



QORTI CIVILI PRIM`AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 13 ta` Lulju 2017

Kawza Nru. 4
Rik. Gur. Nru. 798/15 JZM

Gaetano Bonnici ID No.
970050(M) u martu Maryanne
Bonnici ID No. 671352(M)

kontra

Age Concern Company
Limited (C-18974)

Il-Qorti :

I. Preliminari

Rat ir-rikors guramentat ipprezentat fl-20 ta` Awwissu 2015 li jaqra
hekk :-

1. Illi l-esponenti huma azzjonisti fil-kumpanija intimata fl-ammont ta` hamsin fil-mija (50%) bejniethom liema sehem l-esponenti huma marbutin li jbieghu lill-azzjonisti l-ohrajn is-sehem kollu taghhom sas-sebgha u ghoxrin ta` Awwissu 2015 skont kif inhu miftiehem fl-anness dokument Dok "A";

2. Illi ghas-sena finanzjarja 2013/2014 li bdiet f`Settembru 2013 u gie konkluz f`Settembru 2014 il-kumpanija ghamlet qliegħ sostanzjali u dan skont l-anness rapport tal-awditur Dok "B";

3. Illi minkejja d-diversi interpellanzi mill-esponenti lill-azzjonisti l-ohra kif ukoll lill-kumpanija intimata l-istess azzjonisti l-ohra qegħdin jirrifjutaw sabiex jigi ddikjarat dividend halli l-esponenti jiehu sehem mill-profitti mis-sena finanzjarja 2013/2014;

4. Illi l-esponenti se u qiegħed isofri pregudizzju serju jekk ma jihux dak li huwa d-dritt tieghu skont il-ligi ;

5. Illi sabiex wiehed jara l-ingann tal-intimat azzjonista sarraf cheque tal-kumpanija li kien dovut sabiex ihallas il-pagi tal-haddiema u ghamlu f`ismu personali u sarraf l-ammont ta` mitt elf ewro (€100,000) (ara Dok C) ad insaputa tal-esponenti u bi pregudizzju kbir u għad-detriment tal-aspetti finanzjarji tal-esponenti kemm bhala direttur kif ukoll bhala azzjonista.

Għaldaqstant għar-ragunijiet fuq imsemmija u għal dawk illi se jingiebu waqt it-trattazzjoni ta` dan ir-rikors, ir-rikorrenti jitlob li dina l-Onorabbli Qorti :-

1. Tiddikjara li s-socjeta` intimata Age Concern Company Limited għamlet profitti fis-sena finanzjarja 2013/2014 u tikkwantifika ossia tillikwida tali ammont.

2. Tordna li dawn il-profitti kollha jigu konvertiti f`dividends għall-kumpanija Age Concern Company Limited favur l-azzjonisti fi kwoti ndaqs bejniethom skont l-ammont likwidat bhala profitti.

3. *Tordna d-distribuzzjoni ta` dawn id-dividends favur l-azzjonisti fi kwoti ndaqs bejniethom.*

Bl-ispejjez kontra s-socjeta` intimata li hija ingunta ghas-subizzjoni u bl-ispejjez kontra s-socjeta` intimata inkluz dik tal-ittra ufficjali datata 16 ta` Lulju 2015 u tal-mandat ta` sekwestru numru 1235/2015.

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

Rat ir-risposta guramentata pprezentata fl-24 ta` Settembru 2015 li taqra hekk :-

Dikjarazzjoni

1. *Illi l-atturi kienu azzjonisti fis-socjeta` esponenti fejn kellhom mitejn u hamsin (250) sehem ordinarju ta` valur nominali ta` €2.329373-il wiehed ;*

2. *Illi fit-23 ta` Awwissu 2008, l-atturi flimkien mal-azzjonisti l-ohra tal-kumpannija esponenti ftehm li peress li ftehim li kien hemm bejniethom dwar il-gestjoni ta` ospizju tal-anzjani fil-Mosta kien se jigi terminat nhar is-26 ta` Awwissu 2015, liema gestjoni kienet tikkostitwixxi l-attivita` principali tas-socjeta` esponenti, l-azzjonisti l-ohra kellhom jakkwistaw l-ishma mizmuma mill-atturi odjerni versu l-prezz bonarjament pattwit ta` €58,250. Kopja tal-ftehim relattiv giet ipprezentata mill-atturi mar-rikors guramentat taghhom (Dok. A) ;*

3. *Illi dan il-ftehim gie onorat tant li fis-26 ta` Awwissu 2015 – jigifieri sitt ijiem wara l-prezentata tal-kawza odjerna – l-atturi aljenaw l-ishma taghhom favur Barbara Coates, Odette Falzon Federoff, Fleur Balzan u Alfred Balzan u dan kif jirrizulta min-notifiki ta` trasferiment ta` ishma hawn annessi u mmarkati “Dok. AC1” sa “Dok. AC4” ;*

4. *Illi qabel ma sar dan it-trasferiment tal-ishma, thejjew l-audited accounts tal-kumpannija esponenti ghall-ahhar sena finanzjarja. Ghal dan il-ghan l-ewwel thejja rapport fil-format muri flimkien mar-rikors guramentat*

(Dok. B) liema rapport gie ffirmat biss mid-Direttur Alfred Balzan fil-waqt li l-attur naqas milli jiffirma. Sussegwentement, sabiex l-attur jaccetta li jiffirma saret verzjoni ohra fejn intqal li dwar id-dividends kien hemm disputa. Kopja tar-rapport annwali qed tigi hawn annessa u mmarkata "Dok. AC5";

5. *Illi fil-verita`, l-intendiment bejn l-azzjonisti kien li s-somma ta` €58,250 miftiehma bejniethom fl-2008 kellha tkun "in full and final settlement of all claims and pretences which the said sellers or their heirs at law, may have against the Owners/Guarantors or their heirs at law";*

6. *Illi tant kien dan l-intendiment li l-hlas tal-ammont kien garantit mill-azzjonisti konjugi Balzan u dan ghaliex meta sar dak il-ftehim, il-qaghda tas-socjeta` esponenti qajla kienet felici ;*

7. *Illi hekk kif wasal iz-zmien li l-ftehim tal-2008 jimmatura, l-atturi odjerni hasbu li jaraw biex jistghu johorgu sabiex javvanzaw ftit iehor;*

8. *Illi ghal kull buon fini qed jigu pprezentati wkoll kopja tal-Memorandum u l-Istatut tal-Kumpannija esponenti kif kien qabel ma sar it-trasferiment tal-ishma mill-atturi odjerni lill-azzjonisti godda, liema kopja qed tigi mmarkata "Dok. AC6" kif ukoll kopja tal-Memorandum u l-Istatut tal-kumpannija esponenti kif gie emendat ricentement wara li sar it-trasferiment tal-ishma mill-atturi odjerni lill-azzjonisti godda, liema kopja qed tigi mmarkata "Dok. AC7";*

9. *Illi ghad li l-Istatut tas-socjeta` esponenti huwa sajjem fejn imiss mad-dikjarazzjoni ta` dividends, japplikaw id-dispozizzjonijiet tal-Ewwel Skeda tal-Att dwar il-Kumpaniji (Kap.386) in kwantu dawn mhux talli mhumiex eskluzi talli huma inkorporati b`riferenza fl-Istatut tas-socjeta` esponenti u kwindi japplikaw is-segwenti regoli :-*

73. *"The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors."*

74. *"The directors may from time to time pay to the members such interim dividends as appear to the directors to be justified by the profits of the company."*

75. *“The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for any purpose, to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments, other than shares of the company, as the directors may from time to time think fit. The directors may also without placing the same to reserve carry forward any profits which they may think prudent not to divide.”*

76. *“Subject to the rights of persons, if any, entitled to shares with special rights as to dividend, all dividends shall be declared and paid according to the amounts paid or credited as paid on the shares in respect whereof the dividend is paid, but no amount paid or credited as paid on a share in advance of calls shall be treated for the purposes of this regulation as paid on the share. All dividends shall be apportioned and paid proportionately to the amounts paid or credited as paid on the shares during any portion or portions of the period in respect of which the dividend is paid; but if any share is issued on terms providing that it shall rank for dividend as from a particular date such share shall rank for dividend accordingly.”*

77. *“The directors may deduct from any dividend payable to any member all sums of money, if any, presently payable by him to the company on account of calls or otherwise in relation to the shares of the company.”*

78. *“No dividend shall bear interest against the company.”*

10. *Illi jsegwi ghalhekk li jmiss lis-socjeta` esponenti permezz tad-Diretturi taghha li tirrakkomanda l-hlas ta` xi dividend, xi haga li fil-kaz odjern ma saritx ;*

11. *Illi inoltre kwalsiasi jedd li seta` kellhom l-atturi llum ghadda ghand Barbara Coates, Odette Falzon Federoff, Fleur Balzan u Alfred Balzan stante l-Artiklu 9 tal-Istatut tal-Kumpannija esponenti jipprovidi espressament illi :-*

“A person or persons becoming entitled to a share by way of transfer inter vivos or causa mortis shall be entitled to the same dividend or other

advantages to which he or they would be entitled if he or they were registered holder or holders of the share, except that he or they shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to the meetings of the company.”

12. *Illi jsegwi ghalhekk li l-azzjoni attrici mhi xejn ghajr tentattiv iehor sabiex jivvessaw lis-socjeta` esponenti u lill-persuni li issa ghandhom interess fiha.*

Eccezzjonijiet

1. *Preliminarjament, illi l-atturi m`ghandhomx l-interess guridiku sabiex imexxu l-azzjoni odjerna (liema azzjoni hi msejjsa fuq il-premessa li huma azzjonisti) gialadarba l-atturi aljenaw l-ishma taghhom fil-mori tal-kawza u ghalhekk l-azzjoni odjerna ma tistax tirnexxi ;*

2. *Subordinatament u minghajr pregudizzju ghall-premess, l-azzjoni attrici mhijiex rimedju idoneu gialadarba l-Att dwar il-Kumpaniji (Kap. 386) jipprovi ghal rimedju ad hoc ghall-harsien ta` azzjonisti kontra allegat pregudizzju mhux gust u ghalhekk l-azzjoni odjerna ghandha tigi michuda ;*

3. *L-azzjoni attrici ma tistax tirnexxi peress li :*

(i) *ir-rakkomandazzjoni ghall-hlas ta` dividends tispetta lid-Diretturi ; u*

(ii) *din l-Onorabli Qorti m`ghandhiex is-setgha li tissostitwixxi d-diskrezzjoni taghha ghal dik tad-Diretturi ;*

4. *Subordinatament u minghajr pregudizzju ghall-premess, illi fi kwalunkwe kaz irid jittiehed qies tar-rizervi li ghandhom jinzammu mill-profitti socjetarji skont ir-regoli li jemanu mill-Ewwel Skeda tal-Kap. 386 u li huma applikabbli ghas-socjeta` esponenti ;*

5. *Subordinatament u minghajr pregudizzju għall-premess, illi t-talbiet attrici huma infondati fil-fatt u fid-dritt u għandhom jigu respinti.*

Bl-ispejjez.

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

Rat is-sentenza preliminari li tat fil-11 ta` Frar 2016 fejn cahdet l-ewwel eccezzjoni preliminari, u rriservat id-decizjoni dwar l-ispejjez ta` dik is-sentenza għall-gudizzju finali.

Rat id-digriet li tat fit-13 ta` Ottubru 2016 fejn ordnat li jigu allegat l-atti tal-mandat ta` sekwestru kawtelatorju nru 1236/2015 fl-istess ismijiet.

Rat l-atti ta` dan il-procediment.

Semghet ix-xiehda u rat il-provi l-oħra li tressqu fil-kors tal-kawza.

Rat id-digriet li tat fl-udjenza tal-21 ta` Marzu 2017 fejn halliet il-kawza għas-sentenza għal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet tal-partijiet.

Rat l-atti l-oħra tal-kawza.

