QORTI CIVILI PRIM` AWLA

ONOR. IMHALLEF
JOSEPH ZAMMIT MCKEON

Illum il-Hamis 31 ta` Mejju 2018

Kawza Nru. 5
Rik. Gur. Nru. 842/14 JZM

Samchrome FZE socjeta` estera rregistrata fl-Emirati Arab Uniti (UAE)

u

b`digriet tas-17 ta` Novembru 2014 l-isem tas-socjeta` attrici gie jaqra "Dr Kenneth Grima bhala mandatarju specjali ta` Samchrome FZE socjeta` estera rregistrata fl-Emirati Arab Uniti (UAE)"

kontra

1. Danko Koncar (Passaport Croat Numru 086967790) f`ismu proprju ;

2. Dr. Renald Micallef (785956M) bhala stralcarju tas-socjeta` KDK Limited qabel Samchrome Limited (C35840), u ghan-nom tal-istess socjeta` KDK Limited ;

3. Dr. Renald Micallef (785956M) f`ismu proprju ;

4. Donatella Bondin (30882M), f'isimha proprju, u bhala stralcarja antecedenti ta` KDK Limited, ghall-perjodu ta` bejn il-hatra taghha bhala tali u s-sussegwenti rizenja

Il-Qorti :

I. <u>Preliminari</u>

Rat ir-rikors guramentat prezentat fil-<u>25 ta` Settembru 2014</u> li jaqra hekk :–

*1. Illi s-socjeta` rikorrenti ghandha tiehu minghand is-socjeta` KDK Limited is-somma ta` €2,761,262 piu` l-imghax legali fuq l-istess somma minn Jannar 2013 sal-lum ammontanti dan l-ammont ghas-somma ta` circa €1,030,000 biex b`hekk is-somma globali dovuta lis-socjeta` rikorrenti mis-socjeta` KDK Limited tammonta ghal circa €3,791,000 import ta` credit note mahruga mis-socjeta` Samchrome Limited, illum KDK Limited, lil terzi u liema credit note giet eventwalment assenjata lis-socjeta` rikorrenti, kollox kif jigi spjegat fid-dettal waqt it-trattazzjoni ta` dan ir-rikors. A skans ta` repetizzjoni qed jigi hawn anness u mmarkat bhala `**Dokument A**` r-rikors guramentat ipprezentat mis-socjeta` rikorrenti kontra KDK Limited, citazzjoni numru 55/2014 AE, bhalissa pendenti quddiem din l-Onorabbli Qorti, fejn hemm spjega fid-dettal ta` kif din il-credit note giet assenjata lis-socjeta` rikorrenti u kif l-ammont hawn fuq imsemmi gie dovut lis-socjeta` rikorrenti mis-socjeta` KDK Limited.*

*2. Illi s-socjeta` rikorrenti, ftit granet wara li ntavolat ir-rikors guramentat, fuq riferit, intebhet li s-socjeta` KDK Limited, wara li giet formalment intimata sabiex thallas lis-socjeta` rikorrenti l-ammont indikat fil-credit note, piu` l-imghaxijiet li kienu ddekorrew sal-gurnata tal-prezentata ta` dik il-kawza, kienet ipprocediet ghal voluntary winding up billi wkoll iddikjarat, permezz tal-intimat Danko Koncar, li huwa l-uniku direttur u ghandu prattikament l-ishma kollha tas-socjeta` intimate, fil-formola B(2), kopja ta` liema dikjarazzjoni qed tigi hawn annessa u mmarkata bhala `**Dokument B**`, illi l-istess socjeta` ma kellha l-ebda djun, hlief ghal ftit mijiet ta` ewro, u li allura kellha bizzejjed assi biex tkopri dawn id-djun biex tkun tista` tipprocedi bil-voluntary winding up tal-istess socjeta`: "I, Mr. Danko Koncar being the director of KDK Limited hereby declare in accordance with section 268 of the Companies Act, 1995 that I have made a full inquiry into*

the affairs of the said company and have formed the opinion that the said company will be able to pay its debts in full within twelve months from the date of dissolution which shall take place on the 31st December of the year 2013. A statement of the company`s assets and liabilities made up to the 31st December 2013 is being attached as part of this declaration."

3. Illi din id-dikjarazzjoni, flimkien mal-anness rendikont tal-assi u debiti ezistenti fiz-zmien illi saret l-istess, ma hija xejn hlief dikjarazzjoni falza, specifikament intiza sabiex tiddefrawdi s-socjeta` rikorrenti u xxejjen id-drittijiet taghha li jemanu mill-credit note imsemmija, partikolarment meta wiehed iqis ukoll illi skond l-ahhar accounts tas-socjeta` KDK Limited, li gew mhejjijha qabel ma pprocediet ghall-voluntary winding up, l-istess kellha bizzejjed assi biex tkopri l-ammont dovut lis-socjeta` rikorrenti u/jew biex ta` l-inqas tinkorpora dan l-ammont fil-komputazzjoni tal-assi u debiti ezistenti, meta kienet taf ghal numru ta` snin bl-ezistenza ta` dan id-debitu u meta kienet irrikonoxxiet l-istess tramite l-ufficjali taghha, kif ser jigi spjegat b`iktat mod ampju waqt it-trattazzjoni tal-kawza.

4. Illi inoltre, is-socjeta` rikorrenti kienet mhux biss gharrfet lis-socjeta` KDK Limited dwar dan id-debitu permezz ta` zewg ittri legali lilha mibghuta tramite l-avukati Inglizi taghha, Bryan Cave, u cioe` dawk tat-22 ta` Awwissu, 2013 u tal-14 ta` Ottubru, 2013 fejn kienu nfurmaw lis-socjeta` KDK Limited, kif ukoll lid-direttur, Danko Koncar, illi jekk ma` kienitx ser thallas l-ammont dovut skond il-credit note in kwistjoni, oltre l-imghaxijiet skaduti fuq l-istess, is-socjeta` rikorrenti kienet ser tistitwixxi proceduri kontra taghha, kopji ta` dawn iz-zewg ittri interpellatorji hawn annessi u mmarkati kollettivament bhala `**Dokument C**`. Illi kien biss ftit gimghat wara li s-socjeta` rikorrenti interpellat lis-socjeta` KDK Limited permezz tat-tieni ittra nterpellatorja illi s-socjeta` KDK Limited istitwiet il-proceduri ghal voluntary winding up bid-direttur, Danko Koncar, jiddikjara illi l-istess kellha bizzejjed assi biex thallas il-krediturі taghha.

5. Illi dan l-agir frawdolenti, u cioe` l-istituzzjoni tal-proceduri ghal voluntary winding up u d-dikjarazzjoni falza maghmula minn Danko Koncar biss ftit gimghat wara illi s-socjeta` KDK Limited giet interpellata formalment illi jekk ma kienitx ser tonora l-obbligi taghha proceduri ulterjuri kienu ser jigu istitwiti kontra taghha, huwa agir illi kien indubbjament u specifikament intiz biex is-socjeta` KDK Limited tevita milli thallas lis-socjeta` rikorrenti dak l-ammont dovut lilha, kif fuq imsemmi fid-dettall;

6. Illi dan l-agir frawdolenti tas-socjeta` KDK Limited, kommess tramite d-direttur, Danko Koncar, mhux biss huwa doluz u in pessima malafede u mehud bl-uniku skop illi s-socjeta` KDK Limited tehles milli

tottempora ruhha bl-obbligazzjoni fuw riferita, izda inoltre jammonta wkoll ghal agir kriminuz bi ksur tal-Artikoli 315 u 316 tal-Kapitolu 386 tal-Ligijiet ta` Malta u bhala tali jigbed fuq l-intimat Danko Koncar responsabbilta` personali biex jaghmel tajjeb f`ismu proprju u flimkien u in solidum mas-socjeta` KDK Limited ghall-hlas tal-ammont imsemmi izjed `il fuq billi bl-agir tieghu, Danco Koncar ma` jistax jibqa` jinheba taht il-limitation of liability tal-kumpannija tieghu;

7. Illi l-intimat, Danko Koncar, huwa ta` nazzjonalita` Kroata u residenti l-Ingilterra u allura f`zewg pajjizi membri tal-Komunita` Ewropeja sabiex b`hekk f`kaz ta` ezitu favorevoli ghas-socjeta` rikorrenti f`din il-kawza hija tkun tista` tezegwixxi tali sentenza kemm fl-Ingilterra kif ukoll fil-Kroazja fejn l-intimat ghandu assi bizzejjed li jistghu jaghmlu tajjeb ghall-ammont dovut kif fuq intqal.

8. Illi inoltre, l-istralcarji tas-socjeta` KDK Limited, ukoll intimati f`din il-kawza, u li ffirmaw jew ikkontrofirmaw id-dikjarazzjoni ta` solvibilita/solvenza maghmula minn Danko Koncar, u li kienu jew ghadhom jagixxu bhala stralcarji tal-istess socjeta` u ghalhekk kellhom, u ghad ghandhom, l-obbligu statutorju li jassiguraw l-awtenticita` tad-dikjarazzjoni ta` solvenza maghmula mid-direttur u li tal-inqas jassiguraw illi l-krediti maghrufa versu s-socjeta` KDK Limited jigu ssalvagwardjat, kisru l-obbligazzjonijiet taghhom naxxenti mid-disposizzjonijiet tal-Artikoli 265 et seq tal-Kapitolu 386 tal-Ligijiet ta` Malta u ghalhekk, ai termini tal-istess disposizzjonijiet, ghandhom jigu kkunsidrati personalment responsabbli flimkien u in solidum mas-socjeta` KDK Limited u ma` Danko Koncar personalment, sew ghal-kollox jew in parte, ghad-danni sofferti mis-socjeta` rikorrenti konsistenti fl-ammont imsemmi fil-credit note flimkien mal-imghax relattivi fuq dak l-ammont mid-data ta` meta dan sar dovut sad-data tal-pagament effettiv. Illi dan l-agir jew nuqqas doluzi u frawdolenti kommessi mill-intimati kollha, jew min minnhom, jammonta ghal kummerc bi frodi u/jew kummerc hazin ai termini tal-Artikoli 315 et seq tal-Kapitolu 386 tal-Ligijiet ta` Malta.

9. Illi fl-ahhar nett, l-istralcarju kurrenti, l-intimat Dr. Renald Micallef, ghadu sal-lum ma sejjahx laqgha tal-kredituri meta s-socjeta` KDK Limited ilha ghaddejja minn proceduri ta` likwidazzjoni ghal circa tmien xhur, u meta, ai termini tal-Artikolu 272 tal-Kapitolu 386 tal-Ligijiet ta` Malta ghandu l-obbligu li "minnufih" isejjah din il-laqgha jekk huwa jkun tal-fehma li l-kumpannija mhux ser tkun tista` thallas lill-kredituri taghha fiz-zmien imsemmi fid-dikjarazzjoni ta` solvenza. Illi ghal din ir-raguni biss, l-istralcarju, Dr. Renald Micallef, ghandu jigi mnehhi u sostitwit, b`stralcarju iehor, propost mis-socjeta` rikorrenti, li ghandu jinhatar minfloku, dejjem bl-atworizzazzjoni ta` din l-Onorabbli Qorti.

Ghaldaqstant u ghar-ragunijiet premessi kif ukoll ghal dawk li jistghu jirrizultaw waqt it-tratttazzjoni ta` dan ir-rikors, is-socjeta` rikorrenti titlob bir-rispett lil din l-Onorabbli Qorti sabiex, prevja kwalsiasi dikjarazzjoni necessarja u opportuni, m`ghandhiex :

1. Tiddikjara u tiddeciedi illi l-intimat Danko Koncar huwa personalment responsabbli flimkien u in solidum mal-intimati l-ohra, jew min minnhom, ghall-hlas tal-ammont imsemmi fil-credit note, kif fuq imsemmi f`punt numru 1 ta` dan ir-rikors, flimkien mal-imghax legali relattiv fuq dak l-ammont mit-8 ta` Jannar tas-sena 2010 sad-data tal-pagament effettiv, u dan billi tiddikjara wkoll illi minhabba l-agir abbuziv, illegali u sahansitra kriminuz tieghu meta ghamel dikjarazzjoni ta` solvenza falza ma` Awtorita` Pubblika, u cioe` l-MFSA, meta ddecieda li jillikwida s-socjeta` KDK Limited volontarjament, iddikjara li kien tal-fehma li l-kumpannija kienet tista` thallas id-djun taghha kollha sal-31 ta` Dicembru, 2013 meta kien ben konsapevoli tal-ezistenza tal-ammont indikat fil-credit note u kien ilu hekk jaf zmien twil, huwa sar hati ta` wrongful trading u fraudulent trading u b`hekk kiser diversi provvedimenti tal Malta Companies Act, u liema agir gieghel li s-societa KDK ma tkunx tista aktar tinheba wara l-limitation of liability taghha.

2. Konsegwentement tordna l-lifting of the corporate veil tas-socjeta` KDK Limited u tordna wkoll illi s-somma ndikata flimkien mal-imghaxijiet relattivi sad-data tal-pagament effettiv ghandha tithallas mill-intimat personalment u/jew flimkien u in solidum mal-intimati l-ohra kif din il-Qorti jidhrilha.

3. Tiddikjara u tiddeciedi illi l-intimati, Dr. Renald Micallef, bhala stralcarju presenti tas-socjeta` KDK Limited, u Donatella Bondin, bhala stralcarja ta` qablu, naqsu jew min minnhom, milli jezercitaw id-dmirijiet taghhom naxxenti mid-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta u/jew abbuzaw mill-poteri fdati lilhom billi kkommettew atti u/jew ommissjonijiet in vjolazzjoni tad-disposizzjonijiet tal-istess Kapitolu tal-Ligijiet ta` Malta, senjatament pero mhux biss tal-Artikoli 272 u 312 tal-istess Kap. 386.

4. Konsegwentement, tordna t-tnehhija immedjata tal-prezenti stralcarju tas-socjeta` KDK Limited, Dr. Renald Micallef, u tahtar stralcarju iehor minfloku, li jigi propost mis-socjeta` rikorrenti u kkomfermat minn din il-Qorti, jew kwalunkwe stralcarju iehor, skond kif dil-Qorti jidhirlHa xieraq u opportun.

