaqra hekk :-

*Illi r-rikorrenti huma azzjonisti fis-socjeta` intimata kif jirrizulta mill-Memorandum and Articles of Association tal-istess kumpanija, hawn taht anness u mmarkat **Dok. AF1** ;*

Illi kif se jirrizulta waqt is-smigh ta` dawn il-proceduri, is-socjeta` intimata li ghandha n-numru ta` registrazzjoni C28365 tinsab ghaddejja minn diffikultajiet finanzjarji konsiderevoli, tant li ma tistax tlahhaq mal-hlasijiet tad-djun taghha ;

Illi hemm ragunijiet gravi u serji bizzejjed li jiggustifikaw ix-xoljiment u l-konsegwenti stralc tal-kumpanija ;

Illi kwindi, a tenur tal-Artikolu 218(1) tal-Att tal-1995 tal-Kumpaniji, r-rikorrenti ghandhom id-dritt jitolbu ix-xoljiment u l-istralc tal-kumpanija intimata ghar-raguni kontemplata fl-Artikolu 214(2)(a)(ii) u/jew fl-Artikolu 214(b)(iii) tal-Att tal-1995 dwar Kumpaniji (Kap. 386 tal-Ligijiet ta` Malta) inter alia, peress li l-kumpanija ma tistax thallas id-djun taghha ;

*Illi din it-talba qiegħda ssir da parti ta` Alessandro Farrugia u Anouschka Farrugia bis-sahha ta` resoluzzjoni ai termini tal-Klawsola 9 tal-Artikoli ta` Assocjazzjoni tal-istess kumpanija, kif jirrizulta mid-dokument hawn anness u mmarkat **DOK. AF2** ;*

Ghaldaqstant u in vista tal-premess, l-esponenti umilment jitolbu li dina l-Onorabbli Qorti, prevja li jinghataw id-dikjarazzjonijiet u l-provedimenti kollha opportuni joghghobha :-

1. *Tiddikjara u tiddeciedi li jezistu c-cirkostanzi kkontemplati ai termini tal-Artikolu 214(2)(a)(ii) u/jew tal-Artikolu 214(2)(b)(iii) tal-Kap. 386 tal-Ligijiet ta` Malta, sabiex tghaddi biex tordna x-xoljiment u l-istralc konsegwenzjali tal-kumpanija 2A Co. Ltd.*

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

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

Bl-ispejjez kontra s-socjeta` intimata u b`riserva ghal kwalsiasi azzjoni spettanti lir-rikorrenti.

Rat il-lista tax-xhieda u l-elenku ta` dokumenti.

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

Rat id-digrieti li tat fil-kors tal-procediment fejn kien permess illi kredituri tas-socjeta` 2A Co Ltd jaghmlu sottomissjonijiet skont l-Art 218(6) tal-Kap 386.

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

Rat l-atti l-ohra tal-kawza.

II. Provi

Lorna Magro xehdet illi bdiet tahdem ma` 2A Co Limited ("**2A**") Marzu 2012. Kienet skrivana u kienet taghmel xoghol generali.

Minn Novembru 2012 saret *accounts clerk*. Kienet tipprepara l-pagi. Inoltre kienet iddahhal fis-*sage* l-invoices, is-sales, u l-infieq tal-kumpannija. Wara kienet tghaddi kollox lill-accountants.

Kompliet tghid illi minn mindu dahal John Mercieca fil-kumpannija bdiet tara mgieba stramba.

Osservat illi kienet qeghda tohrog cheques li ma kienux qeghdin imorru ghand il-klijenti.

Kienet tlesti c-cheques, u tghaddihom lil John Mercieca ghall-firem izda dawn kienu jibqghu fl-ufficju.

Innotat illi numru ta` suppliers kienu qeghdin ighidu li ma kienux qeghdin jithallsu.

Gara li John Mercieca spicca mill-kumpanija.

Intant bdew jinstabu c-cheques li semmiet aktar kmieni.

Xehdet li Mercieca kien jghidilha sabiex taqbez xi fatturi u ma thallasx xahar shih.

Kien hemm ftehim mas-supplier Miller li dan jithallas somma kull gimgha anke jekk ma jittiehdx xoghol izda Mercieca ma kienx jibghat ic-cekkijiet li hija kienet tlesti.

Dan gara ukoll fir-rigward ta` Francis Busuttil, Nestle, Camel u ohrajn.

Mercieca kien jghid lill-accountant li hija kienet qeghda taghmel ammont kbir ta` zbalji.

Mercieca kien jikkonvinci lill-accountants li kellu figuri ohra sabiex jikkonvincihom jaghmlu aggestament tal-figuri u jinghalaq il-perijodu ta` VAT u tas-sena finanzjarja.

Tixhed illi kienet tghid lil Mercieca li kien qed isir aktar xiri milli bejgh u li min-naha tal-hwienet, dawn kienu qed jaqbzu l-budget.

Qalet illi Mercieca kien jghidilha biex ma tghid xejn dwar dan ma` Alessandro Farrugia.

Sostniet li Mercieca kien jghid li Alessandro Farrugia kien bniedem supperserv, li jmaqdar kollox, li ma jhallihx kwiet.

Komplet tixhed illi meta kien jigi l-ahhar tax-xahar hija kienet tipprepara c-cekkijiet tal-pagi u tal-NI li kienet tithallas mill-kumpannija.

Madanakollu Mercieca beda jittardja li jhallas fil-hin ; u wara lanqas beda jibghat ic-cekkijiet, kif kien jattira l-attenzjoni l-accountant Alex Camilleri.

Insistiet li hija kienet tlesti c-cekkijiet ta` Go Plc u ARMS kull nofs ix-xahar izda dawn bdew ma jintbaghtux.