II. Provi

L-attur **Gaetano Bonnici** ("**Bonnici**") ipprezenta zewg affidavits fit-28 ta` Settembru 2015 u fit-18 ta` April 2016.

In succinct, Bonnici xehed illi huwa kien azzjonista u direttur flimkien ma` Alfred Balzan (“**Balzan**”) fil-kumpannija konvenuta (“**Age Concern**”) li kien ukoll direttur. Bonnici u Balzan kellhom ishma ndaqs u cioe` 50% kull parti.

Age Concern saret ghaliex huwa kien kapaci bhala infermier mentri Balzan kellu proprjeta` l-Mosta.

Age Concern bdiet tikri l-fond “Central Home”, Independence Avenue, Mosta, minghand Balzan u martu li kienet azzjonista wkoll.

Age Concern kellha tmexxi dar ta` l-anzjani.

Qal li huwa diga` kellu kuntatti ma` persuni li kienu nteressati.

Stqarr illi Age Concern kienet kostitwita fit-22 ta` Awissu 1995.

Bejn l-azzjonisti sar ftehim fis-26 ta` Awissu 1995 ghal 10 snin bl-intendiment li dan jerga` jiggdedded ghal 10 snin ohra.

Stqarr illi ghall-bidu l-proprjeta` minn fejn kienet sejra topera l-kumpannija kellha bzonn ta` hafna alterazzjonijiet u meljoramenti sabiex tkun tista` tissoddisfa l-hrug ta` licenzja ghal dar ta` anzjani. Dawn l-ispejjez hargu mill-flus tal-kumpannija. Fil-bidu, il-kmamar kienu jinkrew bhala lukanda u minn dawn il-flus imbaghad beda jsir dak mehtieg biex il-lukanda tigi attrezzata bhala dar tal-anzjani. Il-licenzja harget wara disa` xhur.

Qal li Age Concern kellha tkun responsabbli ghall-amministrazzjoni, tmexxija u operat tad-dar ta` l-anzjani. Huwa kellu jiehu hsieb il-*caring* u *nursing* fid-dar waqt li Balzan li bhala professjoni huwa inginier kien responsabbli ghall-manutenzjoni u riparazzjoni ta` l-istess dar.

Kompla jghid li l-kera kienet tizdied b`10% kull sentejn u dejjem thallset.

Stqarr illi bhala diretturi u azzjonisti, hu u Balzan kienu jieħdu *director's fee*. Ma kinux jittieħdu *dividends* peress li dawn kienu dejjem imorru lura fil-kumpannija jew kienu jigu *carried forward*.

Fisser li d-dar kienet timtela malajr u kollox kien miexi tajjeb hliet għall-intoppi li kienu jsiru minn Fleur Balzan, li tigi bint Alfred, u li kienet impjegata mal-kumpannija bhala amministratrici u kienet tieħu hsieb l-*accounts*. Din pruvat kemm-il darba tkeccieħ, għalkemm mela d-dar bin-nies u għallem lin-*nursing staff* kollu. Meta kien jistaqsi biex jara l-*accounts*, din kienet dejjem tagħmel ostakolu għal dan.

Qal illi fl-1999, Fleur Balzan talbet li tithallas salarju qawwi ta' madwar Lm 10,000 fis-sena. Għalkemm missierha accetta, huwa kien kontra talba bħal dik. Minhabba r-rifjut tieħu, Fleur Balzan issupervjat u telqet l-impieg. Kellu pressjoni sabieħ jaccetta s-salarju l-gdid pretiz minn Fleur Balzan. Sahansitra Alfred Balzan ma kienx ser jiffirma ic-cheque tad-*directors' fees*.

Xehed illi Balzan qabbaħ il-kompjuter ta' Age Concern mal-kompjuter personali tieħu bla ma qallu jew talab il-kunsens tieħu.

Stqarr illi fl-2003, kien hemm dizgwid dwar iz-zieda tal-kera li kienet originarjament mifteħma fil-kuntratt u l-partijiet kellhom imorru għal arbitragg. Sar fteħim biex isir kont bankarju fejn imorru fih xi profitti biex jekk ikun hemm bzonn ta' flus għall-bzonnijiet tal-kumpannija, dan isir uzu minnu. Il-kont intuza darbtejn.

Qal illi hames xhur qabel ma għaddew l-ewwel għaxar snin tal-kirja, Balzan rega' waqaf milli jiffirma c-cheques tad-diretturi bl-iskuza li l-awditur Robert Cassar hekk kien ippropona. Kellu jqabbaħ avukat biex jinsab tarf tas-sitwazzjoni.

Intant Age Concern baqgħet miexja ` l quddiem bis-saħħa tieħu u ta' Balzan.

Qal illi fl-2005 id-Dipartiment tal-Anzjani infurmahom li kellhom isiru amiljoramenti fil-binja li kien jinvolvu spejjez kbar. Fin-nuqqas il-licenzja ma

kinitx sejra tiggdedd. L-ispiza ghal dawk ix-xogholijiet thallset minn Age Concern, minkejja li skont il-ftehim originali dawk l-ispejjez kellhom isiru a spejjez tas-sid li kien Balzan.

Wara li ghaddew l-ewwel ghaxar snin, u kellhom jibdedew l-ghaxar snin ta` wara, huwa rcieva ittra minghand Balzan fejn staqsa jekk Age Concern kinitx ser iggedded il-kirja. Saret laqgha fl-1 ta` Gunju 2005 fejn tressqet oggezzjoni minn Balzan sabiex tiggdedded il-kirja. Huwa talab b`ittra datata 1 ta` Gunju 2005 li kien behsiebu jgedded il-kirja. L-ittra ma gietx accettata minn Balzan peress li l-ittra tat-tigdid kienet iffirmata minnu biss u mhux miz-zewg diretturi. Bla ma kien jaf hu, Balzan kien qed jittratta sabiex jaghmel estensjoni fid-dar tal-anzjani billi kien ser jixtri d-dar ta` magenb id-dar ta` l-anzjani. Balzan qabad u xtara din id-dar wahdu u ghamel l-ispejjez go fiha minghajr qatt nformah ;imbaghad ippretenda li l-kumpannija tikriha minghandu. Qal li huwa accetta u sar ftehim ta` kera ghall-estenzjoni sas-26 ta` Awissu 2015 kif ukoll ftehim dwar zieda sostanzjali fil-kera.

Kompla jghid illi kien miftiehem illi jekk huwa jitlaq, huwa kellu jbiegh l-ishma tieghu fil-kumpannija ghas-somma ta` EUR 53,250. Dak l-ammont kellu jkopri l-valur ta` 50% tal-ishma tieghu.

Intant il-kumpannija bdiet sejra ahjar ghaliex fl-2011 kienet tiehu xoghol minghand il-Gvern fis-sens li l-Gvern kien jibghat il-pazjenti ghandhom u jhallashom. Ghalhekk il-profitti bdew jizdiedu. Infatti fis-snin 2013 u 2014 bdew jigu registrati profitti sostanzjali. Mill-accounts, jirrizulta li fis-sena finanzjarja 2013/2014 kien hemm qliegh ghal dik is-sena fl-ammont ta` EUR 66,953, netti mit-taxxi, waqt li *retained earnings* kienu fl-ammont ta` EUR 189,846. It-taxxa fuq il-profitti ghall-istess sena thallset fl-ammont ta` EUR 36,052 ; thallset ukoll it-taxxa fuq ir-*retained earnings*.

Qal illi fit-22 ta` Gunju 2015, huwa rcieva korrisondenza bid-data tat-23 ta` Frar 2015 mill-awditur Robert Cassar li kien hemm *accrued profits* fl-ammont ta` EUR 259,000 li kellhom jigu trasferiti ghas-sena 2015/2016. Fl-24 ta` Gunju 2015, talab lill-awditur u lil Balzan sabiex issir distribuzzjoni tal-profitti kemm dawk attwali kif ukoll dawk *accrued*.

Qal li huwa baqa` sorpriz meta rcieva ittra minghand Dr Victor Scerri, l-avukat ta` Balzan, fis-sens illi ried li jaqsam nofs bin-nofs il-profitti tas-sena 2013/2014 jigifieri l-ammont ta` EUR 66,953 biss hekk kif jirrizulta minn

email ezebit bhala Dok A fejn kien accetta li jhallas u jiddikjara li jaghti nofs il-profitti bhala *dividends* mill-profitti tas-sena finanzjarja li tispicca fis-sena 2014.

Kompla jispjega li d-dizgwid inqala` ghax Balzan ma riedx li jaqsam ir-*retained earnings* u ried izommhom ghalih meta l-kumpannija kienet diga` hallset it-taxxa fuqhom. Balzan ried jikkappara l-flus kollha ghalih u ma jaqsam xejn mieghu mill-*accrued profits*. B`hekk huwa kien ser jispicca biss b`EUR 30,000 minflok 50% ta` EUR 259,000.

Qal li fl-10 ta` Awissu 2015 huwa talab li ssir laqgħa generali straordinarja, liema laqgħa saret. Balzan kien prezenti. Minkejja li ttieħdu l-minuti ta` l-laqgħa, dawn gew iffirmati minnu biss ghax Balzan irrifjuta li jiffirmahom.

Sar jaf ukoll li Balzan kien mar id-Dipartiment tal-Anzjani u nfirmahom li Age Concer ma kenitx ghadha topera, u li kellu jinbidel il-kuntratt tal-anzjani fuq kumpannija ohra li hija tal-familja tieghu biss u li l-pagamenti kellhom isiru fuq dik il-kumpannija l-gdida.

Xehed illi l-ftehim tat-23 ta` Ottubru 2008 ma kellu x`jaqsam xejn mal-profitti li kienu saru fis-snin precedenti.

Stqarr illi bil-kawza tal-lum huwa kien qed jitlob li jithallas sehmu profitti tas-sena finanzjarja 2013/2014 meta huwa kien għadu azzjonist ta` Agen Concern.

Qabel saret il-kawza huwa kien bagħat ittra lill-bord tad-diretturi u lill-azzjonisti sabiex jersqu għal-likwidazzjoni tal-profitti forma ta` *dividends* izda dan kien kollu ta` xejn.

Huwa nsista li ma kienx qed jitlob xi haga mill-ftehim tat-23 ta` Ottubru 2008 izda qed jitlob illi jieħu sehmu mill-profitti tas-sena finanzjarja 2013/2014.

Huwa spjega li hadem ghas-success tal-kumpannija u ghalhekk kien ingust li l-azzjonist l-iehor jiehu l-beneficcu tal-profitti jew li dawn jigu nvestiti lura fil-kumpannija jew li jigu kkunsidrati bhala *retained earnings*.

Huwa nsista li kellu jiehu sehmu mir-*retained earnings*.

Kompla jixhed illi huwa safa` mqarraq meta Balzan utilizza cheque li huwa kien iffirma bl-intenzjoni li jintuza ghall-hlas ta` l-haddiema u ghall-bzonnijiet tal-kumpannija.

Spjega li b`dak ic-cheque, Balzan gibed EUR 100,000 mill-bank.

Qal illi ma kenitx prattika normali li l-bank jsarraf cheque ta` EUR 100,000 fi flus kontanti.

Daqstant ghall-affidavits.

Meta xehed viva voce huwa pprezenta korrispondenza li kienet marret ghand l-Av. Victor Scerri u ghand l-awditur Robert Cassar.

Brian De Gray – Manager - HSBC Bank Malta plc – Rabat – xehed illi meta hareg ic-cheque ezebit bhala Dok HSBC 1 huwa ma kienx jahdem fil-fergha tar-Rabat tal-bank. Ic-cheque in kwistjoni huwa datat 7 ta` Awissu 2015 u hareg mill-kont ta` Age Concern fl-isem ta` Alfred Balzan. Qal li kien hemm zewg firem fuq ic-cheque li kienu ta` Alfred Balzan u ta` Gaetano Bonnici. L-import tac-cheque kien EUR 100,000. Dan ic-cheque kien depozitat fil-kont personali ta` Balzan dakinhar stess stess tas-7 ta` Awissu 2015. Ikkonferma illi ma hargux flus kontanti b`dak ic-cheque ghalkemm fuq ic-cheque kien hemm innizzel il-kliem *withdrawn*.