5. Konsegwentement ukoll, tiddikjara u tiddeciedi illi l-intimati, Donatella Bondin u/jew Dr. Renald Micallef, huma personalment responsabbli flimkien u in solidum mal-intimati l-ohra, billi kkommettaw atti jew naqsu minn dmirijiethom in vjolazzjoni tad-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta u, senjatament, in vjolazzjoni tad-disposizzjonijiet imsemmijin supra u konsegwentement responsabbli ghall-hlas tal-ammont dovut imsemmi supra u ghad-danni kollha sofferti mis-socjeta` rikorrenti bhala konsegwenza tal-atti u/jew ommissjonijiet kommessi minnhom.

6. Tillikwida dawn id-danni, occorrendo, permezz ta` periti nominandi.

7. Konsegwentement tordna lill-intimati, jew min minnhom, sabiex personalment u/jew in solidum bejniethom u f`dik il-porzjoni li din l-Onorabbli Qorti tiddeciedi li huma responsabbli ghall-istess danni, jekk ikun il-kaz, ihallsu lis-socjeta` rikorrenti in linea ta` danni dak l-ammont li jigi hekk illikwidat, bhala konsegwenza tal-eghmilhom kif spjegat izjed il-fuq.

8. Finalment, u fl-eventwalita` illi din l-Onorabbli Qorti tilqa` t-talba jew talbiet hawn fuq dedotti; tirreferi dan il-kaz u/jew id-decizjoni tal-istess lill-awtoritajiet kompetenti biex l-intimati, jew min minnhom, jigu debitament investigati ai termini tad-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta.

Bl-ispejjez, kemm gudizzjarji kif ukoll extra-gudizzjarji, inkluzi wkoll dawk subiti mis-socjeta` rikorrenti ghas-servizzi professjonali moghtijai minn konsulenti legali barranin qabel ma gew istitwiti dawn il-proceduri, dawk tal-Mandat ta` Sekwestru u Mandat ta` Qbid Numri 112/2014 u 111/2014 rispettivament, bl-imghaxijiet legali mit-8 ta` Jannar tas-sena 2010 sad-data tal-pagament effettiv tal-ammont dovut u msemmi fil-credit note, u bl-ingunzzjoni tal-intimati ghas-subizzjoni. B`reserva wkoll ghall-kull azzjoni ohra spettanti lis-societa rikorrenti kontra l-intimati kollha jew minn minnhom, anke azzjoni kriminali.

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

Rat ir-risposta guramentata pprezentata minn Danko Koncar f`ismu proprju u minn Donatella Bondin f`isimha proprju u bhala stralcjarja antecedenti ta` KDK Limited fit-18 ta` Frar 2015 li taqra hekk :–

I. *ILLI, in linea preliminari, jispetta unikament lill-kumpannija attrici li tressaq prova dokumentata li Dr. Kenneth Grima kellu r-rapprezentanza guridika taghha, skond il-ligi, fid-data tal-prezentata tar-rikors guramentat promutorju, ossija nhar il-25 ta` Settembru 2014, billi, fin-nuqqas, l-istess rikors guramentat promotorju jigi rez irritu u null.*

II. *ILLI, in linea preliminari wkoll, izda minghajr pregudizzju ghas-suespost, ir-rikors guramentat promutorju tal-kumpannija attrici huwa irritu u null billi jikkonsisti f`kumulu ta` azzjonijiet - bi pregudizzju ghall-esponenti u ghall-konvenuti l-ohra fil-kawza odjerna - li huma bbazati fuq id-disposizzjonijiet ta` zewg ligijiet distinti u separati, ossija azzjoni dwar tmexxija ta` kummerc bi frodi, bbazata fuq id-disposizzjonijiet tal-Att Dwar il-Kumpanniji (Kapitolu 386 tal-Ligijiet ta` Malta) - u cjoe` fuq lex specialis - u azzjoni ta` danni ibbazata fuq id-disposizzjonijiet tal-Kodici Civili (Kapitolu 16 tal-Ligijiet ta` Malta), tant illi, skond il-ligi, l-ewwel azzjoni tinbeda b`rikors semplici, filwaqt illi t-tieni azzjoni tinbeda b`rikors guramentat.*

III. *ILLI, in linea preliminari wkoll, izda minghajr pregudizzju ghas-suespost, is-sitt u s-seba` talbiet ta` l-attrici kif dedotti ma jistghu qatt jintlaqghu minn din l-Onorabbli Qorti, billi d-danni reklamati mill-kumpannija attrici fl-istess talbiet ma jistghux jigu likwidati f`din l-istanza, ossija fil-kors ta` azzjoni dwar tmexxija ta` kummerc bi frodi bbazata fuq id-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta, izda jistghu jigu likwidati biss f`azzjoni appozita bbazata fuq id-disposizzjonijiet tal-Kapitolu 16 tal-Ligijiet ta` Malta.*

IV. *ILLI, in linea preliminari wkoll, izda minghajr pregudizzju ghas-suespost, l-azzjoni attrici, in kwantu li hija azzjoni dwar tmexxija ta` kummerc bi frodi skond id-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta, hija intempestiva billi tali azzjoni setghet issir biss wara li l-kumpannija konvenuta KDK Limited (C 35840) tkun giet debitament dikjarata xolta u insolventi minn din l-Onorabbli Qorti - ossija tkun giet dikjarata li ma tistax thallas id-dejn taghha ghall-finijiet u l-effetti kollha tad-disposizzjonijiet tal-Artikolu 214 et sequitur tal-istess imsemmi Kapitolu 386 tal-Ligijiet ta` Malta - permezz ta` azzjoni separata u appozita, liema azzjoni ghadha sallum ma saritx.*

V. *ILLI, in linea preliminari wkoll, izda minghajr pregudizzju ghas-suespost, l-azzjoni odjerna hija intempestiva wkoll billi giet ipprezentata f`cirkostanzi fejn ghadu mhux maghruf l-ezitu definittiv tal-kawza fl-ismijiet Samchrome Fze vs. KDK Limited - ossija ta` rikors guramentat numru 55/2014 AE, debitament esebit bhala* ***Dokument A*** *mar-rikors guramentat promutorju, li permezz taghha ser jigi stabbilit u deciz jekk il-kumpannija*

konvenuta KDK Limited (C 35840) hijiex, verament, debitrici tal-kumpannija attrici kif allegat - u ghalhekk, f`dan l-istadju, l-kumpannija attrici ma tikkwalifikax bhala kreditrici tal-kumpannija konvenuta KDK Limited (C 35840) ghall-finijiet u l-effetti kollha tal-Kapitolu 386 tal-Ligijiet ta` Malta.

VI. *ILLI, in linea preliminari wkoll, izda minghajr pregudizzju ghas-suespost, l-esponenti Donatella Bondin u l-konvenut Dr. Renald Micallef, kemm f`isimhom proprju u kif ukoll ghan-nom u in rapprezentanza tal-kumpannija konvenuta KDK Limited (C 35840), ma jistghu qatt ikunu l-legittimi kontraditturi tat-talbiet attrici kif dedotti billi, fil-mument illi l-esponenti Donatella Bondin inhatret bhala stralcatarja tal-kumpannija konvenuta KDK Limited (C 35840), ossija nhar is-16 ta` Jannar 2014, hija sabet statement of affairs (**DOK: A**) li kien jindika kapital ta` elfejn (2,000) dollaru Amerikan, flimkien ma` telf ta` elfejn (2,000) dollaru Amerikan - u cjoe` ma sabet l-ebda attiv x`tamministra - u, mar-rizenja taghha minn din il-kariga nhar it-3 ta` Frar 2014, u mal-konsegwenti hatra tal-konvenut Dr. Renald Micallef fl-istess kariga u fl-istess data, s-sitwazzjoni kienet ghadha identika, b`dan illi, f`tali cirkostanzi, l-esponenti Donatella Bondin u l-konvenut Dr. Renald Micallef ma jistghu qatt jinzammu responsabbli ghal kwalsiasi danni, u wisq u wisq anqas ghall-ammonti astronomici li qed jigu reklamati fil-konfront taghhom mill-kumpannija attrici f`din l-istanza.*

VII. *ILLI, in linea preliminari wkoll, izda minghajr pregudizzju ghas-suespost, u in kwantu li l-azzjoni odjerna hija diretta fil-konfront ta` Danko Koncar u tal-kumpannija konvenuta KDK Limited (C 35840), din l-Onorabbli Qorti m`hijiex kompetenti u m`ghandhiex gurisdizzjoni, skond, fost ohrajn, id-disposizzjonijiet tal-Artikolu 741 tal-Kodici ta` Organizzazzjoni u Procedura Civili (Kapitolu 12 tal-Ligijiet ta` Malta), sabiex tisma` u tiddeciedi din il-kawza, u konsegwentement l-istess Danko Koncar u l-kumpannija konvenuta KDK Limited (C 35840) ghandhom jigu liberati mill-osservanza tal-gudizzju, bl-ispejjez kontra l-kumpannija attrici, u dan kemm ghaliex din il-kawza m`hijiex ta` gurisdizzjoni tal-Qrati ta` Malta, u anke ghaliex kull ftehim vigenti bejn il-kumpannija attrici u l-esponent Danko Koncar u l-kumpannija konvenuta, fosthom Business Sale Agreement tal-20 ta` Lulju 2009 (**DOK: B**), jghid illi kwalsiasi kwistjoni li tqum bejn l-istess kontendenti ghandha tigi regolata bil-ligi Ingliza, u ghandha tigi determinata permezz ta` proceduri ta` arbitragg gewwa Londra.*

VIII. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, skond il-Business Sale Agreement hawn fuq imsemmi, l-kumpannija konvenuta KDK Limited (C 35840), bhala l-venditrici fuq l-istess ftehim, ma kellhiex tibqa` responsabbli ghal kwalsiasi pretensjoni eventwali tal-kumpannija attrici, bhala l-kumpratrici fuq l-istess ftehim, wara d-dekors ta` sentejn mill-iffirmar tal-istess ftehim - jekk kemm il-darba l-istess kumpannija konvenuta*

ma tkunx inghatat, mill-kumpannija attrici, avviz bil-miktub dwar tali pretensjoni, liema avviz, f`dan il-kaz, ma inghatax f`dan it-terminu hekk stabbilit mill-kontendenti - u ghaldaqstant id-decizjoni tal-esponent Danko Koncar illi jxolji l-kumpannija konvenuta KDK Limited (C 35840) b`effett mis-16 ta` Jannar 2014 - ossija b`effett minn erbgha snin u nofs wara l-iffirmat tal-istess ftheim - ma tista` qatt tigi tenuta li kienet b`xi mod frawdolenti kif pretiz mill-kumpannija attrici fir-rikors guramentat promutorju taghha.

IX. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, l-ewwel u t-tieni talbiet attrici kif dedotti huma totalment infondati fil-fatt u fid-dritt billi, fost ohrajn, m`huwiex minnu illi l-esponent Danko Koncar - u/jew il-konvenuti l-ohra kollha f`din l-istanza - agixxa b`mod abbuziv, illegali, u sahansitra kriminuz, meta huwa ghamel id-dikjarazzjoni ta` solvenza tal-kumpannija konvenuta KDK Limited (C 35840), u billi lanqas ma huwa minnu illi l-stess esponent - u/jew il-konvenuti l-ohra kollha f`din l-istanza - f`xi mument, mexa kontra d-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta, kif allegat mill-kumpannija attrici, u dan, fost ohrajn, kemm billi l-kumpannija attrici, bhala fatt, m`hijiex kreditrici tal-kumpannija konvenuta KDK Limited (C 35840), u anke ghaliex, fi kwalunkwe kaz, u minghajr pregudizzju ghal dan, l-istess kumpannija konvenuta ghadha, sallum, ma gietx dikjarata debitrici tal-kumpannija attrici mill-Qorti kompetenti.*

X. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, it-tielet, ir-raba`, u l-hames talbiet attrici kif dedotti huma totalment infondati fil-fatt u fid-dritt billi, fost ohrajn, il-konvenut Dr. Renald Micallef - li, sad-data tal-prezentata tar-rikors guramentat promutorju tal-kumpannija attrici, kien ilu biss ftit aktar minn seba` (7) xhur li nhatar bhala stralcatarju - u l-esponenti Donatella Bondin - li, b`kollox, okkupat il-kariga ta` stralcatarja ghal ftit anqas minn tlett (3) gimghat - qatt ma agixxew kontra d-disposizzjonijiet tal-Kapitolu 386 tal-Ligijiet ta` Malta kif allegat, u ghalhekk ma jistghu qatt jinzammu personalment responsabbli ghall-hlas ta` kwalsiasi ammonti indikati, jew li ghad iridu jigi likwidati, kif mitlub, fir-rikors guramentat promutorju tal-kumpannija attrici.*

XI. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, jispetta unikament lill-kumpannija attrici illi tressaq prova cara u skond il-ligi tad-danni allegati fis-sitt talba attrici kif dedotta, u dan skond, fost ohrajn, id-disposizzjonijiet tal-Artikolu 562 tal-Kapitolu 12 tal-Ligijiet ta` Malta.*

XII. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, is-seba` talba attrici kif dedotta hija totalment infondata fil-fatt u fid-dritt billi,*

fost ohrajn, l-esponenti, u l-konvenuti l-ohrajn kollha, m`humiex responsabbli ghal kwalsiasi danni allegatament sofferiti mill-kumpannija attrici.

XIII. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, it-tmien talba attrici kif dedotta hija totalment infondata fil-fatt u fid-dritt, u jispetta unikament lill-kumpannija attrici illi tressaq prova cara u skond il-ligi tal-allegazzjonijiet fiergha u vessatorji li hija ghamlet, fil-konfront tal-esponenti, u tal-konvenuti l-ohra kollha, fir-rikors guramentat promutorju taghha u, fin-nuqqas, l-esponenti qieghdin minn issa jirrizervaw kull azzjoni spettanti lilhom kontra l-kumpannija attrici skond il-ligi, in salvagwardja tad-drittijiet u tar-reputazzjonijiet rispettivi taghhom.*

XIV. *ILLI, fil-meritu, izda minghajr pregudizzju ghas-suespost, it-talbiet attrici kif dedotti huma, fi kwalunkwe kaz, totalment infondati fil-fatt u fid-dritt, u dan kif ser jirrizulta ulterjorment waqt it-trattazzjoni tal-kawza.*

XV. *SALV eccezzjonijiet ulterjuri permessi mil-ligi.*

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 illi fl-udjenza tal-14 ta` Novembru 2016 kienet akkordata t-talba tal-partijiet sabiex il-provi kollha li nstemghu fil-kawzi Nru. 55/14 JZM u 501/15 JZM ikunu jikkostitwixxu prova ghall-finijiet ta` din il-kawza wkoll.