Qalet illi meta Enemalta kienet taqta` s-servizz tad-dawl ta` hanut, John Mercieca kien ihallas il-kont ta` dak il-hanut partikolari biss. Biex jinghataw lura s-servizz, kien ikollhom ihallsu multa kull darba. Sostniet li Mercieca ma kienx ighid il-verita` lid-direttur l-iehor Alessandro Farrugia li l-kont ma jkunx thallas ghaliex ma jkunx intbaghat ; fil-verita` is-servizz kien jinqata` ghaliex kien hemm hafna hlas dovuti b` lura.

Stqarret illi kienu jsiru diversi ftehim ma` l-ARMS biex l-ammont jithallas bin-nifs izda mbaghad nonostante l-ftehim Mercieca kien joqghod jitlob lilha sabiex titlob lill-ARMS itawwlu z-zmien ghall-hlas. Fl-ahhar tax-xahar Alessandro Farrugia kien jitlobha *aged creditors report* biex jara x` bilanci hemm x` jithallsu lill-fornituri. Farrugia qatt ma kien jara l-valur reali ghaliex kien jkun hemm cekkijiet li ma kinux jintbaghtu. Meta ghaddiet ir-rapport lil Farrugia b`ammonti li ma kinux jidhru kif kien iridhom jidhru Mercieca, dan kien iegerger hafna u jispicca jzommha tard ix-xoghol.

Fissret illi hija kellha struzzjonijiet minn Mercieca sabiex meta suppliers jitolbu biex jimlew il-kuntratti, hija dejjem taghmilhom fuq Alessandro Farrugia u qatt ma tnizzel xejn fuq ismu

Komplet tghid illi fl-2013, is-suppliers kienu kontinwament icemplu biex jithallsu. Mercieca kien dejjem jinsisti biex ma jiltaqax maghhom ; lanqas ha passi biex jipprotegi lilha meta s-suppliers jaqbd u maghha.

Qalet illi fix-xahar ta` Jannar 2014 ghamlet l-istocktakes u harget rapport bl-ammonti maghluqa b`sistema ta` sales bil-figuri tal-valur li kien ikun hemm go kull hanut ; kienu ndikati wkoll il-prodotti fi kwantitajiet. Mercieca kien jilmenta u jghid illi daw k il-figuri ma kinux tajbin biex

jghaddihom lil Farrugia. Hija nfurmat lil Mercieca li ma kenitx sejra tkompli taghmel l-istocktake.

Mercieca kien jilmenta li kienet qeghda tiehu l-izbalji. Lejn l-ahhar tal-2015, mill-figuri li hargu l-accountants, irrizulta li kien sar xiri bit-triplu minn kemm kien limitat fl-overdraft. Ghaliha pero` dan ma setax ikun ghaliex il-limitu tal-overdraft fir-realta` qatt ma nqabez. Bdiet tissuspetta li hargu dawk il-figuri, ghaliex kien hemm cekkijiet li kienu jkunu lesti ghall-firma, izda qatt ma jintbaghtu.

Xehdet illi hija tkellmet mal-accountant Noel Muscat, avzatu li Mercieca kien qed izomm ic-cekkijiet milli jintbaghtu, u li ma kienx qed isir hlas ta` NI. F`Jannar 2016, indunat li kien sar trasferiment ta` EUR 10,000 minn savings account ghall-overdraft. Il-procedura interna taghhom kienet illi meta jkun se jsir hekk, Farrugia kellu jawtorizza t-trasferiment. Meta tkellmet ma` Mercieca dan qalilha li Farrugia ma kienx jaf pero` kien ser jiehu hsieb ta` kollox hu. Fi Frar 2016, kien hemm xi cekkijiet li ma ssarrfux ; tghid illi Mercieca geghlha tigdeb biex tghid illi cheque favur Josef Grech ma kienx issarraff ghaliex kienet qeghdet il-flus go kont zbaljat.

Kompliet tixhed illi s-sitwazzjoni kompliet tmur ghall-aghar meta fi Frar u Marzu 2016, kien hemm cekkijiet ta` certu suppliers li baqghu ma ntbaghtux lilhom. Kien hemm okkazjoni minnhom fejn kellha tiehu hija stess c-cheque lis-supplier koncernat.

Qalet illi meta Mercieca rrizenja, huwa gharrat lill-HR consultant tal-kumpannija mhux lil Farrugia. Taf li wara r-rizenja ta` Mercieca, ir-rikorrenti ltaqghu mas-suppliers li qalulhom li meta ma kinux jircievu l-hlasijiet, Mercieca kien iwahhal fiha. Lir-rikorrent hija qaltlu kull ma ghaddiet minnu. Kien biss Marzu 2016 li Farrugia gab l-istatements mill-bank u nhasad bil-figuri.

Ir-rikorrent xehed illi John Mercieca kien jiehu hsieb l-operat tal-kumpannija E-Marketing. Mercieca kien beda jilmenta mill-imgieba ta` Andre Chetcuti li kien wiehed mid-diretturi. In segwitu kellmu accounts clerk u qallu li kien hemm profitti tajbin izda li Chetcuti kien qed jimmanipula l-finanzi. Ghalhekk beda jiddubita minn Chetcuti. Wara xi zmien, Chetcuti telaq u ha kollox f`idejn John Mercieca. L-ishma ta` Chetcuti daru fuq il-mara tieghu Anoushka Farrugia, l-isem tal-kumpannija indibel ghal 2A Co Limited u John Mercieca sar direttur.

Kompla jixhed illi skont Mercieca billi Chetcuti ma kienx jipprezenta l-invoices kollha li kienet tircievi l-kumpanija, kienet waqghet lura fil-pagamenti b`madwar EUR 100,000 ; ghalhekk talab lil HSBC Bank Malta plc biex jaghti facilita` bankarja ghal dak l-ammont. Ghamel tajjeb b`cash guarantee minn kumpanija ohra tieghu 26th Frame Limited sabiex l-arretrati jithallsu kollha f`salt ghaliex ma riedx li jkollu kontijiet b`lura.