Patrick Vella – Direttur - Dipartiment tal-Anzjanita` Attiva - Ministeru tal-Familja u Solidarjeta` Socjali - xehed illi d-dipartiment huwa d-direttorat responsabbli mis-servizzi kollha fil-komunita` fejn huma involuti anzjani u persuni b`dizabilita. Id-dipartiment joffri servizzi residenzjali kemm fid-djar tal-Gvern, kif ukoll gieli jinkrew sodod mill-Gvern go djar immexxija mill-privat. Age Concern kellha kuntratt mal-Gvern ghall-kiri ta`

sodod. L-ahhar kuntratt li sar kien fil-15 ta` Frar 2013 ghal tlett snin ghal minimu ta` 70 sodda. Spjega li kienu qed jintuzaw aktar sodod mill-minimu ; fil-fatt kien hemm 93 sodda li ntuzaw. Il-kuntratti jiggeddu b`mod awtomatiku. Il-Gvern huwa obligat li jibqa` jhallas sakemm s-sodod ikunu ghadhom jintuzaw mill-anzjani.

Qal li fl-1 ta` Jannar 2016, sar kuntratt gdid ma` Age Concern li tmexxi s-Central Home, Mosta. Il-kuntratt precedenti kien datat Frar 2013 izda kien ghal sena b`effett mill-1 ta` Settembru 2012. Meta ghaddiet is-sena, il-kuntratt baqa` jopera peress li kien hemm *automatic renewal*. Il-hlas lil Age Concern baqa` l-istess. Fis-26 ta` Awissu 2015, huwa rcieva ittra li Age Concern kienet ittiehdet mis-sidien ta` Central Home u dawn kienu ser ikomplu jamministraw id-dar. Fl-ittra kien hemm indikat li l-ftehim kien skadut u li d-diretturi l-godda tal-kumpannija kienu Alfred Balzan u Fleur Balzan.

Ikkonferma li qabel ircieva l-ittra, huwa kien ircieva email datat 6 ta` Awissu 2015 minghand Fleur Balzan, fejn kien infurmat li Age Concern kienet ser tieqaf topera dik id-dar tal-anzjani fil-Mosta. Is-servizz pero` baqa` ghaddej. Huwa kien iltaqa` ma` Balzan wara l-ittra taghhom. Fil-laqgha kien iccarat illi kien hemm bidla fis-sidien u li x-xoghol kien ser jibqa` ghaddej.

Fil-**kontroezami**, huwa stqarr illi l-ftehim kollha saru ma` Age Concern.

Diane Mangion xehdet illi kienet ilha tahdem ma` Age Concern ghal 13-il sena fis-Central Home, Mosta. Hija tahdem bhala segretarja ma` l-Manager, Doris Vella. Gieli kienet prezenti ghal laqghat tal-bord tad-diretturi, u kienet tiehu l-minuti. Tohodhom bil-kitba mbaghad bil-computer u tghaddihom lill-Manager. Kienet tiffirma l-minuti hi stess, izda kien hemm minuti li ma ffirmathomx. Kien hemm okkazjoni fejn kienet mitluba mill-Manager biex tibdel xi parti mill-minuti fuq struzzjonijiet tad-diretturi. Din l-okkazjoni kienet l-ahhar laqgha li ghaliha attenda l-attur. Fil-fatt bidlet il-minuti u rega` tathom lill-Manager. Spjegat li hija baqghet ma ffirmathomx dawk il-minuti ghax stenniet biex tara jekk kinux ser jibdlu xi haga ohra, izda hadd ma rega` kellimha dwarhom.

Stqarret illi kien hemm okkazjonijiet fejn kienet titlob li jkollha cheques li jkunu ffirmati diga` minn Bonnici u/jew minn Balzan. Gieli kienu ffirmati cheques vojta. Spjegat li kien isir hekk billi gieli kienet tiehu zball fl-ismijiet tal-haddiema jew ghal xi bzonnijiet ohra urgenti. Dawk ic-cekkijiet kienu mmirati ghall-pagi. Qatt ma harget cejjijiet minghajr permess. Spjegat li *c-cheque book* ikun ghand Doris Vella.

Robert Cassar – awditur ta` Age Concern Limited – xehed illi sa Settembru 2014, Age Concern kellha *accumulated profits* ta` EUR 189,603. Dan ifisser illi matul iz-zmien, mill-profitti li tkun ghamlet, tkun hallset it-taxxa, u jibqa` l-profitti akkumulati bhala riserva fil-*balance sheet*. Is-somma hija *net*. Spjega li tkun trid tittiehed decizjoni dwar jekk dawk il-flus ghandhomx imorru bhala *dividends* jew inkella ghandhom jinghadu mal-assi tal-kumpannija. Fil-kaz ta` Age Concern, il-profitti dejjem thallew fil-kumpannija. Wara dak l-audit, ma sarx iehor.

Stqarr illi l-attur ittrasferixxa l-ishma tieghu fis-26 ta` Awissu 2015. Ma jiftakarx li qatt ircieva ittra minghand Bonnici sabiex jigu likwidati l-profitti. Qal li kien hemm ftehim privat dwar kif Bonnici kellu jittrasferixxi l-ishma tieghu favur Balzan. Mistoqsi jafx kif ftehimu l-partijiet fil-mument tal-bejgh tas-*shares* dwar x`kellu jsir mill-*accumulated profits* stqarr illi ma kienx hemm larrangement specifiku dwar dan. Spjega li meta kienu ffirmati l-*accounts* tal-2014, kien hemm nota fid-*directors` report* li tghid : “*It is being declared that due to the fact that there exists a dispute regarding the declaration of dividends, the matter will be resolved at a later stage*” . Ikkonferma li d-dizgwid kien dwar jekk il-profitti kinux ser jitqassmu bhala dividends jew kinux ser jibqghu fil-kumpannija.

Spjega li sakemm kien hemm Bonnici bhala azzjonista, ma kienx hemm hlas ta` *dividends*. Il-profitti baqghu fil-kumpannija. Bonnici qatt ma ha l-ebda *dividend* mill-profitti.

Fil-**kontroezami**, xehed illi l-*accounts* dejjem gew iffirmati mill-partijiet. Huwa kkonferma li l-iskritturi datati 26 ta` Awissu 2015 u ndikati fil-ftehim Dok A kienu dwar il-kirja tal-post li Balzan kien jikri lil Age Concern. Dok B anness mar-rikors guramentat huwa nkomplet ghax jonqos fuqu firma. Ipprezenta d-dokument ufficjali kif ukoll l-financial statements ghas-sena li spiccat fit-30 ta` Settembru 2014.

Alfred Balzan xehed illi fil-bidu tas-sena 1995 huwa kellu l-hsieb li jibdel il-lukanda li kellu fil-Mosta bl-isem Central Hotel f' residenza ghall-anzjani. Iltaqa` ma` Gaetano Bonnici li kien jahdem ta` infermier. Bonnici kien interessat izda ried 60% tal-ishma tal-kumpannija li kienet ser tigi kostitwita. Huwa ma accettax izda mbaghad ftehm u li jiehdu 50% ta` l-ishma kull wiehed. Ir-rwol ta` Bonnici kellu jkun illi jahdem bhala infermier, u jiehu hsieb l-istaff mediku

Qal li hu u martu ffirmaw ftehim tal-kirja tal-post liema kirja kellha tkun ghal 10 snin bil-possibilita` li terga` tiggedded ghal 10 snin ohra. Il-kuntratt sar fis-26 ta` Awissu 1995 ma` Age Concern Limited li nholqot biss ftit tal-jiem qabel. Bintu Fleur Balzan baqghet tahdem bhala Manager. Ghall-ewwel ftit xhur, kienu bdew bi ftit anzjani fid-dar u ma kienx jiehu kera. Huwa kien jaghmel il-manutenzjoni fejn ikun hemm bzonn a spejjez tieghu sabiex il-kumpannija tqum fuq taghha.

Spjega li minhabba l-problemi li holoq Bonnici fl-ewwel ftit snin, huwa kien iddecieda li Age Concern tieqaf topera u ghalhekk ma tiggeddidx il-kirja. Bonnici kien infurmat b`dan sa mis-sena 2005 fil-minuta li saret fl-1 ta` Gunju 2005.

Kompla jghid li l-kirja originali ghalqet fis-26 ta` Awissu 2005 u huwa ma riedx li l-kirja tiggedded izda minhabba li Bonnici kellu 50%, ghaddiet tieghu u l-kirja ntemmet fis-26 ta` Awissu 2015. Fl-2008, huwa kien kontattat mill-avukat ta` Bonnici li nfurmah li Bonnici kien lest li jcedi l-ishma tieghu bl-intendiment li jithallas EUR 58,250. Sar ftehim fit-23 ta` Ottubru 2008 li fuqu hemm innizzel li l-hlas kellu jkun *in full and final settlement of all claims and pretences*. Il-ftehim kien propost minn Bonnici peress li dan kien kien jaf li l-kumpannija kienet sejra hazin hekk kif jidher mill-*financial statements* tal-2007, u peress li Bonnici kien jaf li l-kirja li kellha tintemm fl-2015 ma kinitx ser terga` tiggedded. Bil-ftehim, Bonnici kellu mohhu mistireh li jekk ma jkunx hemm bizzejjed flus ghalih kif jintemm il-kuntratt fl-2015, huwa xorta kien ser jiehu t-€58,250. Ghall-ftehim kienet prezenti ukoll bintu Fleur Balzan.

Xehed illi fl-10 ta` Awissu 2015, Bonnici talab li ssir laqgħa tal-kumpannija. Il-laqgħa saret fl-14 ta` Awissu 2015. Bonnici ma riedx jiffirma l-minuti tal-laqgħa ghaliex ried ibiddel xi affarijiet li nghadu fil-laqgħa u li tnizzlu fil-minuti. Inbidlu xi hwejjeg u ffirmaw waqt illi min-naha taghhom ma ffirmawx il-minuti mibdula. Spjega li fl-ahhar gimgha ta` Awissu 2015,

kien sar iz-zmien biex jithallsu l-pagi ta` 65 haddiema. Wara li kienu ffirmati c-cheques tal-pagi, tqassmu lill-haddiema. L-ghada ta` wara li tqassmu c-cheques, sar jaf li Bonnici kien ipprezenta mandat ta` sekwestru kontra l-kumpannija. Huwa thasseb ghaliex il-kumpannija tpoggiet f`sitwazzjoni prekarja hafna bil-pagi tal-haddiema ma jistghux jithallsu. Kien ghalhekk li huwa ddecieda li jigbed il-flus minnufih u dawn inzammu gewwa s-*safe* tal-kumpannija sabiex il-pagi kollha jithallsu minn dawk il-flus. Il-haddiema li rcevev il-paga f`kontanti ffirmaw ghalihom.

Spjega li meta Bonnici sar jaf li huwa gibed il-flus, huwa mar ghamel rapport lill-pulizija.

Qal illi minkejja li kienu trasferiti l-ishma skont il-ftehim ta` l-2008, Bonnici ried aktar flus ghaliex il-kumpannija kienet ghamlet iktar qligh mis-sena 2006/2007 u cioe` miz-zmien meta sar il-ftehim. Huwa baqa` jsostni li l-ammont dovut kien ta` EUR 58,250 skont il-ftehim tal-2008, u xejn aktar.

In **kontroezami**, xehed illi l-kumpannija bdiet taghmel profitti fl-ahhar erba` jew hames snin. Il-profitti kienu qed jigu *accrued forward* ghas-sena ta` wara. Madanakollu huma kienu jiehdu *directors` fees*. Spjega li huwa kien jiffirma l-*accounts* izda kien ihalli kollox f`idejn bintu. Qal li fl-2008 kien sar ftehim ma` Bonnici ; sa dak iz-zmien ma kinux qed jaghmlu profitti. Skont il-ftehim, Bonnici kellu jiehu s-somma ta` EUR 58,250 ghat-trasferiment ta` l-ishma. U xejn aktar. Anke li kiekun kien hemm telf, Bonnici kien jiehu xorta wahda l-istess ammont. Ikkonferma li fil-ftehim, ma kinux issemmev *dividends*.