Rat il-provi li tressqu fil-kawzi Nru. 55/14 JZM u 501/15 JZM.

Rat illi l-kawza thalliet ghas-sentenza ghal-lum bil-fakolta` li l-partijiet jipprezentaw noti ta` osservazzjonijiet.

Rat in-noti ta` osservazzjonijiet.

Rat l-atti l-ohra tal-kawza.

II. **Provi**

L-Awditur David Marinelli xehed illi huwa jiehu hsieb l-*audits* ta` KDK Limited ("**KDK**").

L-ewwel *financial statements* li ghamel kienu tas-sena li taghlaq 30 ta` Gunnu 2006 u ta` l-ahhar wiehed dawk tal-31 ta` Dicembru 2013.

Qal li l-kumpannija qeghda tigi stralcjata skont informazzjoni li ghaddielu d-direttur Danko Koncar ("**Koncar**"). Il-process ta` likwidazzjoni tal-kumpannija beda fl-ahhar tal-2013. L-ahhar *audit* tieghu sar wara li ghalaq it-terminu tal-31 ta` Dicembru 2013. L-*audit* tlesta bejn il-31 ta` Dicembru 2013 u t-3 ta` Settembru 2014 li hija d-data tad-*directors` report* u ta` l-*liquidator` s report*.

Ikkonferma li huwa jaf lill-konvenut Dr Renald Micallef ("**Dr. Micallef**").

Spjega li Koncar kien talbu jissuggerixxi stralcjarju. Huwa ndika l-ismijiet ta` tliet persuni u halla l-ghazla ghal Koncar.

Qal li l-komunikazzjoni skambjata ma` Dr. Micallef sehhet meta nqala` il-kaz mertu ta` din il-kawza.

Fisser illi hemm nota fl-*accounts* dwar *contingent liability* kif ukoll sar *a modified audit report* fil-*financial statements* biex jirrifletti l-possibilita` ta` *liability*. Il-kwistjoni kienet ta` interess professjonali ghalih minhabba li huwa qed jiehu hsieb l-*audits*. Ir-riserva saret fil-*financial statements* tal-2013.

Stqarr illi ma kienx sorpriz li l-kumpannija ser tigi stralcjata peress li kien naqas in-negozju.

Ippreciza li l-*liability* harget wara li saru l-*accounts* tal-2012 u qabel saru dawk tal-2013.

Fil-**kontroezami**, xehed illi n-negozju ta` KDK kien inbiegh. Il-*balance sheet* taghha nizlet wara dak il-bejgh.

Stqarr illi qabel saret din il-kawza, l-ammont ta` EUR 4,000,000 qatt ma dehru fil-kotba ta` KDK.

Il-konvenuta Donatella Bondin xehdet illi hija awditur u taghmel xoghol ta` *subcontracting* mad-ditta Busuttil & Micallef.

Xehdet illi kienet mahtura bhala stralcjarju ta` KDK.

Ghamlet il-proceduri kollha relatati ma` *due diligence.*

Inghatat *statement of affairs* sal-31 ta` Dicembru 2013, ossija dikjarazzjoni min-naha tad-diretturi dwar il-figuri finali, fejn irrizulta li si trattava ta` semplici *paper liquidation*.

Qalet li wara li kienet appuntata likwidatur, saret taf bil-kawza tal-lum u hadet id-decizjoni li tirrizenja. Ghamlet hekk ghaliex ma riditx toqghod tidhol il-Qorti. Kienet hasbet li l-likwidazzjoni kienet ser tkun wahda semplici. Saret taf illi l-kawza kienet dwar pretensjoni ta` kreditur li allega li kellu jithallas ammont ta` flus.

Imliet il-formola ta` r-rizenja u pprezentatha lir-Registratur tal-Kumpanniji u nfurmat lil Koncar bid-decizjoni taghha.

Ikkonfermat li hija haditha *for granted* li d-dikjarazzjoni ta` solvenza li ghamel Koncar kienet saret *in good faith.*

Stqarret illi nkwetat ruhha meta hasbet li kienet sejra tigi tigi assocjata ma` persuna li filli ighid illi m`ghandux dejn u filli tidhol pretensjoni kontra tieghu li kienu dovuta €4,000,000.

In **kontroezami** stqarr illi l-kawza dwar il-kreditu kienet prezentata wara li KDK marret ghall-istralc. Ikkonfermat li ma kien hemm xejn mohbi minnha.

Fissret illi damet stralcjarju ghal madwar tlieta jew erba` gimghat wara l-31 ta` Dicembru 2013. Ma kienx hemm assi fl-*statement of affairs* li nghatat. Kull ma kellha f`idejha kien dan l-*statement of affairs*. Qalet li hija qatt ma ffirmat dikjarazzjoni ta` solvenza. Id-dikjarazzjoni saret u kienet iffirmata minn Koncar.

Av. Dr. Kenneth Grima xehed illi l-kawza bin-Nru 55/2014 saret meta Samchrome FZE ("**socjeta` attrici**") ma kellhiex idea li KDK kienet granet qabel marret fi stralc volontarju.

Xehed illi s-socjeta` attrici kienet ilha tippressa lil KDK ghall-hlas ta` USD 3,772,731.55 oltre l-imghaxijiet dovuti fuq l-istess ghal snin twal permezz ta` diversi emails u telefonati.

Qal illi KDK kienet taf bl-ezistenza ta` dan id-debitu ghal zmien twil qabel marret ghal stralc volontarju.

Stqarr illi KDK kienet ufficjalment interpellata mis-socjeta` attrici sabiex thallas l-ammont ta` *rebate* dovut minn KDK.

Ipprezenta korrisprondenza. *Inter alia* kien hemm ittra fejn KDK iddikjarat illi : "*If we were liable for the relevant rebate we would have expected to receive a demand from ArchelorMittel. We have received no such demand.*"

Saret referenza ghal aktar korrispondenza fejn KDK kienet inghatat l-informazzjoni mitluba dwar dan ir-*rebate* kif ukoll korrispondenza fejn KDK kienet mitluba tittrasferixxi l-flus minghajr dewmien.

Xehed illi KDK kienet konxja ta` dan id-dejn kontra taghha. Ghalhekk kien agir b`qerq dak ta` Koncar li jiddeciedi li jxolji KDK.

Stqarr illi qabel ma tpoggiet fi stralc volontarju, u ftit xhur wara li rceviet l-ittri interpellatorji. KDK kellha assi ta` madwar EUR 14-il miljun.

Qal li l-ezistenza ta` r-*rebate* giet ikkonfermata minn Koncar meta xehed fil-kawza Nru. 55/2014 fejn ammetta li kien sar jaf b` dik il-pretensjoni fl-2010 jew l-2011. L-istess kien ikkonfermat minn Kurt Maske.

Stqarr illi l-uniku skop li kellu Koncar bhala l-uniku direttur u azzjonista ta` KDK li jistralcja lil KDK kien sabiex fil-kaz li ssir kawza kontra KDK dwar ir-*rebate,* ma jkunx hemm assi li fuqhom tkun tista` tigi ezegwita s-sentenza.

Sahaq illi kien edott b`dawn il-fatti kien edott anke Dr Micallef.

Xehed illi Dr Micallef sar likwidatur wara li l-ewwel likwidatur kienet irrizenjat meta saret taf bid-dikjarazzjoni falza li kien ghamel Koncar.

Sostna li Dr Micallef baqa` ma ghamel xejn biex jindaga dwar id-debitu dovut minn KDK lis-socjeta` attrici ; lanqas wara li dan il-fatt hareg mill-audit.

Fil-**kontroezami** xehed illi l-involviment tieghu beda f` Settembru jew Ottubru tal-2013.

Qal illi d-dokumenti li jipprecedu z-zmien li fih huwa gie nvolut, inghataw lilu bhala dokumenti mill-klijent.

Stqarr illi l-*credit note* in kwistjoni li harget is-socjeta` attrici ma kenitx iffirmata u ma kienx hu li pprezentaha.

Sostna li Koncar dejjem kien jghid li jrid jinghata prova li huwa ghandu jaghti dawn il-flejjes u li jekk huwa ghandu jaghti, semmai ghandhu jaghti hlas lil Arcelor.

Xehed li Koncar qatt ma ghamel ammissjoni diretta dwar id-debitu, izda l-impjegati tieghu kollha qalu li dawn l-ammonti jirrizultaw fl-accounts antiki.

Ikkonferma li meta Dr. Micallef sar stralcjarju fit-3 ta` Frar 2014, ma sab ebda assi fil-kumpannija. Sab biss EUR 2,000 *share capital.*

Sostna li l-kawza saret kontra l-likwidatur peress li skont il-ligi, meta likwidatur ma jaghmilx xoghlu, il-Qorti tista` ssibu hati personalment. Ghal sentejn, il-likwidatur ma ghamel xejn. La qatt ghamel *creditors` meeting* jew xi indagni dwar dan il-kreditu pretiz. Il-likwidatur kellu l-obbligu li jissalvagwardja l-interessi tal-krediturі, tenut kont illi l-kreditu ta` s-socjeta` attrici ma kienx imnizzel fl-*accounts.*

Stqarr li Dr. Micallef qatt ma cempel lilu jew lill-avukat Ingliz. Qatt ma kkomunika ma` s-socjeta` attrici dwar il-pretensjoni. Minkejja li l-pendenza kienet quddiem il-qorti, il-likwidatur kellu jindaga ghalfejn saret dikjarazzjoni falza mid-direttur ta` KDK. Baqa` ma ndagax jekk KDK ghandhiex aktar krediturі. Thallew hames snin sa ma saret din il-kawza peress li qabel kienet ghaddejja korrispondenza.

Xehed illi Koncar qatt ma ammetta direttament l-ezistenza ta` d-debitu izda nies li kienu qrib tieghu kienu kkonfermaw id-debitu.

Qal illi Koncar huwa l-*beneficial owner* ta` KDK.

Fisser illi li l-uniku mod kif is-socjeta` attrici tista` tithallas huwa jekk il-Qorti ssib responsabbilita` personali.

Spjega li meta saret l-ewwel kawza, huwa ma kienx jaf li l-kumpannija kienet qeghda tigi stralcjata. Meta nstab li kien hemm agir frawdolenti, Samchrome mexxiet b`azzjoni anke kontra l-likwidatur.

Huwa cahad li Koncar kien stqarr illi jekk il-kreditu jirrizulta li jkun dovut, allura kien lest jaghmel tajjeb ghalih hu.

Irrefera ghall-*credit note.* Fiha hemm imnizzla s-socjeta` attrici. Qal li ma jafx min harigha izda cahad li din harget minn BHP Billiton fi zmien meta huma ma kinux ghadhom jagixxu bhala agenti ta` KDK imma kienu bdew jagixxu bhala agenti ta` s-socjeta` attrici.

Stqarr illi s-socjeta` attrici tqis bhala valida l-garanzija li nghatat fil-mori tal-kawza. Ikunx bizzejjed l-ammont kopert bil-garanzija jiddependi minn kemm il-kawza tiehu zmien biex tigi deciza finalment.

<u>Av. Dr. Renald Micallef</u> xehed li sema` l-ewwel darba b` KDK Limited f`Jannar/Frar 2014. Kien kellmu David Busuttil (li huwa l-partner tieghu fl-*audit firm* Busuttil & Micallef) illi l-awditur David Marinelli kien ippropona lilhom sabiex jiehdu hsieb l-istralc ta` KDK. Kien infurmat li kienet inkarikata Donatella Bondin biex tiehu hsieb il-likwidazzjoni u li KDK la kellha assi u lanqas djun. Kellha biss is-*share capital* u *retained losses*. Kif Donatella Bondin saret taf bil-*money claim* irrizenjat minn stralcjarju. Kien propost lilu sabiex jinhatar flokha. Tkellem ma` Donatella Bondin li hija kienet minghaliha li kienet se tkun likwidazzjoni semplici u rrifjutat li tkompli ghaliex ma rieditx toqghod tiela` u niezla l-qorti ghal mizata mizera ta` EUR 300. Qatt ma qaltlu li tat ir-rizenja taghha ghaliex sabet xi haga hazina fjew ghax kien hemm kwistjoni ta` frodi.

Qal illi huwa accetta l-inkariku. Huwa ra l-*financial statements* ta` KDK u ma sab xejn hazin. L-*audit reports* kienu *clean*. Sab li fl-2007, kellha *turnover* ta` US$ 472,000,000. Fl-2008 kellha *turnover* ta` US$ 1,000,000,000. Imbaghad bdiet tnaqqas sena wara l-ohra sakemm fl-2012 ma kellhiex *turnover*. Il-profitti li kienu sostanzjali kienu jitqassmu permezz ta` l-hlas ta` *dividends*.

Kompla jixhed illi huwa ha parir legali dwar il-pretensjoni ta` s-socjeta` attrici. Il-parir li kellu kienet illi l-pretensjoni hija nfondata.

Stqarr illi huwa sab ruhu go sitwazzjoni fejn ma kienx hemm kredituri u kien hemm biss din il-*contingent liability*.

Spjega li huwa ma rrikonoxxiex il-kreditu. Ghalhekk ma kellux l-obbligu li jsejjah *creditors` meeting*.