Tkellem ma` Mercieca fit-tul dwar il-vizjoni li kellu u kif ried li jsiru l-affarjiet. Mercieca kien b` mod regolari jipprepara u jipprezenta projections li dejjem urew profitt komdu. Fil-projections kienu jitnaqqsu l-figuri tal-bejgh potenzjali u jizdiedu l-ispejjez. Is-suppliers kienu jittrattaw ma` Mercieca direttament ; rarament kienu jikkomunikaw mieghu.

Sahaq illi kien dejjem jikkonsulta ma` Mercieca ghal kwalunkwe decizjoni li jiehu. Kien Mercieca li kien izomm kuntatt dirett u kontinwu mal-accountants, u kien jiffirma r-returns tal-VAT. Milli kien ighid Mercieca, il-kumpanija kienet sejra tajjeb. Ma kellux ghalfejn ikollu dubji dwar li kien ighid Mercieca. Kien anke kecca mill-impieg lil certu Martin Frendo peress li Mercieca kien ilmenta dwaru.

Sostna li d-ditta Spiteri Bailey & Co hadet hsieb l-awditjar tas-snin 2011 u 2012. Kien hemm audit minnhom, l-awditur Conrad Borg irrimarka waqt laqgha li kien jidhirlu li l-figura tax-xiri kif mahruga mis-sistema tas-sage kienet gholja. Mercieca kien ipprotesta u qal li hu konvint mill-figuri u li jista` jkun li fis-sage kien hemm double entres jew zbalji. Mercieca qal li kien qed jara l-istock baxx u li ried joqghod attent ghal dak li kien qed jinghad. Mercieca kien insista mieghu li dak li semmew l-awdituri ma kienx korrett u li l-kumpanija kienet kbira wisq ghall-operat tagghom. Kien ghalhekk li d-ditta ta` l-awdituri rega` nbidlet ghal dik ta` Noel Muscat, li kien jiehu hsieb l-accounts meta l-kumpanija kien jisimha E-Marketing.

Xehed li fl-2013 sar refurbishing tal-hwienet kollha. Mercieca kien favur. Mercieca talab ukoll ir-rizenja ta` Mel Meilak peress li Mercieca hass li ma setax jibqa` jahdem maghha. Kien iddecieda wkoll li l-bank tal-kumpanija jkun l-HSBC minflok il-BOV. Wara li Mercieca ressaq numru ta` *projections* lil HSBC, dan il-bank accetta li jaghti facilitajiet li kienu diga` jinghataw minn BOV, b`zieda ta` self addizzjonali ta` EUR 150,000 sabiex jinfethu zewg hwienet ohra.

Qal illi l-kumpanija kellha tliet kontijiet bankarji – overdraft ta` EUR 100,000 mal-HSBC ; current account mal-BOV fejn kienu jidhlu t-transazzjoni tal-EPOS mill-hwienet ; u savings account mal-HSBC li fih kienu jidhlu t-transazzjonijiet tal-EPOS mill-hwienet. Huwa ta struzzjonijiet sabiex il-current account mal-BOV u s-savings account mal-HSBC ma jintmessewx minghajr l-awtorita` espressa ta` l-azzjonisti.

Stqarr illi f'April 2015, Mercieca talbu jiffirma cheque pagabbli lil Maypole Bakery Ltd mill-current account tal-BOV. Huwa kien accetta li jsir dan f`zewg okkazzjonijiet ohra precedenti, izda mat-tielet talba, huwa irrifjuta. Meta talab lil Mercieca sabiex johrog ic-cheque mill-overdraft, dan sostna li l-bank ma setax. Accetta r-raguni moghtija u rega` ffirmata bil-patt li bhal fiz-zewg okkazzjonijiet ta` qabel, il-flus imorru lura mnejn kienu hargu. Meta saret talba ghar-raba` darba li jinhareg cheque lil Maypole Bakery mill-current account, huwa rrifjuta. Wara li Mercieca baqa` jinsisti, u wara li accerta ruhu li l-flus fl-okkazzjonijiet l-ohra kienu marru lura kif kien qal hu, allura hemm accetta li johrog ic-cheque.

Qal illi meta beda jinvestiga dak li effettivament kien qed jigri, huwa sab li l-ammonti li kien jghaddilu Mercieca ma kinux jaqblu mal-bilanci attwali li hemm il-bank. Irrizulta li Mercieca ma kienx qed jaghmel it-trasferimenti lura fil-current account tal-BOV. Qal li l-account updates li kien jghaddilu kienu kollha b`figuri foloz u oghla milli fil-fatt kienu. L-ingann ta` Mercieca fil-falsifikazzjoni u bdil intenzjonali ta` bilanci tal-kontijiet tal-bank johrog car min-notamenti li ghamel huwa stess u li nstabu fl-iskrivanija tieghu. Ma` genb kull figura fil-parentesi kien jikteb il-bilanc propju tal-kont, u kien jikkalkola x` bilanci sejjer jaghti lilu.

Kompla spjega illi meta Mejju 2015 kien qed jiddiskuti ma` Mercieca sabiex bil-kapital tal-kumpanija jsir investment fil-proprjeta` taghha, Mercieca kien qallu li l-ammonti ma kienx dahhalhom lura ghaliex kien hallas lis-suppliers. Huwa pprotesta ma` Mercieca dwar dan u beda jwajhal fi Lorna Magro ; allega li din kienet qeghda tarmi l-invoices fost ghadd ta` skuzi ohra. Mercieca mexa kontra l-ordni tieghu. Talab lil Mercieca sabiex jahdem repayment plan sabiex l-ammont komplessiv ta` EUR 89,044.39 jidhol lura fil-kont minn fejn hareg. Meta staqsa jekk kinux qed isiru transfers lura skont ir-repayment plan, Mercieca kien ikkonferma li hekk kien qed isir.