Fleur Balzan ikkonfermat id-deposizzjoni ta` missierha Alfred Balzan.

Tghid illi l-inkwiet ma` Bonnici beda mill-ewwel. Kien hemm kwistjoni dwar il-pagi li ma bdewx jithallsu konformi mal-ligi kif ukoll dwar proposta ta` Bonnici li jinghata awment fid-*directors` fees*.

Xehdet illi kienet prezenti ghal kull laqgħa li saret fl-ahhar sena ta` Bonnici bhala azzjonista ta` Age Concern, minkejja li Bonnici kien jopponi.

Irreferiet għall-episodju fejn missierha kien gibed is-somma ta` EUR 100,000 minhabba li bil-mandat ta` sekwestru vigenti, il-flus tal-pagi ma kinux ser jithallsu. Il-flus tqeghdu fis-*safe* tal-kumpannija u ntuzaw għall-hlas ta` pagi u għall-kontribuzzjonijiet tas-sigurta` socjali tal-haddiema, u sabiex thallsu xi kredituri li kien diga` hargulhom cheques li ma kinux issarrfu.

Qalet li l-ishma ta` Bonnici gew trasferiti skont il-ftehim tal-2008 izda huwa ma riedx jiffirma qabel ma jigi accettat li kien ser jithallas aktar flus. Hija u missierhom caħdu l-pretensjoni ta` Bonnici.

III. Il-vertenza

Il-Qorti għandha quddiemha (i) talba sabiex tillikwida u tikkwantifika l-profitti li għamlet Age Concern fis-sena finanzjarja 2013-2014, (ii) talba sabiex tordna li dawn il-profitti kollha jigu konvertiti għal *dividends* ta` Age Concern favur l-azzjonisti fi kwoti indaqs bejniethom ; u (iii) talba għad-distribuzzjoni ta` dawk id-*dividends* favur l-azzjonisti fi kwoti ndaqs bejniethom.

Irrizulta li l-atturi bejniethom kienu azzjonisti ta` Age Concern fi kwota ta` 50%. Fil-fatt kellhom 250-il sehem ordinarju b`valur nominali ta` EUR 2.329373 kull sehem.

Bis-sahha ta` skrittura tat-23 ta` Awissu 2008, l-ishma tal-atturi kellhom jigu trasferiti lil Alfred Balzan u uliedu sas-27 ta` Awissu 2015. Il-ftehim kien onorat tant illi fis-26 ta` Awissu 2015, l-atturi Bonnici għaddew l-ishma tagħhom lil Barbara Coates, Odette Falzon Federoff, Fleur Balzan u Alfred Balzan (ara Dok AC1 sa AC4 a fol 34 sa 37).

Fis-sena finanzjarja 2013/2014 (tnax-il xahar b`effett minn Settembru) Age Concern għamlet qligh sostanzjali. L-atturi nterpellaw lis-socjeta` konvenuta u lill-azzjonisti l-oħra sabiex jigi dikjarat *dividend* halli l-atturi jieħdu sehemhom mill-profitti għal dik is-sena. Billi kien hemm rifjut saret din il-kawza.

IV. It-tieni eccezzjoni

Bit-tieni eccezzjoni, is-socjeta` konvenuta qeghda tghid illi kif dedotta l-azzjoni attrici mhijiex dik idoneja stante li l-Att dwar il-Kumpanniji 1995 jipprovdi ghal rimedju *ad hoc* ghall-harsien ta` azzjonisti kontra allegat pregudizzju mhux gust. Ghalhekk l-azzjoni kellha tkun michuda.

Jidher illi Age Concern qeghda tirreferi ghall-azzjoni skont l-Art 402 tal-Kap 386.

Fil-provvediment li tat fis-6 ta` Mejju 2013 fil-kawza bin-nru. 642/2012 fl-ismijiet “**Suzanne Busuttil et vs Francis Busuttil & Sons Limited et**” (konfermat b`decizjoni tal-Qorti tal-Appell tal-31 ta` Jannar 2014) il-Qorti ttrattat il-kwistjoni ta` min kellu jedd jaghmel l-azzjoni skont l-Art 402 tal-Kap 386.

Inghad hekk :-

*“L-ewwel subinciz tal-Art 402 jibda bil-kliem any **member** of the company who complains (enfasi u sottolinear tal-qorti).*

*“**Member**” huwa definit fl-ewwel subinciz tal-Art.2 tal-Kap.386 fis-sens illi “except where otherwise specifically defined, means a shareholder of a company and a partner in any other commercial partnership.”*

*Fl-istess subinciz, “**shareholder**” huwa definit bhala “a person entered in the register of members of a company pursuant to article 123 or the bona fide holder of a share warrant referred to in article 121”*

***Specifikament** ghall-fini tal-Art.402, il-legislatur ried iwessa` t-tifsira ta` “member” ghall-fini ta` dik id-disposizzjoni billi fis-subinciz (6) ighid illi –*

*“**member**” includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company.*

L-erba` intimati fuq riferiti qeghdin jikkontendu illi ttliet rikorrenti ma jikkwalifikawx bhala “member” kwindi ma setghux jintavolaw azzjoni skond tagghom abbazi ta` l-Art.402 kwindi mhumiex il-legittimi kontraditturi tagghom.

Hija l-fehma ta` din il-Qorti illi ghall-ahjar interpretazzjoni tal-ligi taghna ghandha ssir riferenza ghas-sources tal-ligi taghna.

*Fis-sentenza taghha tad-9 ta` Marzu 2007 fil-kawza “**Vella vs Vella Brothers Limited et**”, il-Qorti tal-Appell qalet espressament u senza mezzi termini illi l-Art.402 kien infassal fuq l-Art.459 tal-UK Companies Act 1985.*

L-Art.459 kien imhassar bl-Art.994 tal-UK Companies Act 2006. Pero` id-disposizzjoni baqghet l-istess.

Din il-Qorti sejra tirriproduci l-Art.402 taghna u l-Art.994 tar-Renju Unit ghal finijiet komparattivi.

L-Art.402 shih jaqra hekk –

(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or that any act or omission of the company have been or are or are likely to be, oppressive, unfairly discriminatory against, or unfairly prejudicial, to a member or members or in a manner that is contrary to the interests of the members as a whole, may make an application to the court for an order under this article.

(2) Where the Registrar has received a report on a company under article 410 and it appears to him that the company's affairs are being or have been conducted in a manner falling within the meaning of subarticle (1), he may make an application to the court for the issue of an order under this article.

(3) If on an application made in terms of subarticle (1) or (2), the court is of the opinion that the complaint is well-founded and that it is just and equitable to do so, the court may make such order under such terms as it thinks fit—

(a) regulating the conduct of the company's affairs in the future ; or

(b) restricting or forbidding the carrying out of any proposed act ; or

(c) requiring the company to do an act which the applicant has complained it has omitted to do ; or

(d) providing for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company, for the reduction accordingly of the company's issued share capital ; or

(e) directing the company to institute, defend, continue or discontinue court proceedings, or authorising a member or members of the company to institute, defend, continue or discontinue court proceedings in the name and on behalf of the company ; or

(f) providing for the payment of compensation by such person as may have been found by the court responsible for loss or damage suffered as a result of the act or omission complained of, to the person suffering the said loss or damage ; or

(g) dissolving the company and providing for its consequential winding up.

(4) When an order is made for the dissolution of a company in terms of subarticle (3)(g), the company shall be deemed to have been dissolved on the date when the order is made and the provisions of Sub-Titles I and III of Title II of Part V of this Act regulating the winding up of companies shall apply.

(5) An order made under this article may require a company not to make any amendment, or to make such amendment as may be required, in its memorandum or articles.

(6) In this article, the term "member" includes a person entitled at law to represent the interests of a deceased member, a person to whom shares in the company have lawfully devolved by way of testate or intestate succession, and a trustee, as defined in article 127, who holds shares in the company. (enfasi u sottolinear ta` din il-qorti).

L-Art.994 tal-UK Companies Act 2006 shih jaqra hekk –

1) A member of a company may apply to the court by petition for an order under this Part on the ground—

(a) that the company`s affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself) , or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.

(3) *In this section, and so far as applicable for the purposes of this section in the other provisions of this Part, “company” means—*

(a) *a company within the meaning of this Act, or*

(b) *a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991. (enfasi ta` din il-qorti)*

*Ghall-fini ta` kompletezza ta` analizi, trid issir riferenza ukoll ghall-**Art.112 tal-UK Companies Act 2006** li jaghti tifsira ta` “member”. Id-disposizzjoni taqra hekk –*

(1) *The subscribers of a company’s memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.*

(2) *Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.*

*..... Minn analizi meqjusa tad-disposizzjonijiet tal-Kap 386, din il-Qorti hija ta` l-fehma konsiderata illi ghax irrikorrenti Suzanne Busuttil de proprio, ir-rikorrent Brian Bususttil de proprio u r-rikorrenti Stealth Holdings Limited ma jikkwalifikawx bhala “membri” tal-kumpanniji Foster Clark Products Limited (C803), Francis Busuttil & Sons (Marketing) Limited (C24137), B&S Exports Limited (C16946) u B&S Manufacturing Limited (C16941) huma prekluzi milli jintavolaw azzjoni skond l-Art 402 tal-Kap 386 kontra dawk l-erba` kumpanniji. Din il-Qorti tikkondividi l-fehma tal-Qorti tal-Appell fis-sentenza taghha fil-kawza **“Perit Raymond Vassallo vs Anthony Parlato Trigona et”** (op. cit.) illi fil-ligi taghna ma hemmx il-kuncett ta`*

second tier shareholding u kwindi ghandu jedd jistitwixxi l-azzjoni skond l-Art 402 dik il-persuna li tikkwalifika bhala “membru”. (ara wkoll Andrew Muscat fil-“Principles of Company Law” (MUP) Pg 961-62 et seq).

Dan accertat, din il-Qorti zzid tirrileva illi fis-subinciz (6) tal-Art 402 il-frazi “includes” minflok il-frazi “means” mhijiex intiza sabiex tiftah il-bieb berah ghal kulhadd illi jittenta l-azzjoni fuq il-pretest illi l-frazi “includes” ma taghtix l-idea ta` “an exhaustive provision of law”. Hija pero` intiza sabiex ma teskludi lil hadd minn dawk ilpersuni li ghandhom jedd jiprocedu izda li b`interpretazzjoni stretta u distakkata ta` member u shareholder fis-subinciz (1) tal-Art.2 kienu jibqghu barra. Certament ma kienx dak ir-ratio legis fejn si tratta tal-Art.402.

*Finalment din il-Qorti, anke in vista ta` dak rilevat mir-rikorrenti, taghmel riferenza ghal dak li nghad fil-Pag.711 et seq tat-Tmien Edizzjoni (2011) ta` **Boyle & Birds` Company Law** (pubblikat minn Jordans) dwar il-kwistjoni li qeghda tkun deciza llum –*

...Section 994(1) allows a member to apply to the court by petition for an order under the section

[Dwar member hemm din il-footnote – This may theoretically include a passive majority – it is not necessarily restricted to a minority member ...]

In a number of cases, it has been held that in the case of a small private `quasi-partnership` type of company, the court may take account of the `legitimate expectations` of members. However in a more substantial company such a `concept` has no place. More recently, the Court of Appeal has emphasised that in general members have no legitimate expectations beyond the legal rights conferred on them by the constitution of the company. This applies unless it can be shown that a `legitimate expectation` arises out of a fundamental

understanding between shareholders, which formed the basis of the association. This may confer a right to participate in management ...

Even in the case of a `quasi-partnership` type of company, dismissal from employment and a position on the board will not necessarily establish unfair prejudice ...