Xehed illi meta saret id-*declaration of solvency,* din kienet tammonta ghal garanzija personali li ser jithallas id-dejn. Huwa kellu din il-garanzija li saret *in good faith* u mexa fuqha. Spjega li huwa sejjah laqgha mal-azzjonist u mal-awditur li saret fl-ufficcju ta` l-awditur Marinelli. Huwa talab li jsir l-*audit* tal-2013. Qal illi huwa ma kellux dritt jitlob li d-*declaration of solvency* tigi awditjata. Waqt il-laqgha kien infurmat li Koncar kien qal kjarament illi fil-kaz li ssir kanonizzazzjoni tal-kreditu b`decizjoni final ital-qorti, huwa kien ser ihallas. Koncar kellu fondi bizzejjed mnejn ihallas il-kreditu pretiz.

Spjega li huwa ma kienx partecipi fl-ebda transazzjoni tal-kumpannija. Staqsa lill-awditur jekk il-*credit note* qattx kienet fil-kotba ; u jekk kienet, qattx giet ikkancellata. Marinelli accertah illi qatt ma kienet fil-kotba. Fis-*circularisation audit* li sar mill-awditur u nbaghtet lill-*paying agency* li kienet BHP Biliton, ma rrizultat l-ebda *credit note.*

Qal illi huwa kien sorpriz li saret kawza kontra tieghu sabiex jitnehha minn likwidatur. Qal li huwa kien talab lil Koncar jaghmel garanzija li kapaci jhallas il-kreditu pretiz, u din il-garanzija saret. Il-garanzija tikkonsisti billi 15,000,000 sehem li kellu Koncar ghaddew ghand P.I Trustees Limited. L-ishma qed jinzammu in kutodja minn Lombard Bank. P.I Trustees Limited m`ghandhiex tiehu struzzjonijiet minghand Koncar u sakemm tkun deciza finalment il-kawza, Koncar ma jistax ihassar il-garanzija. Il-garanzija tithallas skont struzzjonijiet tieghu. Fil-kaz li l-*money claim* tkun deciza b`mod definittiv kontra KDK jew kontra tieghu bhala stralcjarju ta` KDK, u Koncar ma jhallasx, allura huwa ghandu s-setgha li jitlob lit-*trustees* sabiex ibieghu l-ishma u r-rikavat imur ghand is-socjeta` attrici.

Fisser illi l-uniku relazzjoni li ghandu ma` Donatella Bondin u Koncar hija professjonali u m`ghandhom l-ebda negozju flimkien. L-ewwel darba li ltaqa` ma` Koncar kien meta ghamel il-garanzija. Huwa cahad li kien konsapevoli li kien hemm xi frodi jew li addirittura ghamel frodi. Kieku sab frodi, kien jirrizenja.

Xehed illi skont l-*international reporting standards,* hemm tlett tipi ta` krediturі : *secured creditors, unsecured creditors* u *accruals and provisions.* Fil-kaz tal-lum, kien hemm kienet *claim* li dwarha saret kawza. Min-naha tieghu huwa qies il-*claim* bhala *a contingent liability*. Billi ma kienx hemm kredituri accertati, ma baqa` ma sejjahx *creditors` meeting.*

Qal li huwa vverifika l-*financial statements* biex jara jekk hemmx xi kuntrast bejn id-dikjarazzjoni li ghamel Koncar u l-*audited accounts.*

Qal ukoll illi l-garanzija li ghamel Koncar bl-ishma ghandha valur ta` €13,500,000.

Kompla jghid illi minn verifiki li ghamel bejn l-2015 u l-2017 ma rrizultax li saru kawzi ohra kontra KDK.

Stqarr illi kull darba li talab flus lil Koncar dejjem hallas.

Ipprezenta estratt mill-*international reporting standards* dwar is-sinjifikat ta` *contingent liability*.

Spjega li likwidatur ma jiffirmax id-dikjarazzjoni ta` solvenza. Dikjarazzjoni bhal din issir minn direttur. Wara li accerta ruhu li saret din id-dikjarazzjoni, huwa talab li jsir *audit up to date*. Fid-*declaration of solvency* ma jkunx hemm imnizzla l-*contingent liabilities*.

Danko Koncar xehed li huwa kien direttur ta` KDK mill-15 ta` Marzu 2005 sakemm kien appuntat il-likwidatur. Skont *Business Sale Agreement* tal-20 ta` Lulju 2009, KDK bieghet in-negozju taghha lis-socjeta` attrici, li hija kumpannija registrata fl-Emirati Gharab Maghquda. KDK tqeghdet fi stralc fil-31 ta` Dicembru 2013 u Donatella Bondin kienet appuntata likwidatur.

Xehed illi fit-22 ta` Jannar 2014, Samchrome l-kawza Rik. Gur. Nru. 55/2014 fejn talbet il-hlas ta` EUR 2,761,262 flimkien ma` l-imghax dekors abbazi ta` *credit note* li Samchrome allegat li KDK kienet irrilaxxjat fit-8 ta` Jannar 2010. KDK ikkontestat il-pretensjoni ta` s-socjeta` attrici.

Kompla jixhed illi fit-3 ta` Frar 2014, Donatella Bondin irrizenjat minn likwidatur u minflokha kien appuntat Dr Renald Micallef.

Fil-25 ta` Settembru 2014, is-socjeta` attrici pprezentat il-kawza tal-lum, li kienet kontestata wkoll.

Fis-26 ta` Mejju 2015, is-socjeta` attrici pprezentat it-tielet kawza Rik. Gur. Nru. 501/2015 fejn talbet it-tnehhija ta` Dr Micallef minn likwidatur. Din il-kawza giet kontestata wkoll.

Kompla jixhed illi wara li KDK bieghet in-negozju taghha lis-socjeta` attrici, hija ma baqghetx taghmel negozju, fatt li kien a konoxxenza ta` s-socjeta` attrici. Tant hu hekk illi ghall-bidu, KDK hadet l-isem ta` Samchrome. Huwa kien informa lis-socjeta` attrici li ma xtaqx li KDK tmur ghall-istralc immedjatament wara l-firma tal-*business sale agreement* peress li l-ftehim kien jistipola li l-partijiet setghu jressqu pretensjonijiet kontra xulxin fi zmien sentejn mid-data tal-ftehim u anke minhabba li KDK kien

ghad fadlilha xi assi li ma kinux gew trasferiti lis-socjeta` attrici. Kien ghalhekk li ppropona li jkun hemm bdil ta` l-isem ghal KDK biex b` hekk ma tinholoqx konfuzjoni vis-à-vis l-konsumaturi. Il-bdil tal-isem sar fit-8 ta` Jannar 2010.

Stqarr illi bhala segwitu beda jhejji t-tnehhija tal-assi ta` KDK bil-ghan li fl-ahhar titqieghed fi stralc. Ghall-ahhar ta` l-2011 u bidu ta` l-2012, huwa kien infurmat li s-socjeta attrici kienet qed tippretendi l-hlas ta` EUR 2,761,262 minn KDK abbazi ta` *credit note* li KDK kien harget favur tal-kumpannija ArcelorMittal. KDK kellha negozju ma` ArcelorMittal qabel is-socjeta` attrici xtrat in-negozju ta` KDK. Dik kienet l-ewwel darba li sema b`din il-pretensjoni.

Kompla jixhed illi ArcelorMittal qatt ma kienet qajjmet din il-pretensjoni ma` KDK.

Zied jghid li bhala direttur ta` KDK qatt ma approva din il-*credit note* u lanqas jaf min kien irrilaxxja dik il-*credit note*.

Stqarr illi ghalih il-*credit note* ma kinitx valida. Fi kwalunkwe kaz is-socjeta` attrici ma kellhiex x` taqsam maghha peress li kienet mahruga favur ArcelorMittal, mhux Samchrome.

Spjega li in segwitu, is-socjeta` attrici sostniet li ArcelorMittal kienet zammet pagament dovut lilha ta` EUR 2,761,262 minhabba dik il-*credit note*. Ghalih is-socjeta` attrici kien messha kkontestat dak l-agir.

Sahaq illi s-socjeta` attrici ma setghetx tippretendi hlas minn KDK minhabba li kien sar *cession and assignment agreement*.

Spjega li huwa dejjem ghamilha cara li KDK ma kinitx responsabbli ghall-hlas ta` din il-*credit note*.

Qal li KDK qatt ma rceviet xi ittra legali jew gudizzjarja sa l-ahhar ta` l-2013.

Kompla jghid illi KDK ma setghetx toqghod tistenna lil ArcelorMittal jew is-socjeta` attrici biex jiddeciedu li jiehdu azzjoni gudizzjarja fuq din il-

pretensjoni. Is-socjeta` attrici kienet ilha taf mill-2009 li KDK kellha tigi likwidata fuq talba stess tas-socjeta` attrici stess. Kien ghalhekk li fil-31 ta` Dicembru 2013, il-kumpannija tpoggiet fi stralc u nhatar stralcjarju. KDK kellha *called-up share capital* ta` $2,000 u *retained losses* ta` $2,000 u ghalhekk ma kellha l-ebda valur.

Xehed illi KDK marret ghal *member`s voluntary liquidation* u kkonferma li kien iddikjara li kien fil-pozizzjoni li jhallas id-debiti kollha fi zmien 12-il xahar mix-xoljiment tal-kumpannija. KDK ma kellha l-ebda *liabilities* ghaliex il-pretensjoni ta` s-socjeta` attrici qatt ma dehret fil-kotba tal-kumpannija u sa dakinhar is-socjeta` attrici kienet qatt ma hadet azzjoni legali dwar il-pretensjoni taghha.

Xehed li wara li s-socjeta` attrici pprezentat l-ewwel kawza, huwa nforma lil Donatella Bondin izda din ma riditx tibqa` stralcjarju billi ma kinitx disposta li talloka bizzejjed hin ghall-kwistjoni. Ghalhekk irrizenjat u nhatar Dr Micallef.

Qal illi in segwitu sar jaf illi s-socjeta` attrici kienet ftehmet ma` ArcelorMittal sabiex takkwista din il-*credit note* sabiex b`hekk tkun hi li tfittex lil KDK ghall-hlas.

Sahaq illi Dr Micallef u Donatella Bondin qatt ma kienu involuti fin-negozju ta` KDK. Huma qatt ma kienu jafu bil-*credit note.*

Kompla jishaq illi s-socjeta` attrici hadet azzjoni legali fit-22 ta` Jannar 2014 fuq bazi ta` *credit note* invalida li giet akkwistata minghand ArcelorMittal minghajr l-approvazzjoni ta` KDK.

Ighid illi sahaq ma` Dr Micallef li ghalkemm KDK ma kellha taghti xejn lis-socjeta` attrici, huwa kien dispost li ghal KDK jonora kwalunkwe decizjoni li tinghata fir-rigward ta` l-pretensjoni ta` s-socjeta` attrici. Billi Dr Micallef talab garanzija, sar *escrow agency agreement* fid-29 ta` Jannar 2016 bejn Kermas Resources Limited, KDK Limited u PI Trustees Limited. Kermas Resources Limited hija kumpannija proprjeta` tieghu. Din ittrasferiet lil PI Trustees Limited l-ammont ta` 15,000,000 ishma fis-socjeta` Afark Group plc b` istruzzjonijiet specifici lil PI Trustees Limited illi tittrasferrixxi l-ishma lis-socjeta` attrici jew tbiegh l-ishma u tittrasferixxi l-proventi lis-socjeta` attrici fil-kaz illi din tikseb decizjoni favur taghha u l-ammont kanonizzat ma jkun thallas fi zmien ghoxrin gurnata.

Xehed illi l-ishma mertu tal-garanzija li nghatat lil Dr Micallef ghandhom valur ta` EUR 13,500,000.

Fil-**kontroezami**, xehed illi fl-2008 u l-2009, kien hemm fis-sehh sistema ta` *rebate* imma ma kienx hemm ammont stipulat jew dikjarat li huwa pretiz minn ArcelorMittal. Dak li kien fis-sehh fid-data tat-trasferiment tan-negozju favur i-socjeta` attrici kien kompriz fil-prezz mentri fir-rigward ta` pretensjonijiet futuri, kien hemm perijodu ta` sentejn biex tittiehed azzjoni.

Cahad li kien hemm xi pendenzi dwar *rebate* ghas-snin 2008 u 2009.

Qal li ArcerolMittal qatt ma talbet lil KDK biex thallas xejn.

Muri l-ittra li baghtet is-socjeta` attrici fis-6 ta` Ottubru 2011 dwar l-ammont pretiz, huwa spjega li rcieva l-ittra. Qal illi l-ittra ntbaghtet wara li skadew is-sentejn skont il-ftehim ma` s-socjeta` attrici. Ghalih dik pretiza kienet tikkwalifika bhala kwistjoni gdida li kienet tohrog barra mill-ftehim.

Xehed illi huwa wiegeb ghall-ittra u talab prova ta` dak li kien pretiz.

Cahad li qatt ircieva talba ghall-hlas minghand ArcerolMittal.

Spjega li l-likwidazzjoni ta` KDK kienet ilha miftehma sa minn mindu sar it-trasferiment tan-negozju.

Cahad li certu Maske kien jghinu fin-negozju tieghu u li kien awtorizzat jiffirma ghan-nom tieghu.

Cahad li William Blundell kien ikkorrisponda mieghu dwar ir-*rebate.*

Sahaq li huwa kien il-persuna li seta` jiehu decizjonijiet u jordna hlasijiet.

III. L-ewwel (1) eccezzjoni preliminari

Fl-ewwel eccezzjoni preliminari, kien eccepit illi s-socjeta` attrici kellha taghmel il-prova b`dokumenti illi Dr. Kenneth Grima kellu r-rapprezentanza guridika taghha skont il-ligi fid-data tal-prezentata tar-rikors guramentat promutorju ghaliex fin-nuqqas ir-rikors guramentat ikun irritu u null.

Il-Qorti tqis illi r-rikors guramentat kien ikkonfermat bil-gurament mill-Dr. Kenneth Grima bhala mandatarju specjali ta` s-socjeta` attrici.

Dr Grima xehed fil-kawza u kkonferma bil-gurament tieghu l-mandat li kellu.

Dan premess, irrizulta li kienet ezebita *letter of instruction to Fenech & Fenech Advocates* ; din tikkonferma l-ingagg ta` Dr Grima sabiex jirrapprezenta lis-socjeta` attrici fil-kawza tal-lum (Dok KG a fol 32 sa fol 35).

Skont l-**Art 1857(2) tal-Kap 16**, mandat jista` jsir anke bil-fomm kif ukoll tacitament.