Fil-fatt il-verita` kienet illi Mercieca qatt ma dahhal lura l-flus fil-kont skont ir-repayment plan. Ftit tax-xhur wara l-accountants Noel Muscat & Co ghaddeu l-ewwel draft ta` l-accounts ghall-2014 ; irrizulta li kien hemm telf ta` EUR 79,049. Meta rrinfaccja lil Mercieca b`dan, Mercieca wiegeb illi l-figuri kienu hziena u li t-tahwid kollu kien tort ta` Lorna Magro billi ma kinitx qed tnaqqas mis-sistema l-ammonti li kienu diga` thallsu. Ried illi Lorna Magro titkecca. Hu pero` ried jivverifika maghha. Baqa` jissikka lil Mercieca biex ikun jaf jekk kienx ghamel analizi ta` l-accounts, peress li kien ferm inkwetat minhabba li kellu d-dar qeghda sservi bhala garanzija. Mercieca baqa` jinsisti li l-ammonti kienu skorretti.

Kompla jghid illi talab lista tal-ammonti tal-kredituri sal-ahhar tal-2014. Mercieca tah lista mhux kompleta ; qallu li l-bqija tal-lista kienu ammonti zghar. Meta ezamina l-lista, sab li fis-sage tal-kumpannija, kien hemm indikati EUR 695,526.18 mentri fil-lista kien hemm EUR 402,765.44. Bi qbil mal-accountants, wara d-diskrepanzi li sab Mercieca, l-accounts tas-sena 2014 ghalqu bi profitt ta` EUR 34,117.

Kompla jghid li fuq suggeriment ta` Mercieca, ir-reconciliations bdew isiru minnu minflok minn Alex Camilleri impjegat ta` Noel Muscat li kien ha hafna zbalji. Nonostante kollox, baqa` jafda lil Mercieca.

Stqarr illi Novembru 2015, il-kumpannija ghamlet konvenju biex tbiegh il-proprjeta` li kellha Pembroke. Fit-13 ta` Jannar 2016, Christina Cutajar mill-ufficju ta` Noel Muscat & Co baghtet il-management accounts sat-30 ta` Settembru 2015 ; kienu juru telf ta` EUR 143,444. Mercieca assikurah li kien se jsiru l-aggiustamenti necessarji. Noel Muscat avzah li kienu nstabu ammont ta` *unpresented cheques*.

Meta talab lil Mercieca lista tal-kredituri ghall-fini ta` verifika, Mercieca nsista mieghu li kien ahjar li jaghmilhom hu. In segwitu rcieva minghand Pyramid Garage li kien hemm ammont *overdue* ta` EUR 2869.86c. Mercieca sostna li ma kienux intbaghtu l-invoices. Dahal fl-email ta` Mercieca u mad-deleted items, sab l-invoices kollha ta` Pyramid Garage. Meta rrinfaccja lil Mercieca b`dan, cahad li qatt ra l-emails u hedded li jirrizenja.

Fil-15 ta` April 2016, ircieva telefonata minghand Farsons plc fejn kien infurmat illi ftehim li kien ghamel Mercieca ma kienx qed jigi onorat.

Meta ltaqa` ma` Mercieca sar jaf illi l-hlasijiet tas-sigurta` socjali ghall-2015 u 2016 ma sarux.

Ghadda aktar zmien, ghamel kuntat mieghu l-konsulent tax-xoghjol Gejtu Vella li nfirmah li Mercieca ma kienx ser jidhol aktar ghax-xoghol.

Kompla jghid illi huwa ma kellux internet banking keys ; ghalhekk mar il-bank u sab illi l-HSBC overdraft kien in` excess ta` EUR 18,924.79 ; il-BOV current account kellu EUR 1002.83 ; u l-HSBC Savings kellu EUR 230.83. Kien evidenti li Mercieca kien battal il-kontijiet. Meta tkellem mal-ufficjali tal-bank, kien infurmat illi Mercieca kien qalilhom li kien sar zball u hargu hafna cekkijiet. Hu u martu kienu kostretti jaghmlu cash injection ta` EUR 100,000 mill-kumpannija taghhom l-ohra sabiex ikunu jistghu joperaw l-overdraft. Innota li kienu aru transfers mhux awtorizzati mill-kont tal-HSBC Savings. Mill-BOV sab illi matul Jannar 2016 u qabel kienu qed isiru transfers kontinwi mhux awtorizzati ta` EUR 5000 fil-kont tal-overdraft tal-HSBC mill-current account, sakemm dan spicca kwazi fix-xejn.

Qal illi fl-ufficju taghhom dahlu kwantita` ta` telefonati minn kredituri biex jithallsu.

Intant Mercieca dahal l-ufficju bil-lejl, gabar xi affarijiet, imposta c-cwieviet tal-karozza u baghat sms lil Conrad Borg biex jinfurmah b`dan. Imbaghad zamm il-mobile mitfi. Fl-ufficju ta` Mercieca nstabu numru ta` cekkijiet li kienu nhargu mill-kumpannija izda li zammhom ghandu. Cheque minnhom intestat lil General Soft Drinks baqa` qatt ma ntbaghat.

Spicca ghamel kwerela lit-Taqsima tal-Pulizija Kontra r-Reati Ekonomici wara li minn laqgha li kellu ma` Mercieca ma wasal imkien.

Kompla jixhed illi hu u martu bdew jiltaqghu mal-fornituri sabiex jaraw kif jistghu jindirizzaw il-problemi kollha li sabu.