*Although a petitioner for relief under s.994 **must** be a shareholder before he can petition, he is entitled after he becomes a shareholder to support his petition by relying on conduct that took place before he became a shareholder ... (enfasi u sottolinear tal-qorti).*

(ara wkoll : Qorti tal-Appell : 842/2009 : 24 ta` Gunju 2011 : **Perit Raymond Vassallo vs Anthony Parlato Trigona et** ; Qorti tal-Appell : 3 ta` Frar 2012 : **Jean Karl Soler et vs Raymond Vassallo pro et noe** : PA : 8 ta` Lulju 2004 : **Joseph Calleja pro et noe vs Vincent Calleja**” ; PA : 13 ta` Mejju 1999 : **Monreal et vs Delia noe**)

Ghalhekk huwa **biss** azzjonista ta` l-kumpannija li fit-tmexxija taghha jkun allegat l-agir menzjonat fis-subinciz (1) li jista` jittenta azzjoni abbazi tal-Art 402 tal-Kap 386.

Fil-kaz tal-lum, fid-data tal-prezentata tar-rikors guramentat, l-atturi kienu ghadhom azzjonisti ta` Age Concern izda sitt ijiem wara, l-atturi aljenaw l-ishma taghhom favur membri tal-familja Balzan. Ghalhekk ma baqghux jikkwalifikaw bhala *membri* tal-kumpannija konvenuta.

Il-Qorti tifhem ghaliex l-atturi pprezentaw l-azzjoni tal-lum mhux l-azzjoni skont l-Art 402 tal-Kap 386 peress li fil-mument li ma kinux ser jibqghu azzjonisti kienet tinsorgi certament il-kwistjoni ta` jekk l-azzjoni setghetx titkompla skont l-Art 402 u allura kienet tqum ukoll il-kwistjoni ta` jekk l-atturi kienx ghad kellhom l-interess guridiku li jkomplu bl-azzjoni. Il-fatt li t-trasferiment ta` l-ishma tar-rikorrenti kien imminenti, irrizulta b`mod mill-aktar evidenti minn ezami ta` l-iskrittura tat-23 ta` Awissu 2008.

It-tieni eccezzjoni mhijiex sostenibbli u ghalhekk qeghda tkun respinta.

In parentesi, ghandu jinghad li anke li kieku kellu jigi meqjus li fiz-zmien tal-prezentata kienet tezisti azzjoni ohra li setghet tigi ezercitata mir-rikorrenti, fil-mori tal-kawza l-pozizzjoni tar-rikorrenti nbidlet peress li dawn ma baqghux azzjonisti.

Il-Qorti qeghda taghmel referenza ghas-sentenza moghtija mill-Qorti tal-Magistrati (Ghawdex) Gurisdizzjoni Superjuri fil-kawza **George Galea vs Giovanni Elia Zammit Haber et** fid-9 ta` Meju 2007 fejn inghad :-

“F`dan ir-rigward wiehed jista` wkoll jaghmel riferenza ghall-principju tal-jus superveniens. Kuncett li gie applikat mill- Qrati taghna anke meta difett inizjali gie sanat bissopravenienza tad-dritt per ezempju wara l-eccezzjonijiet, sahsitra wkoll meta l-kawza kienet fi stadju ta` appell.

*Hekk per ezempju fil-kawzi **Carmela Catro` vs Arturo Grech et** deciza mill-Qorti ta` l-Appell fit-23 ta` Meju 1947 (Vol. XXXIII.i.108):- “illi wara s-sentenza ta` l-Ewwel Qorti l-appellanti pprezentat ic-cedola ta` l-irkupru u b`hekk irradikat id-dritt taghha pretiz fic-citazzjoni. In vista ta` dan, u bis-sahha tal-principju jus superveniens firmat actionem vel exceptionem, ma jistax jinghad izjed li l-appellanti ma ghandhiex interess ghall-ezercizzju ta` l-azzjoni prezenti, li ghandha bhala skop li twaqqa` permuta li tippretendi falza u simulata, biex thares id-dritt taghha ta` l-irkupru u tlesti triq ghall-kawza tar-rivendizzjoni. Ghalhekk biss, ghall-motiv tal-jus superveniens fuq imsemmi, hemm lok li ssentenza ta` l-Ewwel Qorti tigi revokata, u li l-kawza tigi mibghuta lill-istess Qorti ghat-trattazzjoni u definizzjoni fil-meritu”.*

(ara wkoll : **Salvino Abela vs Jimmy Spagnol** : Qorti ta` l-Appell (Sede Inferjuri) : 21 ta` Jannar, 1986 ; **Antonio Falzon vs Salvatore Camilleri et** : Qorti ta` l-Appell : 8 ta` Frar 1943 : Kollez Vol XXXI.i.588 ; u **Maria**

Concetta Cardona vs Salvatore Bonnici et : Qorti ta` l- Appell : 30 ta` Gunju 1947 : Vol. XXXIII.i.195)

V. Il-mertu

Dak li jholl u jorbot fil-kawza tal-lum huwa dak li jirrizulta li kien miftiehem fl-iskrittura ta` bejn il-partijiet tat-23 ta` Awissu 2008.

1. L-interpretazzjoni tal-kuntratti

L-interpretazzjoni tal-kuntratti hija regolata bl-Art 1003 sa 1009 tal-Kap 16.

Il-principju ewlieni dejjem kien li wiehed ghandu jasal ghal dik li kienet l-intenzjoni tal-partijiet kif espressa fil-kuntratt.

Ghalhekk il-Qrati jridu jistabilixxu mhux dak li l-iktar jaghmel sens ghal min ikun sejjer jaghti gudizzju imma dak li kien l-iktar jaghmel sens ghall-partijiet fic-cirkostanzi li kienu fihom fil-mument tal-kuntratt – u dan dejjem fid-dawl ta` dak li johrog mill-kliem tal-kuntratt.

Fis-sentenza li tat fit-13 ta` Frar 1950 fil-kawza **Onor. Edgar Cuschieri noe vs Perit Gustavo R. Vincenti** il-Qorti tal-Appell qalet illi :-

“fid-dritt dwar il-materja ta` interpretazzjoni tal-kuntratti, meta l-partijiet ma jkunux spjegaw ruhhom car, jew ikunu spjegaw ruhhom ekwivokament, jew fil-kaz li posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx preveduta u li hemm bzonn li tigi maqtugha, allura l-Qrati jkunu obligati jinterpretaw il-konvenzjoni; u din ghandha tigi primarjament interpretata skond l-intenzjoni komuni tal-partijiet li jkunu hadu parti fil-kuntratt u li tkun tidher car mill-kumpless tal-konvenzjonijiet (ara L. 34 ff. de regulis juris, Ulpiano - semper in stipulationibus, et in ceteris contractibus id sequimur quod actum est; aut si non appareat quid actum est, erit consequens ut id est; aut si non appareat quid actum est, erit consequens ut id sequamar quod in regione in qua actum est frequentatur. Quid sequamur quod in regione in qua actum est

frequentatur. Quid ergo, si neque regionis mos appareat, quai varibus fuit? Ad id quod minimum est redigenda summa est). F`materja hekk difficili, bhal ma hija l-interpretazzjoni tal-kuntratti, il-legislatur, sabiex jevita l-konsegwenzi fatali dovuti ghall-arbitriju tal-gudikant, nizzel fil-ligi certi regoli li huma suffragati mill-gherf tad-Dritt Ruman u mill-esperjenza tas-sekoli, pjuttost bhala direttivi anzikke` bhala normi assoluti u inflessibili, b`mod li bhala normi direttivi dawk l-istess regoli skond ic-cirkustanzi jistghu ma jigux pedissekwament segwiti, kif qalet il-Qorti tal-Kassazzjoni ta` Franza fit-18 ta` Marzu `807 riportata mill-Merlin fir-Repertorju tieghu taht il-vuci "Convention", para. 7 fl-ahhar.

Il-Qorti fissret illi dawn mhux regoli li wiehed ghandu japplika b`rigorozita izda huma gwida ghall-Qorti sabiex din tasal ghall-iskop ewlieni ta` l-ezercizzju u cioe` l-intenzjoni tal-partijiet. Ghalhekk mhumiex normi assoluti.

Il-Qorti komplet hekk :-

"Infatti inghad li anki l-istess gurekonsulti romani rigward din il-verita`, kif jidher mill-L. 17 ff. de regulis juris, fejn hemm kanonizzat il-principju li "cum tempus in testamento adjicitur credendum est pro haerede adjectum nisi alia mens fuerit testatoris, sicuti in stipulationibus promissoris gratis fuerit testatoris, sicuti in stipulationibus promissoris gratia tempus adjicitur", u kif huwa konfermat mill-eccezzjoni ghar-regoli u definizzjonijiet proposti, "nisi mens testatoris obsistat. . ." tal-L. 19. para. 1 ff. de cond. et demonst. u bnadi ohra tad-Digest; u r-raguni guridika ghal dana l-adattament tinsab fil-fatt li r-regoli proposti ma jistghux ikunu nfiniti u adattabili ghall-kazi kollha u tant varjati u molteplici tal-manjeri kif il-bnedmin fil-hajja ordinarja jistghu jesprimu ruhhom. Kien ghalhekk li l-legislatur kwindi beda biex l-ewwelnett jiffissa l-principju li meta t-termini huma oskuri jrid jigi kunsidrat dak li l-partijiet kontraenti riedu; u jekk il-volonta` taghhom tista` tigi nterpretata per mezz ta` xi uzu ta` l-istess partijiet, jew tal-lokalita` jew regjoni fejn jghammru u ordinarjament imexxu x-

xoghol taghhom, jew b`mezzi ohra, huwa konvenjenti li jigi segwit dak li huwa l-aktar verosimili skond dawk il-veduti anzikke` l-bniedem jattjeni ruhu ghas-sens letterali tal-kliem (ara l-L. 34 ff. "de regulis juris" fuq imnizzla "in extenso" u l-ligi 114 ff. "de regulis juris" li tghid "in obscures in speci solet quod verisimilius est, aut quod plerumque fieri solet"). Mill-banda l-ohra jinghad li hija norma ta` interpretazzjoni stabbilita mill-ligi illi meta l-espressjonijiet fil-konvenzjoni skond is-sens lilhom attribwit mill-uzu fl-epoka tal-kuntratt, huma cari, m`hemmx lok ghal ebda interpretazzjoni. Mhux lanqas ozjuz li jinghad li, stabbilit il-principju nkonkuss, logiku u naturali, li r-rabta tal-konvenzjonijiet titnissel necessarjament mill-unjoni tal-kunsens tal-kontraenti, il-konsegwenza hija li l-kliem tal-konvenzjoni ghandhom (1) jassumu s-sens li l-partijiet li jkunu ntrabtu jkunu manifestament riedu jaghtuhom, jew jassumu s-sinifikat li (2) il-manjera komuni ta` l-espressjoni "per se" tiddetermina, jew (3) il-verita` ta` l-operat tirrikjedi." (XXXIV.I.30)

Fid-decizjoni ta` din il-Qorti diversament presjeduta tad-29 ta` Novembru 2001 fil-kawza **General Cleaners Co. Ltd. vs Accountant General et** inghad hekk :-

"Jibda biex jinghad illi bhala principju generali, l-ligi u senjatament l-artikolu 1002 tal-Kodici Civili jghid illi "Meta l-kliem ta` konvenzjoni, mehud fis-sens li ghandu skond l-uzu fiz-zmien tal-kuntratt, hu car, ma hemmx lok ghal interpretazzjoni".

"Il-principju kardinali li jirregola l-istatut tal-kuntratti jibqa` dejjem dak li l-vinkolu kontrattwali ghandu jigi rispettati u li hi l-volonta` tal-kontraenti kif espressa fil-konvenzjoni li kellha tipprevali u trid tigi osservata. Pacta sunt servanda". (A.C. 5 ta` Ottubru, 1998 - "Gloria mart Jonathan Beacom et vs L-Arkitett u Inginier Civili Anthony Spiteri Staines").