Li mandat mhux jehtieg li jsir bil-miktub kien ikkonfermat fil-gurisprudenza taghna (ara : *inter alia* : PA : 28 ta` Jannar 2004 : **Frendo vs Azzopardi et** ; 28 ta` Frar 2002 : **Elkhaite et vs Attard et** ; 21 ta` Novembru 2007 : **Tabone pro et noe vs Debono et**)

Tenut kont tal-assjem tal-provi, il-Qorti hija sodisfatta li l-mandat ta` Dr Grima nghata ghall-finijiet u effetti kollha tal- ligi anke jekk kien tacitu.

L-eccezzjoni qeghda tkun respinta.

IV. It-tieni (2) u t-tielet (3) eccezzjonijiet preliminari

Fit-tieni eccezzjoni, kien eccepit illi r-rikors promotur huwa rritu u null ghaliex jikkonsisti minn kumulu ta` azzjonijiet li huma bbazati fuq ligijiet distinti u separati ossija azzjoni ghal *fraudulent trading* skont il-Kap 386 li hija l-*lex specialis,* u azzjoni ghal danni bbazata fuq id-disposizzjonijiet tal-

Kap 16. Anke l-forma ghaz-zewg azzjonijiet hija distinta fis-sens ill ital-ewwel tigi promossa b`rikors semplici mentri t-tieni azzjoni tigi ntavolata b`rikors guramentat.

Fit-tielet eccezzjoni, imbaghad, kien eccepit illi s-sitt u s-seba` talbiet ma jistghux jintlaqghu peress li d-danni reklamati permezz ta` dawn iz-zewg talbiet jistghu jigu likwidati biss b`azzjoni ad hoc skont il-Kap 16, u mhux b`azzjoni ghal *fraudulent trading* skont il-Kap 386.

Azzjoni ghal kummerc bi frodi ssir b`*rikors* skont l-Art 315 tal-Kap 386. L-azzjoni attrici hija mpostata fuq aktar minn binarju wiehed, mhux biss fuq l-Art 315. Il-fatt li l-azzjoni kienet intavolata b`*rikors guramentat* ma jgibx in-nullita` tal-procediment anke meta wiehed iqis dak li jghid l-Art 789 tal-Kap 12. Din il-Qorti ma tara li hemm xejn li jzomm lill-attrici milli tiehu azzjoni bil-mod kif sar fil-kawza tal-lum.

Il-kwistjoni relatata ma` kumulu ta` azzjonijiet kienet trattata *in extenso* fis-sentenza li tat il-Qorti tal-Magistrati (Ghawdex) Gurisdizzjoni Superjuri fit-23 ta` Mejju 2013 fl-ismijiet **Robert Camilleri vs PXB Developments Limited et** fejn inghad :-

> *Fis-sentenza fl-ismijiet **Joseph F. Spiteri pro et noe vs Salvatore Guillaumier pro et noe** (Per Imhallef Joseph Henry Xuereb deciza fil-25 ta` Frar 1964) gie ritenut hekk :*
>
> *"infatti hu maghruf li domandi jistghu jigu kumulati biex jigu evitati gudizzji izjed milli hemm bzonn pero` dejjem kompatibilment mal-ezigenzi tal-kaz u meta dana l-kumulu ma jfissirx trattazzjoni differenti ghaliex ikun hemm dika l-konnessjoni bejn ir-rapporti intercedenti bejn l-attur u ddiversi konvenuti, derivanti mill-istess titolu u mill-istess oggett tal-kontestazzjoni, li jissuggerixxu t-trattazzjoni unika u kwindi gudizzju uniku; diversament iridu jsiru tant gudizzji kemm ikunu l-konvenuti u t-trattazzjoni ssir separata. Konferma ta` dan il-principju tinsab fir-regoli li jinformaw l-istitut tal-kjamata in kawza, u cioe` l-integrita` tal-gudizzju u l-eliminazzjoni tal-molteplicita` tal-gudizzji fuq l-istess haga".*
>
> *Imbaghad fis-sentenza fl-ismijiet **Anthony Camilleri vs Citadel Insurance plc et** (Cit Nru:*

556/04GV deciza fil-25 ta` Frar 2005) intqal li gie bosta drabi ritenut mill-Qrati taghna li biex tigi ffissata l-indoli tal-azzjoni li tigi ezercitata wiehed irid ihares mhux tant lejn il-kliem imma lejn dak li sostanzjalment ikun gie mitlub fic-citazzjoni, jigifieri l-fondament u l-oggett tal-pretensjoni fiha dedotta(Ara Kollezz Vol XXXVII pII p776 u Vol XLV pII p652; Vol XI p401, Vol X p926).

F`din is-sentenza appena citata intqal ukoll is-segwenti :

"Il-kumulu ta` azzjonijiet f`gudizzju wiehed huwa possibili kontra pluralita` ta` konvenuti. Id-diffikolta` pero` qeghda filli jigu stabiliti l-kondizzjonijiet li fihom il-gudizzju m`ghandux jigi ammess. Ovvjament l-attur jista`, kontra listess konvenut jitlob fl-istess kawza l-adempiment ta` diversi obbligazzjonijiet, anke naxxenti minn kawzi jew titoli distinti per ezempju li jitlob il-hlas ta` diversi somom dovuti ghal ragunijiet diversi (Art. 759 Kap 12).

M`ghandhux ikun permess pero` li fl-istess citazzjoni l-attur iressaq diversi azzjonijiet kontra diversi konvenuti, jekk ma jkunux konnessi ghal kollox bejnithom. Il-Qrati Taljani irritenew illi biex jistghu jigu kumulati fl-istess gudizzju azzjonijiet ezercitati kontra diversi konvenuti hu almenu necessarju illi bejn id-diversi domandi jkun hemm konnessjoni. In generali imbaghad "e` diferito al prudente arbitrio del magistrato di riconoscere se e quando la collettivita` possa essere autorizzata per l`economia dei giudizi senza pregudizio dei diritti a ciascuno dei litiganti spettanti" (Coen Citazione Materia Civile para 897-907)".

Fis-sentenza fl-ismijiet ***Anthony Saliba vs Carmelo Saliba et*** *(Rik Nru: 43/09PC deciza fis-16 ta` Novembru 2011) saret referenza ghad-decizjoni moghtija mill-Qorti ta` l-Appell fl-ismijiet* ***Mary Bezzina et vs Joseph Vella et*** *(Deciza fid-29 ta` Ottubru, 1999) liema sentenza kienet sostniet*

"F`dan ir-rigward jista` bla diffikolta` jinghad illi l-atti kienu ntizi biex tkun tista` tigi sewwa epurata u deciza din ittalba principali ta` l-atturi. Kien hemm

*konnessjoni cara u netta bejn id-diversi talbiet taghhom b`dan li, ghalkemm kull wahda mit-talbiet kienet indikattiva ta` azzjoni li setghet ukoll tigi proposta wahedha, l-atturi ghazlu li jipproponuhom flimkien ghax kellhom finalita` wahda. `Ha luogo il cumolo delle azioni quando piu` azioni aventi ciascuna vita propria e indipendente si sperimentano tutte nel medesimo giudizio senza che` l`ezercizio nell`una impedisca in tutto o in parte l`ezercizio dell`altra. L`attore puo` di regola cumulare tutte le azioni che gli spettano contro lo stesso connvenuto sebbene dipendano da titoli diversi.` (**Joseph Borg et vs Emanuel Bonello**, deciza mill-Prim`Awla fid-29 ta` Jannar 1999, li ccitat il **Nuovo Digesto Italiano**, Concorso di Azioni).*

Ebda ligi ma tipprojbixxi l-kumulu ta` azzjonijiet, accettat anke mid-duttrina, barra minn xi kazi fejn hemm dispozizzjonijiet espressi u kuntrarji, dak per ezempju li ma tistax tezercita l-azzjoni petitorja u possessorja flimkien, meta l-ezercizzju ta` wahda jeskludi l-ezercizzju ta` l-ohra. (Vol. XXIX P. 1. p. 1087).

*Ma kellux allura jkun hemm ostakolu ghall-atturi li jipprocedu b`att ta` citazzjoni wahda li tkun tikkontjeni kumulu ta` azzjonijiet sakemm jigi sodisfacentement pruvat lill-Qorti li tali procedura kienet utili ghall-ekonomija tal-gudizzju, li kienet tassigura li l-persuni kollha interessati jkunu partijiet, taht vesti jew ohra, fil-gudizzju, u li ma jkunx hemm pregudizzju ghall-konvenuti kjamati biex jirrispondu t-talbiet ta` l-atturi. "La cumulazione delle citazioni era permessa e frequentemente praticata sotto la giurisprudenza anteriore. E` cosa in se ragionevole, conducente ad economia di tempo e di spese e non pregudizievole al convenuto ne punto irriconciliabile con la legge attuale.` (Cremona, **Commentario sul Codice di Procedura**, p. 847)."*

*Fl-ahharnett referenza ssir ghas-sentenza fl-ismijiet **Flavia Cassar et vs Carmelo Muscat et** (Appell Civ Nru: 99/1993/2 deciz fl-14 ta` Novembru, 2011) fejn intqal :*

"13. Hawnhekk non si tratta ta` semplici imprecizjoni fil-forma tac-citazzjoni izda si tratta minn kumulu ta` azzjonijiet distinti bazati fuq kawzalijiet kontradittorji li jincidu radikalment fuq is-sustanza tal-azzjoni u jmorru `l hinn mis-semplici difett ta` forma.

14. Din il-Qorti taqbel mat-tendenza l-aktar recenti talgurisprudenza kontra l-formalizmu esagerat izda fl-istess hin anqas tista` din il-Qorti tippermetti permessivizmu esagerat (**Francis T. Gera noe v Ed. Camilleri et**, Appell Sede Inferjuri, 14/2/1973, Vol. XXXII.i.712) b`mod partikolari fejn dan ikun ippregudika lillparti avversarja.

15. L-eccezzjoni ta` nullità li ntlaqghet mill-ewwel qorti hija dik taht l-art. 789(1)(c) tal-Kodici ta` Organizzazzjoni u Procedura Civili – "jekk fl-att ikun hemm vjolazzjoni tal-forma mehtiega mil-ligi, ukoll jekk mhux taht piena ta` nullità" – izda dik l-eccezzjoni ghandha tintlaqa` biss "kemm-il darba dik il-vjolazzjoni tkun giebet, lill-parti li titlob in-nullità, pregudizzju illi ma jistax jissewwa xort`ohra hlief billi l-att jigi annullat".

16. Il-Qorti hi tal-fehma, kif gia` inghad, li f`dan il-kaz kien hemm difett fil-forma tac-citazzjoni li toltrepassa l-limitu ta` mera formalita` u anzi tolqot is-sustanza stess tal-azzjoni ezercitata mill-atturi b`tali mod li kienet ta` pregudizzju ghall-konvenuti li, kif kellhom dritt jistennew, ma tqeghdux f`pozizzjoni li jkunu jistghu jiddefendu ruhhom adegwatament kontra l-azzjoni tal-atturi. Il-Qorti hi talfehma wkoll li n-nuqqas sostanzjali fic-citazzjoni ma setax jigi rimedjat taht xi dispozizzjoni ohra tal-ligi minghajr ma necessarjament tinbidel is-sustanza tal-azzjoni b`mod partikolari f`sitwazzjoni bhal fil-kaz ta` llum fejn hemm konfuzjoni ta` tlett azzjonijiet kontraddittorji f`daqqa."

*Recentement inghatat sentenza fl-ismijiet **Carmena Muscat vs Frank Said et** (Rik Nru: 739/2006 AE moghtija fl-14 ta` Dicembru, 2012). F`dik il-kawza l-qorti kellha quddiemha rikors guramentat li kellu kawzali dwar vizzju tal-kunsens minhabba zball,*

qerq, vjolenza kif ukoll dik ta` simulazzjoni li evidentement huma inkonciljabbli ma` xulxin. L-istess jinghad fir-rigwrad tal-kawzali ta` kawza falsa mal-kawzali ta` qerq u vjolenza. F`dik il-kawza wara li l-qorti kienet ikkwotat l-artikolu 789 tal-Kap 12 liema artikolu jipprovdi dwar nuliita` ta` rikors ghaddiet ukoll biex tirreferi ghal proviso li jipprovdi li "Izda dik l-eccezzjoni ta` nullita` kif mahsuba fil-paragrafi (a), (c) u (d) ma tkunx tista` tinghata jekk dak in-nuqqas jew vjolazzjoni jkunu jistghu jissewwew taht kull disposizzjoni ohra tal-ligi."

Dik il-qorti tat l-opportunita` lill-attrici tirregola ruhha dwar fuq liema talba kienet se tinsisti billi inghatat l-opportunita` li fir-rigward tal-ewwel tliet talbiet tirrinunzja ghal dawk irragunijiet u t-talbiet li huma inkonciljabbli ma` xulxin (Artikolu 906 jaghti lill-attur il-jedd li jirrinunzja ghall-atti li jkun ipprezenta. Provvediment li impliciment jinkludi l-jedd li jirrinunzja ghall-parti mit-talbiet u ragunijiet).

Din il-qorti kif presjeduta taqbel mal-linja adottata f`din is-sentenza. Dan in vista tal-principju li l-atti kemm jista` jkun ghandhom jigu salvati; kif ukoll ghaliex il-ligi nnifisha tipprovdi meta l-eccezzjoni ta` nullita` tista` tinghata. Jigi nnutat ukoll li kif gie redatt ir-rikors guramentat dan jista` jsir.

Ghalhekk fejn ma jkunx hemm kawzali jew talbiet kontradittorji, ma jkunx hemm nullita` tal-att. Is-sanzjoni estrema tan-nullita` ghandha tigi applikata <u>biss</u> meta jkun hemm kontradittorjeta` <u>mhux</u> meta jkun hemm kumulu ta` azzjonijiet.