Intant b`ittra legali li baghat Mercieca qal illi dahhal EUR 16,000 fil-kont tal-kumpannija.

Xehed li Mejju 2016, sar il-bejgh tal-propjeta` ta` Pembroke.

Qal illi mir-rikavat tal-bejgh thallas is-self kollu li kellha l-kumpannija ma` HSBC u l-bilanc dahal fl-overdraft account li minnu komplew jithallsu xi kredituri. Minn stocktake li ttiehed, irrizulta li kien hemm stock ta` EUR 50,000 biss. Fl-24 ta` Mejju 2016, sar ftehim ma` Maypole Bakery li ha l-hanut ta` San Gwann. Frizoll hadu l-apparat tal-fridge u freezer mill-hanut ta` Birkirkara ghaliex parti mill-apparat ma kienx imhallas. Irrizulta li lanqas kien hemm ftehim ma` Alf Mizzi & Sons li jkollhom freezer taghhom sabiex ikollhom ix-xoghol taghhom esklussivament fiha. Ghalaq il-hanut tal-Mosta u l-istock mar fil-hwienet l-ohra.

Kompla jghid li fil-31 ta` Mejju 2016, Gelati Mezzan ipprezentat mandat ta` qbid fuq il-hanut tal-Mosta u ngarr it-taghmir kollu bil-konsegwenza li kellu jieqaf jopera dak il-hanut. Mill-istatements, sab li d-dejn ma` diversi kredituri kien ilahhaq bjen il-EUR 1.1 – EUR 1.2 miljun. Ma kien hemm l-ebda mod ta` kif il-kumpanija setghet thallas dawk id-djun fic-cirkostanzi li sabet ruhha fihom. Ghalhekk ghalaq l-ahhar hanut tas-Swieqi biex b`hekk il-kumpannija ma setghetx tibqa` topera. Kellu jaghti lura c-cwieviet tal-hwienet lis-sidien peress li l-proprijeta` ma kinitx tieghu. Sabiex jinqata` parti sostanzjali mill-kont pendenti, ma` Maypole sar ftehim ta` hlas bil-konsenja tal-istock li kien hemm, u bit-twellija tal-hanut tal-Mosta.

Intant bdew jaslu xita ta` mandati, ittri ufficjali u kawzi. Sabiex setghu jhallsu d-djun li kienu personalment garanti ghalihom, hu u martu kellhom ipoggu r-residenza taghhom ghall-bejgh. Bl-ghajnuna finanzjarja ta` missieru, huwa hallas il-paga basi ta` 33 impjegat li kienu nghataw is-sensja. Kulhadd accetta l-pagament hlief Clyde Camilleri li ghamel kwerele kriminali kontra tieghu u kontra l-mara tieghu. Fid-9 ta` Mejju 2016, huwa kiteb lid-Dipartiment tat-Taxxi halli jistabilixxi l-ammont dovut. Fil-kamra ta` Mercieca sab ftehim li kien ghamel mad-Dipartiment sabiex jithallsu arretrati ta` EUR 44,266.16. Qal illi l-kontijiet tal-kumpannija kif ukoll dawk personali kienu kolpiti b`mandati ta` sekwestru. Il-kumpannija waqfet topera fl-ahhar gimgha ta` Mejju 2016.

Stqarr illi hu u martu ghamlu kawza civili kontra Mercieca, u qeghdin jistennew mill-pulizija li tiehu passi kriminali kontra l-istess Mercieca. Billi qatt ma rcevev rizenja ufficjali minghandu, fis-7 ta` Mejju 2016 ipprezentaw Form K lir-Registru tal-Kumpanniji.

P.L. Eunice Grech Fiorini – ghar-Registratur tal-Qorti – ipprezentat elenku tal-kawzi pendenti kontra 2A Co Ltd. L-unika kawza deciza kienet dik fl-ismijiet “Borg and Aquilina Limited vs 2A Co. Ltd.”. Ipprezentat lista tal-mandati, tal-ittri ufficjali u tal-ittri ufficjali skont l-Art 166A tal-Kap 12. Bosta mill-ittri ufficjali mhux notifikati. L-unici notifikati kienu dawk bin-nru 1268 ta` 2016 u 1349 tal-2016.

Sharonne Camilleri minn HSBC Bank Malta plc ipprezentat *sanction letter* tad-19 ta` Awissu 2015, *sanction letter* ohra datata 22 ta` Gunju 2016, *statement* dwar l-*overdraft* u erba` *loan accounts*. Qalet illi l-*loans* thallsu kollha minn bejgh ta` proprjeta`, u baqa` bilanc fl-*overdraft* li huwa kristalizzat fi ftehim li hemm mal-kumpanija sabiex jithallas minn bejgh ta` proprjeta` ohra. L-*overdraft* huwa ta` EUR 96,265. Il-bejgh tal-proprjeta` l-ohra li tappartjeni lid-diretturi personalment ghandu jkopri dan l-ammont. Ikkonfermat illi l-kumpanija ma kenitx qeghda topera. Li kieku ma kienx ghall-intervent dirett ta` l-azzjonisti li sborzaw il-flus minn taghhom, kien ikun hemm diffikulta kbira sabiex jithallas id-dejn tal-kumpanija.

Sharonne Cachia minn Bank of Valletta plc ipprezentat id-dokumenti relatati mal-*credit card loan* u *sanction letter*. Fissret illi l-kumpanija ghandha *credit card loan*. Ghad hemm dovut l-ammont ta` EUR 6,128.