Tkompli tghid din is-sentenza ta` l-Onorabbli Qorti ta` l-Appell "Illi l-gurisprudenza nostrali hi kostanti filli rriteniet li ma hiex ammissibbli li prova testimonjali kontra jew in aggjunta ghall-kontenut ta` att miktub u hi talvalta ammessa biex tikkjarifika l-intenzjoni tal-partijiet meta din hi espressa b`mod ambigwu" (Vol. XXXIV, P. III., p. 746).

Jintqal inoltre illi "Il-Qrati jkunu obbligati jinterpretaw il-konvenzjoni meta f`kuntratt il-partijiet ma jkunux spjegaw ruhhom car jew posterjorment ghall-kuntratt jintervjeni avveniment li jkollu bhala konsegwenza kwistjoni li ma tkunx giet preveduta u li kien hemm bzonn li tigi maqtugha, u din ghandha tigi primarjament interpretata skond l-intenzjoni tal-partijiet li jkunu hadu parti fil-kuntratt u li tkun tidher car mill-kumpless tal-konvenzjonijiet" (Vol. XXIV, P. I., p.27) (ikkwotata fis-sentenza "Beacom vs Spiteri Staines" - ibid; "Suzanne Xuereb vs Gilbert Terreni" - P.A. RCP. 12 ta` Lulju 2001; "Anton Spiteri vs Alfred Borg" - P.A. RCP. 30 ta` Novembru 2000; "Emanuel Schembri vs Leonard Ellul" - P.A. RCP 30 t`Ottubru 2001)."

Kien ukoll osservat illi :-

"Jirrizulta, u din hi anke r-ratio tal-ligi, (art. 1004 tal-Kodici Civili) illi l-interpretazzjoni li trid tinghata, meta klawsola tista` tfisser haga w ohra, din ghandha tinftiehem dik il-haga li biha jista` jkun hemm xi effetti milli dik il-haga li biha ma seta` jkun hemm ebda effett. Disposizzjoni li tirrifletti l-principju "in dubiis interpretatio capienda est, ut dispositio potius valeat quam pereat".

(ara wkoll : 15 ta` Dicembru 1995 : **Stanislao Cassar et vs Chevalier Antonio Cassar** : Kollez Vol XXIX.II.704 ; 1 ta` Lulju 1985 : **Dr. Joseph Vella Galea vs Joseph Vella** ; 18 ta` Novembru 1957 : **Arthur Stuart Mortimer vs Onor. Nutar Dr. Giorgio Borg Olivier et ne**)

Il-gurista **Giorgi** jitratta l-kwistjoni fir-raba` volum tal-*Obbligazioni*.

Ighid :-

"Puo` accadere, che le parole del contratto siano equivoche od ambigue; ed in tale presupposto tutta l'arte dell'interprete deve rivolgersi a trascogliere il piu` plausibile fra i due significati. Escluderne uno col dimostrarne le inammissibilita`; includerne l'altro, perche` piu` probabile e da preferirsi; e la perfezione dell'ermeneutica si raggiunge col riunire entrambi questi argomenti: giacche` in simile guisa la spiegazione del contratto rimane coartata al senso che si sostiene.

Le regole piu` idonee per attuare questo metodo sono le seguenti. Chi fa un atto giuridico intende principalmente farlo valido ed efficace: percio`, se una clausola e` suscettiva di due sensi, deve spiegarsi piuttosto in quello che puo` avere qualche effetto, anziche` nell'altro che non ne avrebbe alcuno." (p.200)

Giorgi jghid illi kuntratt ghandu jigi kemm jista` jkun salvat u li l-kliem ta` kuntratt m`ghandux jigi trattat separatament izda ghandu jitqies f`kuntest wiehed.

Ighid :

"Debbono quindi rigettarsi le interpretazioni, che a) produrrebbero la nullita` del contratto, b) riuscirebbero contraddittorie al fine voluto dai contraenti, c) porterebbero a considerare costoro come persone stravanganti o di poco senno.

Scartate in questa guisa le interpretazione inammissibili, per fissare la piu` vera o la piu` probabile intelligenza del contratto ambiguo ed equivoco, non e` lecito scostarsi dal senso proprio e ricevuto delle parole. Per altro, queste si debbono

intendere piuttosto secondo l'uso commune, che secondo la purita` dei lessici." (p. 201)

Giorgi jelenka diversi fatturi li jistghu jghinu fl-interpretazzjoni tal-kuntratti. Jirreferi ghac-cirkustanzi kollha li jkunu pprecedew, akkumpanjaw jew segwew il-kuntratt, kif ukoll ghal dak li jkun inghad mill-partijiet ma` terzi persuni :

"Che se l'oscurita` o l'ambiguita` fossero assolutamente invincibili, si hanno per non opposte tutte le clausole non intelligibili, e nel dubbio il contratto s'interpreta contro colui, che ha stipulato, ed in favore di quello che ha contratta l'obbligazione." (p. 202)

"Fa d'uopo analizzare il contratto; esaminare le circostanze che lo hanno preceduto, accompagnato e seguito. Ponderato tutto questo, riescira` chiaro il carattere delle disposizione, e si capira`, se sia dimostrativa o restrittiva.

Fra gli elementi da cui puo` desumersi pure, che la volonta` delle parti fu piu` o meno estesa nel senso letterale, abbiamo annoverato in secondo luogo il fatto delle parti medesime. E qui senza fermarci nuovamente sull'osservanza, quante volte le altre convenzioni che le parti abbiano fatte tra loro, le dichiarazioni che abbiano confidate a terze persone circa il senso del contratto, e gli obblighi che hanno inteso di assumere, bastano a rendere chiara la volonta` dei contraenti. Senonche`, essendo il contratto l'accordo di due volonta`, e` pienamente conforme ai principii di ragione, che nel ricercare fuori del contratto le prove di questa volonta`, si tenga conto delle convenzioni, in cui sono intervenute tutte e due le parti, o almeno quella sola contro cui si reclama l'adempimento.

L'uso poi delle parti stesse, cioe` il loro modo di fare antecedente al contratto, quando abbia relazione necessaria con questo, puo` essere una face luminosissima per mettere in chiaro, se

l'intendimento di entrambe fu diverso dal significato naturale delle parole." (p.209-210)

Giorgi jishaq ukoll li dak li wiehed ghandu jfittex waqt li jinterpreta kuntratt hija l-intenzjoni tal-partijiet:

"Ma possiamo dire liberamente qualche cosa di piu`. L'ufficio dell'interprete non consiste soltanto nel decifrare il senso oscuro delle parole` sibbene comprende anche quello di indagare fino a qual segno il senso apparentemente chiaro delle parole concordi coll'intenzione dei contraenti, e di ricondurre mediante l'uso opportune della interpretazione estensiva o restrittiva la necessaria armonia fra la manifestazione esteriore fallace e il sentimento vero dei contraenti." (p.216)

2. Il-pattijiet u l-kondizzonijiet tal-kuntratt de quo

L-iskrittura de qua hija esebita a fol 4 sa 5, u a fol 194 sa 195 tal-process.

Dehru s-sidien ta` Central Home, ossija l-fond minn fejn kienet qed topera d-dar ta` l-anzjani gestita minn Age Concern u l-atturi.

Il-kontraenti rreferew ghall-iskritturi li saru fis-26 ta` Awissu 1995 (fol 149 et seq) u fit-23 ta` Ottubru 2008 (fol 189 et seq).

Kien patwit li gej :-

- 1. On termination of these Agreements, herein mentioned, the Owners/Guarantors, or their heirs at law, hereby agree to give the sellers or their heirs at law, the sum of fifty eight thousand two hundred and fifty euros (EUR 58,250) in consideration of services rendered by the said Gaetano Bonnici, during the operation of these Agreements.*

2. *The Parties declare that this payment is in full and final settlement of all claims and pretences which the said sellers or their heirs at law, may have against the Owners/Guarantors or their heirs at law.*
3. *This payment also includes the transfer by the sellers or their heirs at law to the Owners/Guarantors or their heirs at law, of the shares they hold in the Company `Age Concern Company Limited`, amounting to fifty per centum (50%) of the said Company. No extra consideration exceeding the sum above mentioned of fifty eight thousand two hundred and fifty euros (EUR58,250) shall be paid to the sellers for the transfer of shares.”*

Il-ftehim sar bejn il-konjugi Balzan u l-konjugi Bonnici.

Age Concern ma tirrafigurax bhala parti.

Dak li gie miftiehem bejn il-konjugi Balzan u l-konjugi Bonnici kien jirrigwarda specifikament il-hlas lill-konjugi Bonnici tas-servizzi rezi waqt l-operat tal-iskritturi datati 26 ta` Awissu 1995 u 23 ta` Ottubru 2008, kif ukoll hlas ghal trasferiment ta` ishma mill-konjugi Bonnici lil konjugi Balzan ta` l-ishma li l-konjugi Bonnici kellhom fl-Age Concern.

Il-klawsola fil-ftehim citata minn Alfred Balzan u bintu Fleur Balzan dwar hlas ghas-saldu tirrigwarda hlas *in full and final settlement of all claims and pretences* li l-konjugi Bonnici ghandhom *against the Owners/Guarantors or their heirs at law*.

Inoltre kien specifikament innizzel li ma kinitx dovuta ebda konsiderazzjoni ohra in eccess ta` s-somma ta` EUR 58,250 in konnessjoni ma` trasferiment ta` l-ishma.

Il-Qorti tqis illi apparti dak li hemm innizzel tant car fl-iskrittura in kwistjoni, l-isfond ta` fatti u l-intenzjoni li kellhom il-

partijiet meta ghamlu l-ftehim ukoll isahhah ir-realta`, ossija li l-hlas stipulat fil-ftehim kien miftiehem li jkun ghas-saldu anke fir-rigward ta` l-ishma li Bonnici kellhom fis-socjeta` intimata.

3. L-isfond tal-fatti

Mhux kontestat illi l-ftehim mertu tal-kawza tal-lum kien propost mill-atturi.

Kien propost mill-atturi t-trasferiment ta` l-ishma billi ma kinitx sejra tigi mgemma l-lokazzjoni ta` Central Home lil Age Concern minhabba dizgwid kontinwu bejn l-azzjonisti.

Il-ftehim kien konkluz fi zmien meta Age Concern ma kenitx qeghda taghmel profitt (ara l-*financial statements* tas-sena li ghalqet fit-30 ta` Settembru 2007 a fol 326 sa 339).

Mill-evidenza jirrizulta illi kien fl-2011 li l-kumpanija bdiet tigi fuq saqajha anke minhabba li kien sar ftehim mal-Gvern dwar kiri ta` sodod.

Ghalhekk fl-2008 kienu l-atturi li waslu ghall-figura ta` EUR 58,250.

Irrizulta li Balzan accettaw li jhallsu dik is-somma minkejja li l-kumpanija kienet f`qaghda finanzjarja xejn felici. Riedu li l-kwistjoni tinghalaq bonarjament.

A contrario sensu, li kieku l-kumpanija baqghet taghmel telf, is-somma ta` EUR 58,250 kienet xorta wahda tibqa` dovuta mill-konjugi Balzan a favur tal-konjugi Bonnici.

In aggunta ghal din is-somma li kienu ser jircievu mat-trasferiment ta` l-ishma, Bonnici baqa` dejjem jircievi d-*director`s remuneration* sakemm ma baqax direttur.

Tajjeb jinghad illi l-azzjonisti ftehm u li d-diretturi jithallsu rimunerazzjoni ta` Lm 1,200 fix-xahar (fol 166).

Tajjeb jinghad illi meta sar il-ftehim, l-atturi kienu diga` jafu illi l-lokazzjoni ta` Central Home ma kenitx sejra tiggedded.

Ghalhekk Bonnici u Balzan kellhom l-intenzjoni li b` dan il-ftehim jigi regolat dak kollu li ghandhu x` jaqsam ma` Age Concern.

Abbazi tal-ftehim kienet patwita s-somma li kellha tithallas lil Bonnici sabiex dawn ma jkollhomx pretensjonijiet aktar u johrogu mix-xena ta` Age Concern darba ghal dejjem.