Fis-sentenza li tat il-Qorti ta` l-Appell fit-18 ta` Lulju 2017 fil-kawza **<u>Ricevitur Ufficjali vs Steve Alamango et</u>** saret distinzjoni bejn azzjoni ghal danni u azzjoni skont il-Kasp 386. Fl-istess waqt il-Qorti ma esprimietx ruhha fis-sens li dawn huma konfliggenti. Inghad hekk :-

L-attur, f`isem is-socjeta` issa fi stralc, mhux qed jitlob hlas ta` danni fis-sens li tiftiehem din il-frazi fl-ordinament guridiku Malti. L-attur qed jitlob li

l-konvenuti jikkompensaw lill-istess socjeta` talli, konsegwenza tal-agir taghhom, din spiccat b`passiv li jissupera l-attiv. Azzjoni normali ta` danni tista` tintalab minn kull vittma, anke jekk huwa jkollu assi personali bizzejjed biex ihallas kull dejn li ghandu. F`din l-azzjoni, il-kontribuzzjoni tista` tintalab biss meta l-passiv jissupera l-attiv, u tintalab precizament bi skop li jithallsu d-djun tal-kumpanija. L-iskop u n-natura taz-zewg azzjonijiet huma differenti. Din l-azzjoni ma hijiex wahda ghad-danni per se, izda biex id-direttur responsabbli jaghmel pagament favur l-attiv tal-kumpanija, u dan fl-interess tal-kumpanija u biss meta din tkun waqfet topera.

Kif intqal fil-ktieb "Farrars` Company Law" (pagna 739) li ghalih saret anke referenza mill-appellant Farrugia :

"Once liability is established, the extent of any contribution to the company sets is a matter for the court`s discretion and the aim here is primarily compensatory rather than penal to ensure that any depletion of the assets attributable to the period of wrongful trading is made good."

L-iskop ta` din il-kontribuzzjoni hija, biex nghidu, "to balance the books", u mhux bhala kumpens ghad-danni kkagunati. Tnaqqis li issofri socjeta` fil-bilanc taghha, ma hux danni, izda zbilanc li, f`kaz ta` kummerc hazin, u f`kaz biss ta` stralc tas-socjeta`, irid jaghmel tajjeb ghalih id-direttur responsabbli. Diment li s-socjeta` tkun ghadha topera, dan l-izbilanc fil-kotba tal-kumpanija ma jitqiesx "danni" li xi hadd ikun irid jaghmel tajjeb ghalih, izda parti mill-operazzjoni tan-negozju, xi kultant indotta volontarjament ghall-fini ta` beneficcju fiskali. L-izbilanc, ghalhekk mhux "hsara" fis-sens tal-Artikolu 2153 imsemmi, izda nuqqas ta` parita` bejn l-attiv u passiv li thalla jipperdura meta d-direttur kien jaf jew seta` kien jaf li dak l-istat ta` insolvenza ma kienx realistikament possibbli li jitwarrab…t-talba hi fl-interess tal-attiv tal-kumpanija issa fi stadju ta` stralc, u r-relazzjoni guridika hija bejn l-istess kumpanija u d-diretturi – il-kredituri, f`dan l-istadju, ma humiex involuti fl-azzjoni.

Fis-sentenza li tat fid-29 ta` Ottubru 1999 fil-kawza **Mary Bezzina et vs Joseph Vella et**, il-Qorti ta` l-Appell ghamlet tliet kondizzjonijiet sabiex jigi permess il-kumulu tal-azzjonijiet :-

a) Illi l-procedura tkun utili ghall-ekonomija tal-gudizzju ;

b) Illi l-persuni kollha interessati jkunu partijiet, taht vesti jew ohra, fil-gudizzju ;

c) Illi ma jkun hemm ebda pregudizzju ghall-konvenut.

Fil-kaz tal-lum, it-tliet kondizzjonijiet huma sodisfatti. L-attrici setghet mexxiet b`zewg kawzi separati. Pero` dan kien ikun ifisser aktar spejjez ghaz-zewg partijiet, apparti r-riskju reali li l-kawzi jmorru quddiem gudikanti differenti bil-possibilita` ta` sentenzi konfliggenti. Inoltre fil-kawza odjerna, kull persuna nteressata, specjalment il-konvenuti, tinsab fil-gudizzju sabiex twiegeb ghat-talbiet kollha. L-impostazzjoni ta` aktar minn azzjoni wahda fi procediment wiehed ma jidhirx illi fixklet lill-konvenuti tant illi dawn fehmu n-natura tal-azzjonijiet u ddefendew ruhhom minnhom minghajr diffikulta`. Il-mod kif huma redatti t-talbiet, fl-eventwalita` li l-pretensjonijiet attrici jigu ppruvati, mhux se jkun difficli ghal din il-Qorti sabiex, jekk ikun il-kaz, tiddistingwi bejn ir-responsabilita` tal-konvenuti jew min minnhom.

Dan premess, il-Qorti tirrileva li l-Kap 386 ma tipprovdix rimedji ohra kontra allegat abbuz mid-diretturi jew minn ufficjali ohra tal-kumpannija hlief dawk ir-rimedji ndikati fil-ligi stess.

Meta istitut huwa regolat b`ligi specjali *m`ghandhiex* issir riferenza ghal principji generali tad-dritt ghal dak l-istitut.

Fid-decizjoni li tat fit-12 ta` Ottubru 2007 fil-kawza **Valle Del Miele Limited vs Wallace Fino et** din il-Qorti diversament presjeduta qalet :-

> *Kif intwera, is-socjeta` attrici qed titlob li d-diretturi tal-kumpanija Price Club Operators Ltd, jigu dikjarati personalment responsabbli ghall-ghemilhom lejn is-socjeta` attrici.*
>
> *Il-ligi tal-kumpaniji, pero`, ma tipprovdix ghall-kaz ta` responsabbilita` illimitata tal-azjonisti jekk*

mhux fil-kaz ta` fraudulent jew wrongful trading. Fil-fatt dak li qed tallega s-socjeta` attrici jista` jinkwadra ruhu taht fraudulent jew wrongful trading, u dana peress li qed tallega li d-diretturi tal-kumpanija ghamlu zmien joperaw meta kellhom kumulu ta` debiti li kienu jafu li ma setghux ihallsu. Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali tad-diretturi, tali responsabilita` personali tista` tigi dikjarata biss waqt li l-kumpanija tkun fi process ta` stralc, u dana a tenur tal-artikolu 315 u 316 tal-imsemmi Kap. 386. Il-ligi tal-kumpaniji, li hi ligi specjali li tirregola l-kumpaniji u l-ufficcjali taghha, ma tipprovdix rimedji ohra kontra allegat abbuz tad-diretturi, u meta istitut hu regolat b`ligi specjali, mhux lecitu li ssir riferenza ghal xi principju generali tad-dritt. Hu minnu li, b`mod generali, minn jabbuza bid-drittijiet moghtija lilu jista` jkun passibbli ghal danni, izda meta istitut hu regolat b`ligi specjali, hi biss dik il-ligi li ghandha tigi kkunsidrata ghal-fini ta` responsabilita` tal-partijiet u tar-rimedji moghtija – "specialia generalibus derogant" (ara, fil-kaz tal-istitut tal-bejgh, l-applikazzjoni ta` dan l-istess principju fil-kawza "**Scifo Diamantino vs Meridian Enterprises Co. Ltd**", deciza minn din il-Qorti fit13 ta` Frar, 2003). F`dan il-kaz, il-ligi specjali rregolat kif u meta diretturi jistghu jinstabu responsabbli personalment ghad-djun tal-kumpanija taghhom, u hi biss fil-limiti ta` dak provdut f`dik il-ligi specjali li r-rimedji jridu jinstabu.

Fid-decizjoni li tat fil-21 ta` Marzu 2011 fil-kawza **G. Molton Company Limited vs Dr. Raymond Borg et** il-Qorti tal-Magistrati (Malta) qalet hekk :-

Relazzjonijiet u agir ta` socjetajiet u relazzjonijiet u agir ta` membri, ufficjali jew rapprezentanti ta` socjetà huma regolati bl-Att dwar il-Kumpanniji, Kap.386 tal-Ligijiet ta` Malta. L-unici zewg istanzi fejn din il-Ligi tipprovdi ghall-kaz ta` responsabilità illimitata u diretta ta` azzjonisti u rapprezentanti ta` socjetà huma dawk ta` fraudlent trading u wrongful trading, kontemplati fl-Artikolu 315 u fl-Artikolu 316 ta` l-Att … Mill-mod kif giet

impostata l-azzjoni attrici hu evidenti li ssocjetà attrici qed tagixxi kontra Dr. Raymond Borg LL.D. u martu u Salvu Loreto sive Silvio Borg u martu f`isimhom personali ghaliex l-imsemmija Dr. Raymond Borg LL.D. u Salvu Loreto sive Silvio Borg bhala rapprezentanti tas-socjetà Alufinish Limited allegatament agixxew bi frodi tad-drittijiet tas-socjetà attrici. In effetti fir-Rikors promotur is-socjetà attrici titlob li l-konvenuti f`isimhom personali jigu kkundannati jhallsuha is-somma ta` €7,607.97 in bazi ghall-premessa li l-imsemmija somma giet negozjata f`isem is-socjetà Alufinish Limited (C-25894) izda dan sar bi frodi tad-drittijiet tas-socjetà attrici peress illi l-intimati Dr. Raymond Borg u huh Salvu Loreto sive Silvio Borg bhala rappreznetanti stajtu tkunu tafu li s-socjetà Alufinish Limited ma kienetx f`posizzjoni li tonora l-obbligazzjonijiet taghha.

*Fil-fehma tal-Qorti dak allegat mis-socjetà attrici jista` jwassal, kemm-il darba jkun debitament ippruvat, ghal dikjarazzjoni ta` responsabilità personali tar-rapprezentanti tas-socjetà Alufinish Limited, izda kif gustament inghad mill-Prim` Awla tal-Qorti Civili fis-sentenza fl-ismijiet **Valle Del Miele Limited v. Wallace Fino et pro et noe**, Citaz. Nru. 1903/01TM deciza mill-Prim` Awla tal-Qorti Civili fit12 ta` Ottubru 2007, tali responsabilità personali tista` tigi dikjarata biss waqt li il-kumpanija tkun fi process ta` stralc, u dana a tenur ta` l-Artikoli 315 u 316 ta` l-imsemmi Kap.3865. Il-Ligi tal-kumpaniji, li hi ligi specjali li tirregola l-kumpaniji u l-ufficjali taghha, ma tipprovdix rimedji ohra kontra allegat abbuz tad-diretturi, u meta istitut hu regolat b`ligi specjali, mhux lecitu li ssir riferenza ghal xi principju generali tad-dritt. Hu minnu li, b`mod generali, min jabbuza bid-drittijiet moghtija lilu jista` jkun passibbli ghal danni, izda meta istitut hu regolat b`ligi specjali, hi biss dik il-ligi li ghandha tigi kkunsidrata ghal-fini ta` responsabilità tal-partijiet u tar-rimedji moghtija – specialia generalibus derogant … F`dan il-kaz, il-ligi specjali rregolat kif u meta diretturi jistghu jinstabu responsabbli personalment ghad-djun tal-kumpanija taghhom, u hi biss fil-limiti ta` dak provdut f`dik il-ligi specjali li r-rimedji jridu jinstabu (**Brian Theuma v.**

***Chris Cachia pro et noe**, Citaz. Nru. 537/03TM deciza mill-Prim` Awla tal-Qorti Civili fl-14 ta` Ottubru 2004; Hi-Timber Company Limited v. Joseph Baldacchino et, Citaz. Nru. 294/02TM deciza mill-Prim` Awla tal-Qorti Civili fil-15 ta` Dicembru 2005).*

L-import ta` l-insenjament enuncjat f`dik is-sentenza huwa car : ghad illi kreditur jista` jottjeni dikjarazzjoni ta` responsabilità ta` rapprezentanti ta` socjetà debitrici ghad-dejn ta` dik is-socjetà, hu jista` jaghmel dan biss fil-limiti ta` dak provdut fil-Kap. 386 tal-Ligijiet ta` Malta, u senjatament fil-kuntest ta` procediment ta` stralc ta` socjetà u ta` dak provdut fl-Artikoli 315 u/jew 316 ta` l-imsemmi Kapitolu tal-Ligi. Dan il-principju huwa guridikament korrett ghaliex kif osservat mill-awtrici Brenda Hannigan fil-ktieb taghha "Company Law" (Butterworths, Edition 2003, pagna 837; **Brian Theuma v. Chris Cachia pro et noe**, Citaz. Nru. 537/03TM deciza mill-Prim` Awla tal-Qorti Civili fl-14 ta` Ottubru 2004; **Hi-Timber Company Limited v. Joseph Baldacchino et**, Citaz. Nru. 294/02TM deciza mill-Prim` Awla tal-Qorti Civili fil-15 ta` Dicembru 2005; **Valle Del Miele Limited v. Wallace Fino et pro et noe**, Citaz. Nru. 1903/01TM deciza fit-12 ta` Ottubru 2007) dwar il-posizzjoni fil-Ligi Ingliza, li hija il-ligi fuq liema giet addatata l-ligi nostrali dwar il-kumpanniji, in addition to the formal processes of dealing with the insolvent company, whether through liquidation, administration, etc, the collapse of the company is also the time when the conduct of the directors (and officers) of the company will be reviewed.

Mill-Kap.386 tal-Ligijiet ta` Malta oltre li jirrizulta li rimedju dirett fil-konfront ta` rapprezentant tas-socjetà huwa disponsibbli biss fil-kuntest ta` procediment ta` stralc ta` socjetà, jirrizulta wkoll li kemm il-procedura ghall-istralc ta` socjetà kif ukoll il-konsegwenti azzjoni ghal rimedji filkonfront ta` rapprezentant ta` dik is-socjetà – bhal ad ezempju r-rimedju fil-kaz ta` fraudulent trading jew wrongful trading – jistghu jigu istitwiti biss quddiem il-Prim` Awla tal-Qorti Civili."

(ara wkoll is-sentenza ta` din il-Qorti diversament presjeduta tas-27 ta` Gunju 2006 fil-kawza fl-ismijiet **Alf. Mizzi & Sons (Marketing) Limited vs Unifoods Limited et**)

Din il-Qorti kif presjeduta kellha kwistjoni simili ghal dik tal-lum fil-kawza fl-ismijiet **Amadeo Balzan vs Central Holidays (Travel and Tourism) Ltd et** li kienet deciza fis-16 ta` Gunju 2015.