Noel Muscat xehed li huwa accountant. Kien jipprepara l-accounts ta` 2A Co Ltd. Imbaghad dawn kienu jmorru ghall-audit ta` Silvio Muscat. L-inkariku tieghu gie minghand Alessandro Farrugia. John Mercieca kien il-persuna fit-tmexxija, izda Farrugia dejjem tah x` jifhem li kollox kien taht kontroll. L-aktar li kellu x`jaqsam hu direttament kien ma` Mercieca. Saru l-audited accounts tal-2013 u l-2014, kif ukoll il-management accounts tal-2015.

Qal illi meta beda l-inkarigu tieghu, sab li kien hemm sensiela shiha ta` bank reconciliations li ma kinux saru. Osserva wkoll movimenti strambi. Dawn kienu trattati ma` Mercieca izda dan kien bniedem konvincenti li jimpressjonak u qatt ma wera l-icken dubju jew wera lilu nnifsu bhala mfixkel. Mercieca kien dejjem jghid li kellu kollox taht kontroll. X`hin beda jsib li l-affarijiet ma kienux daqstant tajbin, beda jinvolvi lil Farrugia.

Qal illi d-ditta tieghu kellha d-dubji taghha dwar il-kontijiet tas-socjeta`. Mercieca kien jaghmel minn kollox biex juri li huma ma kellhomx ragun. Huwa talab lil kumpannija biex tiffirma dokument li tikkonferma li l-figuri taghha kienu korretti, dan fl-2014.

Farrugia kien jafda lil Mercieca. Kien jittratta d-dubji tieghu ma` Mercieca izda kien jikkonvincieh li kollox kien sew. Christina Cutajar li kienet tahdem mad-ditta tieghu ma kinitx konvinta mill-workings. Lorna Magro gieli kellmithom izda huma kellhom struzzjonijiet minghand Mercieca u Farrugia biex lilha ma jkellmuhiex.

Ikkonferma li huwa kreditur tal-kumpannija ghaliex id-drittijiet tieghu ma thallsux. Mercieca kien ighidlu li baghat ic-cheque tal-hlas izda dan qatt ma wasal.

Spjega li l-qaghda ta` 2A Co Ltd ma kienet tajba xejn. Iktar ma beda jghaddi zmien, aktar bdiet taggrava ruhha. Ikkonferma li Dok AF 50 a fol 244 huma l-*management accounts*.

L-Awditur Silvio Muscat xehed li huwa qatt ma kellew lil Alessandro Farrugia. Huwa kien biss jiccekkja x-xoghol tal-accountant Noel Muscat u jiffirma. Skont l-audit tal-31 ta` Dicembru 2014, jirrizulta li l-kumpannija ghamlet profitt dik is-sena wara t-taxxa ta` EUR 17,000 waqt li t-telf akkumulati kien ta` EUR 454,162. Il-profitt mar kollu biex jaqta` mit-telf tas-snin ta` qabel. Il-profitt tas-sena ta` qabel kien EUR 50,000. Ghalhekk fl-2014 naqas il-profitt kontra dejn ta` aktar minn EUR 450,000.

Kompla jghid illi l-kumpannija jidher li ghandha retained earnings ta` EUR 454,000, reserves ta` EUR 119,000 u share capital ta` EUR 150,000. Ghalhekk kien hemm *negative balance* ta` EUR 185,092. Ma setghetx tifti bil-bejgh tal-assi. Spjega li ma saret l-ebda riserva biex tista` ssalva. L-accounts saru *on a going concern basis*. Sar hekk ghaliex kienet qed taghmel profitt. Allura kien hemm potenzjal li forsi taqbad ladarba kien hemm profitt. Fl-2015 huwa ma ghamilt minhabba kwistjonijiet li nqalghu mad-diretturi.

III. **Locus standi**

Qabel tqis il-mertu tal-istanza odjerna, il-Qorti trid taccerta ruhha li r-rikorrenti ghandhom *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-laqgħa generali jew mill-bord tad-diretturi tagħha 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.

Mill-memorandum u l-articles of association tas-socjeta` (ara fol 6 et seq) jirrizulta li r-rikorrenti huma azzjonisti u diretturi tagħha. Kienet prezentata rizzoluzzjoni straordinarja ta` l-azzjonisti kollha fejn kien maqbul illi 2A Co Ltd tigi xjolta u stralcjata mill-qorti (Dok AF2 a fol 29). Inoltre kienet prezentata rizzoluzzjoni tal-bord tad-diretturi fl-istess sens (ara fol 48). Ladarba t-talbiet huma msejsa fuq l-Art 214(2)(a)(ii) u l-Art 214(2)(b)(iii) tal-Kap 386 ir-rikorrenti ghandhom *locus standi* sabiex jippromwovu l-azzjoni.

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

L-ewwel disposizzjoni li fuqha r-rikorrenti qeghdin imexxu bl-azzjoni tagħhom hija l-Art 214(2)(a)(ii).

Id-disposizzjoni tghid illi kumpannija tista' xxolji u tkun stralcjata mill-qorti ... jekk il-kumpannija ma tkunx tista' thallas id-djun tagħha.

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 ntegrati 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 tistax 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.*

Fil-kaz tal-lum, ir-rikorrenti ma kienux specifici dwar fuq liema miz-zewg paragrafi li jaghmlu s-subinciz (5) kienu qeghdin isostnu li l-kumpannija ma tistax thallas id-djun taghha. Ghalhekk il-qorti sejra tittrattahom it-tnejn.

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

Diga' ghidna illi li *kumpannija ma tkunx tista' thallas id-djun taghha* ghandu **sinjifikat preciz u definit** mil-ligi stess.

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”) ...

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 specificat **bil-preciz** x` m`ghandhiex taghmel kumpannija debitrice 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*.

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 ...

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

Fit-test bl-Ingiliz 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 Ingliża 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` 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 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.

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.

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

Ir-rikorrenti qeghdin jikkontendu wkoll illi l-kumpannija ghandha tigi xjolta u stralcjata abbazi tal-Art 214(2)(b)(iii).