Li kieku verament kien ghad fadal pretensjonijiet ohra, kien ikun hemm accenn ghal dan fil-ftehim, anzi kien jigi specifikat li kien ghad fadal kwistjonijiet dwar profitti jew telf li taghmel il-kumpannija intimata fiz-zmien meta jimmatura dan il-ftehim.

Din ir-riserva ma saritx billi l-ftehim kien jinkorpora hlas a saldu ta` kwalunkwe pretensjonijiet relatati mas-socjeta` intimata.

4. L-azzjoni

L-azzjoni tal-lum saret kompletament abbazi tal-fatt li fiz-zmien tal-prezentata ta` l-kawza, ir-rikorrenti kienu azzjonisti tas-socjeta` intimata.

Fl-ewwel premessa, inghad bic-car illi r-rikorrenti huma azzjonisti fil-kumpannija intimata fl-ammont ta` hamsin fil-mija (50%) bejniethom.

Apparti dan, ir-rikorrenti Gaetano Bonnici nnifsu kien ukoll direttur fis-socjeta` intimata.

Il-Qorti tara li li kieku ma kienx hemm il-ftehim de quo, kien hemm lok li tigi ezaminata f` iktar dettal appfondit it-talba odjerna.

Madanakollu bil-konkluzjoni tal-kubntratt de quo, ir-rikorrenti kien digra` stabbilew il-pattijiet u l-kondizzjonijiet li bihom kienu rabtu l-valur tat-trasferiment ta` l-ishma.

Dik is-somma proposta u ffissata mir-rikorrenti stess kienet tinkwadra l-pretensjonijiet kollha li kellhom fil-valur tal-ishma.

5. Ir-rizerva

Minn ezami tal-*annual report and financial statements* ghas-sena li ghalqet fit-30 ta` Settembru 2014, jirrizulta li (i) a fol 6 et seq immarkat bhala Dok B, kien ipprezentat rapport iffirmit mid-direttur Alfred Balzan wahdu ; u (ii) sussegwentement ir-rapport kien emendat fis-sens illi inghad illi dwar id-*dividends* kien hemm tilwima, bil-preciz : “*It is being declared that due to the fact that there exists a dispute regarding the declaration of dividends, the matter will be resolved at a later stage.*” (ara Dok AC 5 a fol 38 et seq).

In segwitu r-rapport kien iffirmit miz-zewg diretturi.

Il-Qorti tqis li r-rizerva dwar il-kwistjoni ta` *dividends* ma tbiddel xejn mit-termini tal-ftehim de quo.

Dwar *dividends*, il-Qorti tirreferi ghal Charlesworth & Cain Company Law (12th Ed - Geoffrey Morse) fejn inghad :-

“A dividend is the share, received by a shareholder, of the company’s profits legally available for dividend and divided among the members. Commercial companies are formed to earn profits for the shareholders out of which dividends can be paid, and no express power to pay dividends is required in the memorandum or the articles. It has been held that dividends must only be paid out of profits.....Dividend must be distinguished from interest. Interest is a debt which, like all debts, is payable out of the company’s assets generally. A dividend, however, is not a debt until it has

been declared by the company, and dividends cannot be declared out of the assets generally, they can be declared only out of the profits available for the purpose.” (pagna 532)

[enfazi ta` din il-Qorti)

Brenda Hannigan fil-ktieb taghha **Company Law** (Lexis Nexis UK 2003) tghid :-

*“Assuming that a company does have distributable profits as determined in accordance with the statutory provisions, the next question is whether this automatically entitles the shareholders to a dividend. The position is that it will do so only if the memorandum or articles expressly provide for the payment of a fixed dividend where the company has distributable profits (**Euling v Isreal & Oppenheimer Ltd** 1918, 1 Ch 101). More commonly, the articles will require a declaration of a dividend by the company in general meeting by ordinary resolution following a recommendation by the directors.*

*Only when a dividend has actually been declared does it become payable and due to the members (**Bond v Barrow Haematite Steel Co** 1902, 1 Ch 353).”*(pagna 622 u 623)

Huwa pertinenti li jsir ezami tal-memorandum u l-articles of association tal-kumpannija intimata.

Il-memorandum u articles of association ta` Age Concern qabel it-trasferiment ta` l-ishma mill-konjugi Bonnici ghall-membri tal-familja Balzan kien dak ezebit bhala Dok AC6 a fol 55 et seq.

Fl-articles of association, jinghad li:

“The regulation contained in Part one of the first schedule to the Companies Act 1995 (such schedule

hereinafter referred to as the first schedule) shall apply to the company save insofar as they are not excluded or modified hereby”

Fl-articles of association, ma jissema xejn aktar dwar *dividends* u dikjarazzjoni tagħhom.

Anke fil-*memorandum* u l-*articles of association* tas-socjeta` intimata wara li kien sar it-trasferiment ta` l-ishma (ara Doc AC7) ma jinghad xejn dwar dikjarazzjoni u hrug ta` *dividends* hlief li :

“The regulation contained in Part one of the first schedule to the Companies Act 1995 (such schedule hereinafter referred to as the first schedule) shall apply to the company save insofar as they are not excluded or modified hereby”

Għalhekk ladarba fil-*memorandum* u *articles of association* ma hemm immizzel xejn dwar dikjarazzjoni u hrug ta` *dividends*, għandhom japplikaw id-disposizzjonijiet ta` l-Ewwel Skeda tal-Kap 386.

Id-disposizzjoni rilevanti għall-kaz tal-lum huma :-

Dividendi u rizerva

73. *Il-kumpannija flagħha generali tista` tiddikjara dividendi, izda ebda dividend ma għandu jkun izjed mill-ammont rakkomandat mid-diretturi.*

74. *Id-diretturi jistghu minn zmien għal zmien ihallsu lill-membri dawk id-dividendi provvizorji li jidher lid-diretturi li jkunu gustifikati bil-qligh tal-kumpannija.*

75. *Id-diretturi jistghu, qabel ma jirrakomandaw xi dividend, iwarrbu mill-qligh tal-kumpannija dawk is-somom li jidhrilhom xierqa bhala rizerva jew rizervi li għandhom, fid-diskrezzjoni tad-diretturi, jigu applikati għal xi skop li għalih il-*

qligh tal-kumpannija jista` jigi applikat sewwa, u sakemm issir dik l-applikazzjoni jistghu, bl-istess diskrezzjoni, jew jigu impjegati fin-negozju tal-kumpannija jew ikunu investiti f'dawk l-investimenti, li ma jkunux azzjonijiet tal-kumpannija, kif id-diretturi minn zmien ghal zmien jidhrilhom xieraq. Id-diretturi jistghu wkoll minghajr ma jqieghdu fl-istess rizerva jfaddlu xi qligh li jidhrilhom ahjar li ma jqassmux.

76. Bla hsara ghad-drittijiet ta` persuni, jekk ikun hemm, intitolati ghal azzjonijiet bi drittijiet specjali dwar dividendi, id-dividendi kollha ghandhom jigu dikjarati u mhallsa skont l-ammonti mhallsa jew kreditati bhala mhallsa dwar l-azzjonijiet li ghalihom dividend jithallas, izda ebda ammont imhallas jew kreditat bhala imhallas fuq azzjoni bil-quddiem ta` sejhiet ma jigi konsidrat ghall-fini ta` dan ir-regolament bhala mhallas fuq l-azzjoni. Id-dividendi kollha jigu maqsuma u mhallsa proporzjonatament ghall-ammonti mhallsa jew kreditati bhala mhallsa fuq l-azzjonijiet waqt kull sehem jew ishma taz-zmien li dwaru d-dividend jithallas; izda jekk xi azzjoni tohrog fuq pattijiet li jipprovidu illi jkollha dritt ghal xi dividend minn xi data partikolari dik l-azzjoni ghandu jkollha hekk dritt ghal dividend.

77. Id-diretturi jistghu jnaqqsu minn kull dividend li ghandu jithallas lil xi membru s-somom ta` flus kollha, jekk ikun hemm, li ghandhom dak iz-zmien jithallsu minnu lill-kumpannija akkont tas-sejhiet jew xort`ohra dwar l-azzjonijiet tal-kumpannija.

78. Ebda dividend ma jghaddi bl-imghax kontra l-kumpannija.

Fil-ktieb **Principles of Maltese Company Law** (OUP – 2007) Andrew Muscat ighid hekk dwar l-Art 73 ta` l-Ewwel Parti ta` l-Ewwel Skeda tal-Kap 386 :

“Except where the company’s articles make dividends payable automatically on the ascertainment of sufficient distributable profits, dividends are payable only if and when an authorized organ of the company declares them. It is common for the articles to provide that dividends are to be declared by a resolution passed at a general meeting but that no dividend is to exceed the amount recommended by the directors (Regulation 73 of Part I of the First Schedule to the Companies Act, regulation 74 of Part I of the First Schedule to the Commercial Partnerships Ordinance and article 102 of Table A to the UK Companies Act 1985 are in this sense) – this effectively prevents the shareholders from being too generous with themselves.” (pagna 756)

Fin-Notes on the Companies Act (Midsea Books Ltd) **Oscar Grech**
 ighid :-

“Regulation 73 of Part I of the First Schedule empowers the general meeting to declare a dividend which should not exceed the amount recommended by the directors. Regulation 74 on the other hand gives authority to the directors to pay interim dividends from time to time.

The memorandum and articles of association of a company may provide otherwise. Although it is not usually done, there is no provision in the Act which prohibits a company from empowering the directors to declare a dividend without the sanction of the general meeting.”(pagna 39)

Jinghad illi emm cirkostanzi fejn *dividends* ma ghandhomx jinhargu :

“The law does however attempt to limit distributions by the company to its members if the value of the assets would then be below its capital yardstick. An important rule in this context is that dividends cannot be paid if the value of the net assets of the company is, or would become as a

*result of the dividend payment, less than the value of the issued share capital together with the share premium account, if any, and the capital redemption reserve, if any. (ara : Pg 699-700, **Principles of Maltese Company Law**. op. cit.)*

Dwar Reg 75 tal-Ewwel Parti tal-Ewwel Skeda tal-Kap 386, **Andrew Muscat** ighid :-

“ ... Dividends may only be paid from the distributable profits of the company ... Unless otherwise provided in its articles of association, a company need not distribute all its distributable profits to its shareholders. The normal practice is to set some of this amount aside and to carry it forward to subsequent financial years. It is common for articles of association to provide that the directors may transfer part of the profits to a reserve before recommending a dividend, thereby diminishing the amount which the shareholders may declare as dividends. Under such a provision. The directors may transfer profits to reserves for specific purposes (such as the replacement of particular fixed assets), but a company’s largest reserve is usually its general reserve which may be used for any purpose. Any reserves brought forward from a previous accounting period may be applied in the same way as the company’s profits for the current accounting period. Consequently, if these reserves represent realized profits, they could be added to the company’s realized profits for the current year and distributed as dividends.” (pagna 701 u pagna 755)

Fil-**Pennington’s Company Law** (8th Edition - Butterworths), jinghad :-

“A company is not bound to distribute the whole of its distributable profits among its shareholders, unless its articles so provide. It is usual for a substantial part of the distributable profits of each financial or accounting period to be carried forward

to the next and subsequent periods, when they may be dealt with as if they were profits of the same character earned during those later periods. It is also common for a company's articles to provide that the board of directors may transfer any part of its profits to reserves before recommending a dividend, thus diminishing the fund out of which the shareholders may declare a dividend. Under such an articles, the board may transfer profits to reserves for specific purposes, such as the replacement of fixed assets or the payment of future taxation, but a company's largest reserve is usually its general reserve, which may be used for any purpose, such as the expansion of the company's business by the acquisition of new fixed or other assets.” (pagna 515).

Dwar l-istess suggett, **Oscar Grech** (op. cit.) ighid fil-pag 39 :-

“...according to Section 192(1) dividends should only be paid out of profits available for distribution to the shareholders. Unless the memorandum or articles provide otherwise, dividends should be paid in cash.