Inghad hekk :-

> *L-eccezzjonijiet li qeghdin jigu decizi llum, bid-diversi sfumaturi taghhom, meta trattati fl-assjem, qeghdin fis-sostanza jikkontestaw il-legittimita` tal-azzjoni attrici fl-intier taghha.*
>
> *L-attur isostni illi ghax huwa azzjonista li jippossjedi 49.7% tal-ishma tas-socjeta` Central Holidays (Travel and Tourism) Limited huwa ghandu l-jedd illi jippromwovi l-azzjoni tal-lum kemm skond l-Art 136A tal-Kap 386 kif ukoll skond l-Art 1124A tal-Kap 16.*
>
> *Din il-Qorti in primis tibda billi tirrileva illi ghax l-attur agixxa bhala azzjonista (ara propju l-ewwel kawzali) u allega vjolazzjoni da parti tal-konvenuti Alexandra Balzan Ruggier u Joseph Oliver Ruggier tal-jeddijiet tas-socjeta` konvenuta u tieghu personali bhala azzjonista, huwa kien qed jinvoka l-harsien tad-disposizzjonijiet tal-Kap 386.*
>
> *Din hija l-lex specialis li tirregola l-allegata vjolazzjoni tad-drittijiet tas-socjeta` konvenuta u tieghu personali bhala azzjonista.*
>
> *Ghax hekk huwa l-kaz tal-lum, l-attur ma jistax, fil-kaz li ma tirnexxix l-azzjoni tieghu skond il-Kap 386, jinvoka wkoll jew alternativament l-applikazzjoni tal-Art 1124A tal-Kap 16, propju ghaliex fil-kaz tal-lum il-Kap 16 huwa l-lex generalis.*
>
> *Japplika l-principju tad-dritt : lex specialis derogat generalis.*

Incidentalment fin-nota ta` osservazzjonijiet tieghu, jirreferi ghal dak li jirrizulta mill-awturi u mill-gurisprudenza dwar il-ligi socjetarja minghajr ma jirreferi – mqar b`accenn – ghall-Art 1124A tal-Kap 16.

Dan premess, il-Qorti tirrileva illi huwa evidenti illi fil-kors tal-kawza, l-attur bidel l-istrategija tieghu. Infatti huwa nieda din il-kawza bil-presentata ta` rikors guramentat minflok b`rikors semplici. L-ghazla ta` l-att opportun ghall-istituzzjoni tal-kawza mhuwiex materja ta` formalizmu izda ta` ordni pubbliku u ta` sostanza. Huwa evidenti illi l-attur ried iwessa` kemm seta` l-modalita` u l-finalita` tal-azzjoni tieghu, billi bl-ewwel erba` talbiet min-naha wahda, avvanza pretensjoni ghal danni billi rrefera ghall-Art 136A tal-Kap 386 u ghall-Art 1124A tal-Kap 16, u min-naha l-ohra, avvanza pretensjoni ulterjuri skond l-Art 402 tal-Kap 386.

*Rinfaccjat bl-ewwel eccezzjoni tal-konvenuta Alexandra Balzan Ruggier, li evidentement kienet motivata minn zviluppi fil-gurisprudenza li tghid illi azzjonijiet abbazi tal-Art 402 tal-Kap 386 ghandhom jigu promossi b`rikors semplici mhux b`rikors guramentat (ara : "**Michael Debono et vs Mario Debono et**" : Prim`Awla tal-Qorti Civili : 29 ta` Novembru 2011 ; "**Bridget Giusti et vs Godwin Giusti et**" : Prim`Awla tal-Qorti Civili : 3 ta` April 2012) l-attur e` corso ai ripari u rtira l-hames u s-sitt talbiet li fl-essenza jfisser li warrab ghal kollox l-azzjoni tieghu abbazi tal-Art 402 tal-Kap 386, u tefa` l-piz kollu fuq il-pretensjonijiet tieghu skond l-Art 136A tal-Kap 386 u skond l-Art 1124A tal-Kap 16 li kellu ta` bilfors ad validitatem iressaqhom `il quddiem bil-presentata ta` rikors guramentat. In segwitu ghall-pass li ha l-attur, il-konvenuta Alexandra Balzan Ruggier irtirat l-ewwel eccezzjoni.*

Il-Qorti sejra tqis li l-azzjoni kif promossa mill-attrici kienet fis-sostanza msejsa fuq id-disposizzjonijiet tal-Kap 386.

Fil-kors tal-kawza ma tressqux provi dwar quantum ta` danni ghall-fini tad-disposizzjonijiet tal-Kap 16. Waqt it-trattazzjoni, is-socjeta` attrici ma ghamlet l-ebda accenn ghall-Kap 16.

Ghalkemm ma hemmx nullita` minhabba l-kumulu ta` azzjonijiet, l-ottika li fiha ghandha tkun inkwadrata din il-kawza ghandha tkun il-*lex specialis* u cioe` il-Kap 386.

In vista tal-premess, qeghda tichad it-tieni (2) eccezzjoni preliminari, u qeghda tilqa` t-tielet (3) eccezzjoni preliminari.

V. <u>Is-seba` (7) eccezzjoni preliminari</u>

Kien eccepit in-nuqqas ta` gurisdizzjoni tal-Qorti kemm abbazi tal-Art 741 tal-Kap 12 u kif ukoll abbazi tal-fatt illi s-socjeta` attrici u KDK kienu ftehmu li kwalsiasi kwistjoni li tqum bejniethom kellha tigi determinata b` arbitragg go Londra skont il-ligi Ingliza.

1. <u>L-Art 741 u 742 tal-Kap 12</u>

Skont is-subartikolu 1(a), tista` tinghata l-eccezzjoni tal-inkompetenza tal-qorti *meta l-kawza ma tkunx ta` gurisdizzjoni tal-qrati ta` Malta.*

Imbaghad l-Art 742(1) jistabilixxi ghal liema persuni l-qrati civili Maltin fejn ghandhom il-gurisdizzjoni li jisimghu u jiddeciedu kawzi :-

> *(a) cittadini ta` Malta, sakemm ma jkunux stabbilew id-domicilju taghhom band`ohra ;*
>
> *(b) kull persuna, sakemm jew ghandha d-domicilju taghha jew tkun toqghod jew tkun qeghda Malta ;*
>
> *(c) kull persuna, f`kawza dwar hwejjeg li qeghdin jew li jinsabu f`Malta ;*
>
> *(d) kull persuna li tkun ikkuntrattat obbligazzjoni f`Malta, izda ghall-kawzi biss li ghandhom x`jaqsmu ma` dik l-obbligazzjoni u kemm-il darba dik il-persuna tkun tinsab Malta ;*

(e) kull persuna illi, ghalkemm tkun ikkuntrattat obbligazzjoni f`pajjiz iehor, tkun ftehmet li ghandha tesegwixxi dik l-obbligazzjoni f`Malta, jew tkun ikkuntrattat obbligazzjoni illi bilfors ghandu jkollha effett f`Malta, kemm-il darba, f`kull kaz, dik il-persuna tkun tinsab Malta ;

(f) kull persuna, ghal kull obbligazzjoni li tkun ikkuntrattat favur cittadin ta` Malta jew persuna li tinsab Malta jew korp li jkollu personalità guridika distinta jew assocjazzjoni ta` persuni inkorporati jew li jiffunzjonaw f`Malta, meta s-sentenza tista` tkun esegwita f`Malta;

(g) kull persuna li tkun b`mod espress jew tacitu volontarjament qaghdet jew qablet li toqghod ghall- gurisdizzjoni tal-qorti.

Is-subartikolu (2) ighid :

Il-gurisdizzjoni tal-qrati ta` kompetenza civili mhijiex eskluza mill-fatt li qorti barranija tkun qeghda tittratta l-istess kawza jew kawza li ghandha x`taqsam maghha. Meta qorti barranija jkollha gurisdizzjoni konkorrenti, il-qrati jistghu fid-diskrezzjoni taghhom, jilliberaw lill-konvenut mill-osservanza tal-gudizzju jew iwaqqfu l-procedimenti f`kaz li l-azzjoni, jekk titkompla Malta, tkun vessatorja, oppressiva jew ingusta ghall-konvenut.

Huwa pacifiku li l-*persuna* li ghalih tirreferi d-disposizzjoni hija l-konvenut.

Fil-kaz tal-lum, il-konvenuti kollha (hlief ghal Koncar) u nkluza KDK huma domiciljati u prezenti Malta. KDK hija registrata Malta wkoll.

Issa tajjeb jinghad illi fi kwistjoni ta` inkompetenza tal-qrati ordinarji, minhabba deroga li tinholoq bhala rizultat ta` kompetenza konkorrenti ta` qorti gewwa gurisdizzjoni ohra, il-Kap 12 jistabilixxi li l-fatt wahdu li jkun hemm qorti ohra barranija li jkollha gurisdizzjoni konkorrenti ma jeskludix *a priori* l-gurisdizzjoni tal-qrati ta` dawn il-Gzejjer.

Fis-sentenza li tat din il-Qorti diversament presjeduta fil-11 ta` Gunju 2013 fil-kawza **Dr Kenneth Grima noe vs Monet Limited et**, inghad illi s-subartikolu (2) japplika fejn ikun hemm diga` kawza dwar l-istess haga jew konnessa maghha li qeghda tinstama` minn qorti barranija. Inghad ukoll illi

jekk ma jkunx hemm kawza bhal dik diga` mibdija – del resto kif inhi din tal-lum – jidher li s-setgha li qorti Maltija tqis u tisma` l-kawza tiddependi mill-kriterji li normalment jsejsu l-gurisdizzjoni tal-qrati taghna skont l-Art 742(1) tal-Kap 12.

2. *Choice of jurisdiction* u *Choice of law*

Da parti tal-konvenuti hemm insistenza fl-eccezzjoni taghhom fuq il-klawsola arbitrali li tolqot kemm il-gurisdizzjoni kif ukoll id-dritt li ghandhom jirregolaw il-vertenza.

Il-kaz tal-lum issib is-sostanza tieghu fi kwistjoni ta` *wrongful trading* u ta` *fraudulent trading* li allegatament sar minn KDK jew l-ufficjali taghha. Ma jirrigwarda xejn il-kontenut tad-diversi kuntratti li saru bejn is-socjeta` attrici u KDK. Il-kaz huwa mpernjat fuq allegat agir abbuziv, illegali u kriminuz ta` xi ufficjali ta` KDK. Ghalhekk ma tidhol ebda kwistjoni ta` *choice of jurisdiction* u ta` *choice of law*. Il-qrati tagna huma kompetenti u ghandhom gurisdizzjoni li jiddeciedu dan il-kaz skont il-ligi Maltija.

Il-Qorti qeghda tichad is-seba` (7) eccezzjoni preliminari.

VI. Ir-raba` (4) eccezzjoni preliminari

Qeghda tkun eccepita l-intempestivita` tal-azzjoni attrici ghaliex skont l-Art 315 u 316 tal-Kap 386 l-azzjoni tista` ssir biss wara li KDK tkun giet debitament dikjarata xjolta u insolventi.

Minn ezami taz-zewg disposizzjonijiet jirrizulta li l-azzjoni tista` tigi promossa wara li kumpannija tkun fi giet xjolta u tkun qeghda tigi stralcjata.

Fis-sentenza ta` din il-Qorti diversament presjeduta fil-kawza fl-ismijiet **Valle Del Miele Limited vs Wallace Fino et** (op. cit.) inghad illi sabiex ikun hemm applikazzjoni tal-Art 315 u 316 tal-Kap 386, kumpannija trid tkun fil-process ta` stralc.

Inghad :-

Din il-Qorti gia ittrattat dan il-punt fil-kawzi ***"Theuma vs Cachia"****, deciza fl-14 ta` Ottubru, 2004, u* ***"Hi-Timber Co. Ltd vs Baldacchino et"****, deciza fil-15 ta` Dicembru, 2005, u gie osservat li, fil-waqt li l-att tal-1995 Dwar il-Kumpaniji (Kap. 386) jaghti rimedju kontra agir abbuziv jew "hazin" tad-diretturi, dan irid jintalab fil-kuntest ta` proceduri ta` stralc kontra l-kumpanija. Fil-kawza deciza l-ahhar din il- Qorti kienet ghamlet dawn l-osservazzjonijiet :*

"Fil-fatt l-artikolu 316 jiddisponi illi l-Qorti tista` taghmel dikjarazzjoni ta` responsabilita` personali, minghajr ebda limitazzjoni, "meta kumpanija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha". Hekk ukoll hija l-posizzjoni fl-Ingilterra minn fejn ahna adattajna l-ligi l-gdida dwar il-kumpaniji.

Fil-ktieb "Farrar`s Company Law" (Edit. 1998 pag. 739) jinghad li biex direttur jinsab responsabbli ta` "wrongful trading" :

"The conditions are that the company has gone into insolvent liquidation, and it appears that the company continued trading after a point in time before the commencement of the winding up when the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation" ;

...

Fin-nuqqas ta` talba ghal istralc, il-Qorti, pero`, ma tistax tipprocedi b`dan il-mod mitlub. Dan kollu japplika wkoll ghal dan il-kaz. L-awtrici Brenda Hannigan fil-ktieb taghha "Company Law" (Butterworths Edit. 2003) tesprimi l-istess opinjoni. Hi tibda it-trattat taghha fuq ir-responsabilitajiet tad-diretturi billi tghid (f`pagna 837) li :

"In addition to the formal processes of dealing with the insolvent company, whether through liquidation, administration, etc, the collapse of the company is also the time when the conduct of the directors (and officers) of the company will be reviewed".

Aktar `l quddiem, l-istess awtrici tindika l-kondizzjonijiet li jridu javveraw ruhhom qabel ma direttur ta` kumpanija jista` jinstab responsabbli ta` "wrongful trading". L-istess bhal ma jinghad fil-ktieb "Farrar`s Company Law" aktar qabel kwotat, hi wkoll

tinnota li l-ewwel kondizzjoni hi li "the company has gone into insolvent liquidation" (pagna 844). Dan hu hekk ghax qabel ma jigi dikjarat li kumpanija hija insolventi, mhux lecitu li wiehed imur wara l-corporate veil u jitlob sodisfazzjon ghall-kreditu tieghu direttament minghand id-diretturi personalment."