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 jkun 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 Ingliزي biex ighidu x`nhu just and equitable ghall-fini ta` winding up tghin biex tiftah tieqa lill-Qrati taghna ghall-interpretazzjoni ta` x`hinuma 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 kien il-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 f`idejn 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.”

IX. Risultanzi

A. Fil-kuntest tal-Art 214(2)(a)(ii)

1. U ghall-fini tal-Art 215(4)(a)

Ghall-fini ta` din id-disposizzjoni, trid issir il-prova illi d-dejn dovut baqa` ma thallasx ghal kollox jew in parte wara erbgha u ghoxrin (24) gimgha mill-ezekuzzjoni ta` titolu ezeuttiv kontra l-kumpannija b`xi wiehed mill-atti ezeuttivi msemmijin fl-Art 273 tal-Kap 12.

Fil-kaz tal-lum saret il-prova ta` lista tal-kawzi li saru kontra 2A Co Ltd minn diversi kredituri (ara fol 422).

Madanakollu jirrizulta illi wiehed biss mill-procedimenti kien determinat u cioe` dak bin-nru 151/2016 fl-ismijiet *Borg & Aquilina Limited vs 2A Co Ltd et.* Jidher illi dan kien jirrigwarda digriet dwar revoka ta` mandat.

Kienet prezentata lista ta` mandati li hargu kontra l-istess socjeta` a fol 423.

Ma jirrizultax jekk dawk kienux mandati kawtelatorji jew ezekuttivi.

Fl-atti ma kienux esebiti kopji ta` l-mandati – kienu x`kienu.

Kienet ipprezentata lista ta` l-ittri ufficjali ai termini ta` l-Art 166A tal-Kap 12 (ara fol 425 – 426).

Minnhom tnejn biss jirrizulta li kienu ghadhom pendent ghan-notifika peress li l-bqija gew kellhom riferta negattiva.

Fil-kors tal-kawza, ma tressqux aktar provi – naha jew ohra - dwar dawn l-ittri ufficjali.

Ghal din il-Qorti, ghalkemm giet fornita b`lista tal-maggor parti tal-kredituri li ghandha s-socjeta` intimata, ir-rekwizit tal-prova rikjesta minn din id-disposizzjoni ma gietx milhuqa.

Tenut kont tal-assjem il-Qorti m`ghandhiex il-prova ta` dak li jirrikjedi l-Art 214(5)(a) sabiex tkun stabbilita l-insolvenza ghall-fini tal-Art 214(2)(a)(ii).

2. U ghall-fini tal-Art 215(4)(b)

Skont l-*audited accounts* ghas-sena li ghalqet fil-31 ta` Dicembru 2014 (fol 795 sa fol 808 u fol 851 sa fol 885), hekk imfissra mill-awditur Silvio Muscat, is-socjeta` intimata kellha telf akkumulat ta` EUR 454,162. Il-profitt li ghamlet fl-2014 wara t-taxxa kien jammonta ghal EUR 17,000. Il-profitt fis-sena ta` qabel, ossija fl-2013, naqas ukoll peress li fl-2013, kien hemm profitt ta` EUR 50,000.

Irrizulta li s-socjeta` kellha *retained earnings* ta` EUR 454,000. Kull ma kellha kienu *reserves* ta` EUR 119,000 u *share capital* ta` EUR 150,000. Dan ifisser illi ghall-2014 is-socjeta` kellha *negative balance* ta` madwar EUR 185,000.

Il-kontijiet saru *on a going concern basis* peress li minkejja dak it-telf kollu, is-socjeta` kienet ghal dak l-ahhar zmien qeghda ghamlet profitt u ghalhekk kien hemm possibilita` li forsi tqum lura sabiex taghmel attivita` kummercjali li thalli l-qliegħ.

Ma jirrizultax illi dan sehh.

Kienu esebiti zewg *balance sheets* li juru s-sitwazzjoni tas-socjeta` sat-30 ta` Settembru 2015 (ara fol 820, fol 844, fol 821 u fol 849).

Jidhru ammonti simili ghalkemm b`differenzi minhabba li ma kienx hemm qbil dwar liema informazzjoni kienet dik korretta in vista tas-sitwazzjoni li tpoggiet fiha s-socjeta` allegatament minhabba l-agir tad-direttur John Mercieca.

Irrizulta illi bhala total ta` assi kien hemm EUR 1,005,021 jew EUR 1,001,109 b` dan li *non-current assets* kienu jammontaw ghal EUR 484,047 jew EUR 484,776 u *current assets* kienu jammontaw ghal EUR 520,974 jew EUR 516,334. *Retained earnings* kienu EUR 682,145 jew EUR 599,822 mentri *share capital* baqa` EUR 150,000, u *reserve* ta` EUR 119,070 biex b` hekk it-*total equity* kien EUR 413,075 jew EUR 330,752. Il-*current liabilities* kienu jammontaw ghal EUR 1,261,399 jew ghal EUR 1,175,165 mentri n-*non-current liabilities* kien EUR 156,697.

Sabiex ikun hemm *balance sheet insolvency*, il-*liabilities (contingent u prospective)* iridu jaqbzu l-assi.

L-istampa li tirrizulta mill-*financial statements* hija dik ta` socjeta` li waslet at a *point of no return*.

Hija socjeta` li kellha tieqaf topera minhabba li kienet superata fl-operat taghha mid-djun.

Kwalunkwe qligh li seta` kien hemm kien qed imur mhuxghall-fini ta` investment kapitali (intiz biex ihalli qligh) jew ghal investment produttiv ta` qligh izda xejn aktar milli sabiex itaffi jew jaghmel tajjeb ghat-telf akkumulat.