Regulation 76 of the First Schedule provides that subject to shares which give their holders special rights as to the payment of dividend, such as preference shares, all dividends should be paid in proportion to the amount to which the shares are paid up, that is to say, not on the nominal amount of shares held respectively by the members.”

Tkompli ssir riferenza ghal **Principles of Maltese Company Law** fejn fit-taqsima li tittratta *unfair prejudice* **Andrew Muscat** ighid :-

“Another frequent cause for complaint can be the failure of the board to recommend the payment of adequate dividends. As a general rule, the quantum of dividends is regarded as a commercial decision which the courts can only chastise if the directors have either abdicated their responsibilities or have

exercised their powers for an improper purpose. The crucial point however is that directors owe a duty to consider the payment of dividends on a regular basis. The reason is that shareholders have a prima facie right to participate in the profits made by their company and which are available for distribution, particularly if the majority shareholders are receiving some form of remuneration from the company (as in the case where they are also directors) and there is no good commercial reason for the dividends not to be paid.

*If the failure to pay dividends is based on a decision of the company to expand its operations, then such failure should not constitute unfair prejudice. Where however, the company continues to accumulate reserves with no foreseeable plans for investment or if, while failing to pay dividends, the directors are paid excessive fees, a strong case of unfair prejudice could be made out in respect of those shareholders who receive no form of remuneration or revenue. In *Re A Company (No 00370 of 1987) ex parte Glossop*, the Court remarked that directors have a duty to consider how much they can properly distribute to the members. The directors, it was remarked, have a duty to remember “that the members are the owners of the company, that the profits belong to the members, and that subject to the proper needs of the company to ensure that it is not trading in a risk manner and that there are adequate reserves for commercial purposes, by and large the trading profits ought to be distributed by way of dividends.” The Court also emphasized that actions of the directors could not be justified by simply pleading that they were taken bona fide in the interest of the company. The Court, relying on the Privy Council Decision in *Howard Smith Ltd vs Ampol Petroleum Limited*, stated that the actions of the board could be attacked in the courts notwithstanding (a) that directors were not influenced by any “corrupt” motive (that is any motive of personal gain as by increased remuneration or by retaining office) and (b) that*

directors honestly believed that their decision was in the best interests of the company as they saw it.

The duty to pay reasonable dividends was also highlighted in Re Sam Weller & Sons Limited. In that case, the company paid the same amount of dividends for thirty seven years, while the sole director and his two sons who were employees of the company, and who altogether held the majority of the shares in the company, continued to receive remuneration for their services. It was held that the failure of the directors to approve the payment of reasonable dividends, whilst continuing to take fees and accumulate reserves, could amount to unfairly prejudicial conduct. The Court did however emphasise that any such allegation of unfair prejudice should be viewed with great caution and that the Court would, as a general rule, be deferential to the commercial judgement of the directors in relation to dividends. It would only be in special circumstances that the Court would interfere with the commercial judgement of the directors given after a bona fide consideration of the matter.” . (pagni 982 sa 984)

Fil-kaz tal-lum, l-atturi kienu azzjonisti, Gaetano Bonnici kien direttur.

Hadu passi sabiex tibda l-procedura biex tigi diskussa u ssir votazzjoni dwar dikjarazzjoni ta` hrug ta` *dividends*.

Kif inhi l-pozizzjoni li ghandha quddiemha l-Qorti, kellha ssir laqgħa generali tal-azzjonisti u tigi diskussa l-materja.

Irrizulta li r-rikorrenti bagħat ittra lill-awditur Robert Cassar b`notifika lil Alfred Balzan datata 24 ta` Gunju 2015 fejn huwa rrakkomanda li ssir distribuzzjoni ta` *dividends* (fol 217).

Imbaghad fl-10 ta` Awissu 2015 talab li tissejjah laqgha generali straordinarja (fol 219).

Mill-minuti tal-laqgha generali straordinarja li saret fl-14 ta` Awissu 2015, ezebiti a fol 221 sa 223, jirrizulta li dawn gew iffirmati minn Gaetano Bonnici biss.

Irrizulta li ghalkemm il-kwistjoni tad-*dividends* kienet diskussa, ma kien deciz xejn mill-azzjonisti fil-laqgha generali straordinarja.

Tajjeb jinghad illi fid-decizjonijiet : **Bond v Barrow Haematite Steel Co** (1902) 1 Ch 353 u **Re Accrington Corpn Steam Tramways Co** (1909) 2 Ch 40, kien inghad illi :-

“unless the company`s articles make dividends payable automatically on the ascertainment of sufficient distributable profits to meet them, dividends are not payable unless and until an authorized organ of the company.”

Ghal din il-Qorti, is-semplici fatt li kien hemm ammont ta` profitt fis-sena 2014, ma jfissirx li awtomatikament dak il-profitt kellu jigi konvertit f *dividends*.

Dan qed jinghad peress li rrizulta li Age Concern ghamlet zmien twil topera minghajr ma taghmel qliegh.

Ghalhekk kien hemm bzonn li l-qliegh jibda jigi akkumulat halli Age Concern ikollha rizerva finanzjarja bhalma solitament ikollha kumpannija b`sahhitha.

Tant hu hekk illi fil-*financial statements* tas-sena 2014, kien dikjarat illi :

“Revenue from residents` stay increased during the year under review. The increase was mainly the result of added business and improved rates generated from an agreement reached with the Health Authorities for the Provision of Services to

the Elderly. Such agreement has translated itself into improved margins which effected positively the results for the year."

Irrizulta wkoll li kienet prassi komuni hafna fil-umpannija li ma jinhargux *dividends*.

Tant hu hekk li anke fis-sena li ghalqet f'Settembru 2015, ma nhargux *dividends*, minkejja li kien hemm qliegh li kien ferm anqas mill-qliegh li sar fis-sena precedenti.

L-atturi kellhom l-oneru tal-prova.

Cio` nonostante ma ressqu ebda provi li s-socjeta` intimata ma kellhiex progetti fil-futur u li ghalhekk ma kellhiex bzonn li zzomm il-profitti taghha biex tkun tista` tinvesti `l quddiem.

Ma tressqux provi li juru li ma kienx mehtieg li jittiehdu in konsiderazzjoni ir-rizervi li ghandhom jinzammu mill-profitti soċjetarji skont ir-regoli li jemanu mill-Ewwel Skeda tal-Kap 386.

Ir-rikorrenti mexxew bil-kaz taghhom abbazi tas-semplici fatt li kienu azzjonisti fiz-zmien li l-kumpannija intimata ghamlet ammont sostanzjali ta` profitt u ghal dik ir-raguni ressqu l-pretensjoni li kellhom jedd li jiehu parti minn dak il-profitt bhala *dividends*.

F`ghajnejn il-Qorti, il-pretensjoni attrici hija bil-wisq superficjali.

Kellhom jingiebu mill-atturi aktar provi ta` sostanza sabiex isostnu l-pretensjoni taghhom.

Jibqa` dejjem il-fatt li l-aturi kienu ftehm u li l-valur tal-ishma taghhom kienet is-somma ndikat fil-ftehim.

Fuq nota finali, issir referenza ghall-klawsola numru 9 tal-*articles of association* tal-kumpannija liema klawsola baqghet l-istess anke wara li sar it-trasferiment ta' l-ishma.

Taqra hekk :-

A person or persons becoming entitled to a share by way of transfer intervivos or causa mortis shall be entitled to the same dividend and other advantages to which he or they would be entitled if he or they were registered holder or holders of the share, except that he or they shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to the meetings of the Company.

Minn din il-klawsola, johrog illi kwalsiasi jedd li seta' kellhom ir-rikorrenti lllum ghadda ghand l-azzjonisti l-godda.

Tajjeb li terga' ssir riferenza ghal **Pennington's Company Law** (op. cit.) fejn inghad :-

*“Unless the company's articles otherwise provide, dividends are payable to the persons who are registered in its register of members, or who are the bearers of its share warrants, on the date when the dividend is declared or when it becomes payable if the articles dispense with a declaration. (**Re Wakley, Wakley v Vachell 1920, 2 Ch 205; Godfrey Phillips Ltd v Investment Trust Corpn Ltd 1953, Ch 449, 1953 1 All ER 7**).*

Dan huwa wkoll in linea ma' dak li jirrizulta fid-dokumenti ta' *share transfer* ezebiti a fol 81 sa 84 tal-process fejn hemm imnizzel b`mod car li :

*“It is hereby agreed that the transferee will hold the said shares under the same conditions as they were held by the transferor **and rights arising from the said shares shall vest in their entirety in the transferee.**”*

(enfazi minn din il-Qorti)

Per konsegwenza, il-Qorti ma tarax li kien ippruvat ghas-sodisfazzjon taghha li r-rikorrenti kellhom dritt li jiricievu parti mill-profitt li ghamlet is-socjeta` intimata u li jezigu li l-profitt kollu jigi konvertit f` *dividends* li ghandhom jigu distribwiti.

6. Argumenti ohra

i) L-izbank tal-EUR 100,000

Min-naha tal-atturi saret enfazi dwar il-fatt illi Alfred Balzan sarraf cheque mahrug f` ismu mill-flus tal-kumpannija (fol 23).

Ir-rikorrenti sostnew li dak l-izbank kien jikkostitwixxi ngann da parti ta` Alfred Balzan.

Din il-Qorti ma tarax kif dan l-incident jista` b`xi mod jaghti xi sostenn lit-talbiet tar-rikorrenti.

Minn evalwazzjoni tal-provi prodotti, il-Qorti ssib bazi fil-verzjoni ta` Alfred Balzan dwar fejn kellhom imorru l-flus import tac-cheque.

Dwar jekk dak li sar minn Balzan kienx jammonta ghal ingann, il-Qorti mhijiex sejra tidhol fil-kwistjoni billi ma ghandha x`taqsam xejn mal-mertu ta` l-kawza.

ii) L-accettazzjoni ta` Alfred Balzan ghall-hlas

Ir-rikorrenti jghidu illi Alfred Balzan accetta li jhallas nofs il-profitti tas-sena 2013-2014 limitament ghall-profitti generati f`dik is-sena biss li kienu jammontaw ghal circa EUR 66,000. Kienet esebita kopja ta` *email* mibghut fl-4 ta` Lulju 2015 minn Dottor Victor Scerri a fol 77 li fiha hemm innizzel li :

“...Kindly note that as a sign of goodwill, and subject to liquidity, my client is willing to accept payment of dividend of 50% of profits registered during financial year ending September 2014.”

Skont ir-rikorrenti, id-dizgwid inqala` ghax Balzan ma riedx jaqsam il-profitti ta` l-accrued profits li kienu jammontaw ghal aktar minn EUR 70,000 ohra.

Il-Qorti sejra tiskarta dan l-argument, peress li l-korrispondenza fuq riferita saret *without prejudice* u fi stadju precedenti ghal din il-kawza fejn kienu qed jigu diskussi rimedji bonarji.

Lanqas ma sejra tiehu in konsiderazzjoni dak li ntqal u li kien diskuss fil-minuti tal-laqgħa generali straordinarja mizmuma f'Awissu 2015, peress li dawk il-minuti qatt ma gew iffirmati mill-azzjonista Alfred Balzan.

Ghaldaqstant dawk l-argumenti ma jagħtu l-ebda sostenn lit-tezi tar-rikorrenti.

Decide

Għar-ragunijiet kollha premessi, il-Qorti qegħda taqta` u tiddeciedi din il-kawza billi :-

Tichad it-tieni eccezzjoni.

Tilqa` l-eccezzjonijiet l-ohra.

Tichad it-talbiet kollha attrici.

Tordna lill-atturi sabiex ihallsu l-ispejjez kollha relatati mas-sentenza tal-lum, kif ukoll dawg kollha relatati mas-sentenza li kienet tat fil-11 ta` Frar 2016.

**Onor. Joseph Zammit McKeon
Imhallef**

Deputat Registratur