Minghajr attivita` sostenibbli u li trendi qligh tajjeb, is-socjeta` mhijiex fil-qaghda li thallas id-dejn qawwi li ghandha, tenut kont illi sprovvista kif inhi minn assi taghha. Il-*liabilities* taghha huma evidenti fil-*balance sheet*.

Il-Qorti ssib li saret il-prova sal-grad rikjest mil-ligi ta` dak previst fl-Art 215(b) tal-Kap 386.

B. Fil-kuntest tal-Art 214(2)(b)(iii)

Tenut kont tal-fatti u cirkostanzi ta` dan il-kaz, il-Qorti sejra tqis hemm prova sal-grad rikjest mil-ligi ta` dak previst fl-Art 214(2)(b)(iii) tal-Kap 386.

Il-kwadru ta` fatti ppruvati xejn ma huwa felici ghas-socjeta` ntimata.

2A Co Ltd spiccat f`sitwazzjoni finanzjarja prekarja prinicipalment minhabba dissest fiducjarju intern fis-socjeta` li kien gravi tant li kellu jitwaqqaf in-negozju b`bosta kredituri jibqghu minghajr il-hlas tal-krediti taghhom u bil-kumpannija tibqa` sprovvista minn assi biex bihom forsi thallas id-dejn jew parti minnu.

Ir-rikorrenti ghamlu sforz biex isalvaw il-kumpannija. Saru ftehim ma` xi kredituri kif jirrizulta mill-iskritturi ezebiti bhala Dok AF 80 a fol 360 sa 363, Dok AF81 a fol 364 ; Dok AF 82 a fol 365 sa 366 u Dok AF 84 a fol 370

sa 371. Ir-rikorrenti waslu f'akkordju ma` HSBC Bank Malta plc bil-bejgh ta` assi personali taghha. Minkejja ghamlu li setghu il-voragni kienet kbira wisq biex timtela` tenut kont tal-potenzjal ta` tkattir tan-negozju fi sfond ta` dejn qawwi. Kienet esebiti l-listi ta` kredituri tas-socjeta` intimata bl-ammonti dovuti (fol 367 sa 369).

Saru ammont sostanzjali ta` provi dwar kif u ghaliex is-socjeta` intimata waslet ghal din is-sitwazzjoni finanzarja tant gravi. Mgharrbla dawn il-provi, din il-Qorti tesprimi t-thassib serju taghha dwar il-kondotta tad-diretturi fit-tmexxija tas-socjeta`. Huwa preokkupanti kif socjeta` jkollha bord ta` diretturi li pero` effettivament titmexxa minn direttur wiehed kwazi kwazi b`mod esklussiv u cioe` John Mercieca fuq il-pretest li dan kien igawdi l-fiducja shiha tar-rikorrenti. Fin-negozju l-fiducja hija vitali. Fl-istess waqt pero` - fiducja ghamja hafna drabi jkollha effett negattiv kuntrarju kif gara fil-kaz tal-lum bl-akkuzi ta` tmexxija hazin u mgieba frawdolenti diretti mir-rikorrenti lejn John Mercieca. Il-Qorti ma semghetx il-verzjoni tal-fatti skont John Mercieca. Ghalhekk il-kondotta tieghu – tajba jew hazina – jista` jkun li tkun trid tigi mistharrga f`sede ohra. Fi kwalunkwe kaz jibqa` l-fatt illi anke fin-negozju trid tithaddem sistema ta` *checks and balances* ghaliex din tippromwovi t-trasparenza u l-kontabilita`. Ghar-rikorrenti kien bil-wisq tard li ntebhu li n-negozju kien sejjer hazin, u ghad-detriment taghhom u tas-socjeta` stess.

Fid-decizjoni ta` **Loch v. John Blackwood Ltd** : [1924] AC 783, 93 LJPC 257, [1924] B&CR 209, 131 LT 719, 68 SJ 735, 40 TLR 732 kien inghad hekk :-

*“It is undoubtedly true that at the foundation of applications for winding up, on the “just and equitable” rule, there must lie a justifiable lack of confidence in the conduct and management of the company’s affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company’s business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. **On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company’s affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.**”* (enfasi ta` din il-Qorti)

Il-Qorti tqis illi ladarba saret il-prova tar-rekwiziti tal-Art 214(2)(b)(iii) tal-Kap 386, sejra tghaddi ghax-xoljiment u ghall-istralc ta` 2A Co Ltd, billi l-ordni huwa tassattiv jekk jirrizultaw ippruvati c-cirkostanzi previsti fl-Art 214(2)(b)(iii). Ladarba hekk se jsir, mhux il-kaz ghal din il-Qorti li tezercita diskrezzjoni skont l-Art 214(2)(a)(ii) anke jekk irrizulta ppruvat illi s-socjeta` ma tistax thallas id-djun taghha.

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 2A Co. Ltd. (C-44598) jirrizultaw ippruvati sal-grad rikjest mil-ligi r-rekwiziti tal-Art 214(2)(a)(ii), tal-Art 214(5)(b) u tal-Art 214(2)(b)(iii) tal-Kap 386 tal-Ligijiet ta` Malta.

Riferibbilment ghat-tieni talba, tordna x-xoljiment u l-istralc tal-kumpannija 2A Co. Ltd. (C-44598) b`effett mil-lum skont l-ewwel proviso ta` l-Art 223(1) tal-Kap 386.

Riferibbilment 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 tal-kumpannija de qua;
- b) jaghmel il-gradwazzjoni tad-djun;
- c) jiehu taht il-kustodja jew kontroll tieghu l-assi tal-kumpannija de qua;
- d) jaghmel 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-qagħda 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-rikorrenti Alessandro u Anouschka konjugi Farrugia, u mill-kumpannija 2A Co. Ltd. (C-44598) *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