Fid-decizjoni li tat din il-Qorti diversament presjeduta fil-kawza **Brian Theuma vs Chris Cachia pro et noe** deciza fl-14 ta` Ottubru 2004, inghad illi :

Ghalkemm l-agir lamentat jista` jwassal ghal dikjarazzjoni ta` responsabilita` personali ta` direttur, tali responsabilita` personali tista` tigi dikjarata biss waqt li kumpanija tkun fi process ta` stralc, u dana a tenur tal-artikolu 315 u 316 tal-Att tal-1995 Dwar il-Kumpaniji (Kap. 386).

Fl-istess sens kienet id-decizjoni tal-Qorti tal-Appell tal-14 ta` Mejju 2010 fil-kawza fl-ismijiet **Dottor Andrew Borg Cardona noe vs Victor Zammit et**.

Fil-kaz tal-lum, KDK tinsab ghaddejja minn stralc tant li Dr Micallef huwa l-istralcjarju prezenti tal-kumpannija bis-setghat u l-obbligi li tistipola l-ligi.

Ir-raba` (4) eccezzjoni preliminari hija nfondata u ghalhekk qeghda tkun respinta.

VII. Is-sitt (6) eccezzjoni preliminari

Kien eccepit illi Donatella Bondin u Dr Micallef mhumiex il-legittimi kontradittur tal-attrici.

a) L-Art 315 tal-Kap 386

Azzjoni skont l-Art 315(1) tal-Kap 386 hija diretta kontra dawk *"il-persuni li xjentement kienu partijiet fit-tmexxija tan-negozju"*.

Andrew Muscat fil-**Principles of Maltese Company Law** (MUP – 2007) Pag 257 ighid :-

> *"The provision* (b`referenza ghal Art 315) *can be invoked against any person involved in the fraud. Liability may therefore be imposed on directors, managers, shareholders and on any other person as long as they are knowingly parties to the fraud."*

Ghalhekk skont Andrew Muscat, l-azzjoni tista` tigi tentata kontra kull persuna sakemm din kienet partecipi fil-frodi perpetwat.

Ta` interess hija l-kwistjoni jekk l-azzjoni tistax tkun istitwita kontra korp morali.

Il-Qorti taghmel riferenza ghall-**Art 332 tal-Companies Act 1948** li kien jaqra hekk :-

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct. On the hearing of an application under this subsection the official receiver or the liquidator, as the case may be, may himself give evidence or call witnesses.

(2) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any company or person acting on his behalf, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection. For the purpose of this subsection, the expression " assignee " includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration

(not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1) of this section, every person who was knowingly a party to the carrying on of the business in manner aforesaid, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or to a fine not exceeding five hundred pounds or to both.

(4) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made, and where the declaration under subsection (1) of this section is made in the case of a winding up in England, the declaration shall be deemed to be a final judgment within the meaning of paragraph (g) of subsection (1) of section one of the Bankruptcy Act, 1914.

Fl-Ingilterra, id-disposizzjonijiet ta` natura penali kienu nkorporati fl-Art 458 tal-Companies Act 1985. In segwitu kienu trasposti fl-Art 993 tal-Companies Act 2006.

Id-disposizzjonijiet dwar responsabbilita` personali u cioe` dak li nsibu fl-Art 315(1) tal-Kap 386 marru fl-Art 213 ta` l-Insolvency Act 1986.

Fil-kaz taghna, il-legislatur ried illi *fraudulent trading* iwassal ghal konsegwenzi civili u penali bis-sahha tal-istess disposizzjoni u cioe` Art. 315 tal-Kap 386, bla ma jqieghed l-azzjoni civili u dik penali sabiex ikunu regolati permezz ta` ligijiet diversi kif gara fl-Ingilterra.

Fil-kuntest Ingliz, il-qrati cahdu talbiet ghal responsabilita` civili minhabba nuqqas ta` l-element ta` *"dishonesty"* filwaqt li kien hemm insistenza ghal oneru ikbar ta` provi, ossija oneru li huwa simili ghal dak rikjest fil-ligi kriminali.

Fil-kuntest tal-Art 315 taghna, is-subartikolu 1 ghandu x` jaqsam mas-sanzjoni civili mentri huwa s-subartikolu 2 jirrigwarda is-sanzjoni penali.

Jirrizulta li l-azzjoni odjerna hija msejsa skont l-ewwel (1) subartikolu biss.

Ghalhekk il-kawza tirrigwarda s-sanzjoni civili u mhux anke dik penali.

Fil-kamp civili u b`mod partikolari ghal dak li ghandu x`jaqsam ma` l-Art 315(1), issir referenza ghal dak li jistipola l-Art 4 tal-Kap 249 :-

F`dan l-Att u f`kull Att iehor mghoddi qabel jew wara l-bidu fis-sehh ta` dan l-Att, kemm il-darba ma jkunx jidher hsieb kuntrarju –

...

(d) l-espressjoni "persuna" tinkludi korp jew ghaqda ohra ta` persuni sew jekk dak il-korp jew dik l-ghaqda jkunu persuna guridika, skont id-disposizzjonijiet tat-Tieni Skeda tal-Kodici Civili, sew jekk le."

Jinghad illi l-Qrati Inglizi fit-trattament ta` l-Art 213(2) tal-Insolvency Act 1986 [ossija dak li hu simili ghal Art 315(1) tal-Kap 386] ikkonkludew li l-azzjoni tista` ssir kontra entitatjiet guridici bhal kumpanniji fl-istess grupp.

Din il-Qorti tesprimi ruhha fis-sens illi l-azzjoni tal-lum tista` ssir kontra korpi morali.

Fil-ktieb : **Corporate Finance and Management Issues in Company Law : Section C : Corporate Management I**" (Revised Edition 2008 - Pag 23), **A.J Dignam & J. P Lowry** ighidu :-

> *"the term parties to the carrying on of the business containing in s 213 (of the 1986 Act) is expansive in effect so that any person who takes a positive step in the fraudulent trading can be liable. Contrast s. 214 ... the scope of which is limited to directors and shadow directors."*

Fil-kawza **In Re Augustus Barnett & Son Limited** (1986) BCLC 170, Hoffman J. spjega illi :

> *"The words "persons .... parties to" may be wide enough to cover outsiders who could not be said to*

have carried on or even assisted the carrying on of the company`s business, but who nevertheless in some way participated in the fraudulent acts."

Fil-kawza **Morris vs Bank of India** (2004, EWHC 528(Ch) ; 2004, 2 BCLC 279) Neuberger J. ighid hekk :-

"In my judgement, just as an employee of the company who was merely carrying out orders does not fall within section 213(2) whereas somebody who orchestrates, organizes or can seize of the business concerned does not fall within the section, so a company or other entity which carries on (so far as it is concerned) a bona fide business with the company, does not fall within section 213(2) but a company which is involved in, and assists and benefits from, the offending business, or the business carried on in an offending way, and does so knowingly and therefore, dishonesty does fall or at least can fall within section 213(2)."

Il-fatt illi persuna li teknikament tkun esterna ghall-kumpannija izda jkollha ngagg maghha tkun involuta direttament fit-tmexxija tal-kumpannija taqa` taht il-kappa tal-Art 315(1).

Il-Qorti ma tarax ghaliex l-azzjoni skont l-Art 315 ma tistax tkun promossa kontra l-istralcjarji.

Fl-istess waqt tghid illi ghalkemm l-azzjoni tista` tigi ezercitata kontra korp morali, dan il-korp morali ma jistax ikun il-kumpannija li tkun qeghda tigi stralcjata (ara : PA : 31 ta` Jannar 2017 : Bowood Constructions Limited vs Greta Bugeja et ; u PA : 31 ta` Ottubru 2017 : Galleria Management Limited vs Angele Calleja et)

Ghalhekk l-azzjoni skont l-Art 315 ma tistax tigi ezercitata kontra Dr Renald Micallef *ghan-nom ta` KDK Limited*.

b) L-Art 316 tal-Kap 386

Ghal dak li jirrigwarda l-azzjoni skont l-Art 316, din tista` tigi promossa kontra l-persuna li kienet direttur tal-kumpannija.

Fil-kaz tal-lum l-azzjoni setghet tigi ntavolata <u>biss</u> kontra Koncar mhux ukoll kontra l-konvenuti l-ohra.

VIII. <u>Il-hames (5) eccezzjoni preliminari</u>

Kienet eccepita l-intempestivita` tal-azzjoni billi ghadu ma rrizultax jekk KDK hijiex tassew debitrici tal-attrici, wisq anqas b`decizjoni tal-qorti.

L-eccezzjoni hija nfondata ghar-rigward tal-Art 315(1).

Ighid **<u>Andrew Muscat</u>** fil-Pag 257 tal-**<u>Principles of Maltese Company Law</u>** (op. cit.) :

> *"the wording of the provision appears wide enough to include fraud committed against potential creditors (Vide L.S. Sealy & D Milman, Annotated Guide to the Insolvency Legislation (5th ed. 1999 at pg 244). In Re Seillon (1982 Crim L.R. 676), the creditor was a bank which had brought an action against the defendant some nine years previously but had not pursued it. The jury was directed to interpret the term "creditor" so as to include "persons who the defendant feared would pursue him with legal claims in Court." The Court of Appeal upheld his conviction even though the judges were willing to accept that the bank was not a creditor for the purposes of the bankruptcy legislation. They noted that the term "admitted of some flexibility".*

Ma jistax jinghad l-istess fil-kaz tal-Art 316.

Minn qari tal-Art 316, jirrizulta li l-azzjoni trid tkun intavolata mill-istralcjarju.

Skont id-disposizzjoni, il-Qorti tista` taghmel dikjarazzjoni ta` responsabilita` personali, minghajr l-ebda limitazzjoni, meta kumpannija tkun giet xjolta jew tkun insolventi, u jkun jidher li min kien direttur tal-kumpannija kien jaf, jew inkella kellu jkun jaf qabel ix-xoljiment, li ma kienx hemm prospett xieraq li l-kumpannija setghet tevita x-xoljiment minhabba l-insolvenza taghha.

Din ukoll hija l-posizzjoni fil-ligi Ingliza, li hija s-sors tal-ligi taghna.

Fil-Pag 739 ta` **Farrar`s Company Law** (Edit. 1998) jinghad hekk dwar *wrongful trading* –

> *The conditions are that the company has gone into insolvent liquidation, and it appears that the company continued trading after a point in time before the commencement of the winding up when the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation.*

Fis-sentenza li tat din il-Qorti kif presjeduta fil-15 ta` Dicembru 2016 fil-kawza fl-ismijiet **Brian Tonna noe vs Luciano Rotondi et** kien affermat illi :-

> *Huwa car li d-disposizzjoni tapplika meta kumpannija tkun giet xolta, u tkun insolventi, u jkun jidher li persuna li kienet direttur kienet taf, jew kellha tkun taf, qabel ix-xoljiment tal-kumpannija, li ma kienx hemm prospett xieraq li l-kumpannija setghet tevita x-xoljiment minhabba l-insolvenza taghha.*
>
> *Fis-sentenza li tat fil-25 ta` Ottubru 2013 fil-kawza **"Electronic Products Limited vs Emanuel Micallef et"**, il-Qorti tal-Appell qalet :-*
>
> *… din il-Qorti tirrileva illi l-kuncett ta` kummerc bi frodi jinsab deskritt fl-Artikolu 315 tal-Kap. 386 tal-Ligijiet ta` Malta, cioe`, l-Att dwar il-Kumpaniji, waqt li l-kuncett ta` kummerc hazin huwa deskritt fl- Artikolu 316 tal-istess Kap. 386. Skont dawn l-artikoli, ikun hemm kummerc bi frodi meta jkun jirrizulta li xi negozju tal-kumpanija jkun tmexxa*

bil-hsieb ta` frodi ta` kredituri tal-kumpanija jew ta` kredituri ta` xi persuna ohra jew bil-ghan ta` frodi, filwaqt li jkun hemm kummerc hazin meta persuna li kienet direttur ta` kumpanija tkun agixxiet filwaqt li tkun taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha. Dawn l-artikoli tal-ligi Maltija gew mehuda kelma b`kelma mil-ligi Ingliza li tirregola x-xoljiment tal-kumpaniji (The Insolvency Act, 1986), u l-artikoli ekwivalenti fil-ligi Ingliza huma l-Artikolu 213 (`fraudulent trading`), u l-Artikolu 214 (`wrongful trading`).

Iz-zewg kuncetti ta` kummerc bi frodi u kummerc hazin jixxiebhu, bid-differenza tkun li f`kaz ta` kummerc bi frodi irid jirrizulta li kien hemm il-hsieb li jigu ppregjudikati l-kredituri tal-kumpanija. F`kaz li jirrizulta kummerc bi frodi jew hazin, il-ligi tkontempla it-tnehhija tar-responsabilita` limitata tad-diretturi, bir-responsabilita` personali taghhom tkun kompluta u ampia f`kaz li jirrizulta kummerc bi frodi."

L-azzjoni skont l-Art 316 tista` ssir biss b`rikors ta` l-istralcjarju."

Fil-kaz tal-lum, il-kawza skont l-Art 316 ma kenitx promossa mill-istralcjarju izda minn kreditur *potenzjali* ta` KDK.

Ghalhekk sejra tiddisponi mill-eccezzjoni billi tirrespingi l-eccezzjoni fejn tirrigwarda l-azzjoni skont l-Art 315 tal-Kap 386 pero` qeghda tilqa` l-eccezzjoni safejn l-azzjoni kienet istitwita abbazi tal-Art 316 tal-Kap 386.

IX. Mertu

1. L-Art 315 tal-Kap 386

Ghall-fini tal-procediment tal-lum, dak rilevanti huwa l-ewwel (1) subartikolu tal-Art 315.

Fit-test bl-Ingliz, **<u>l-Art 315(1)</u>** jaqra hekk :-

If in the course of the winding up of a company, whether by the court or voluntarily, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court on the application of the official receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.

Jidher illi l-mudell adottat ghat-tfassil tal-Art 315(1) kien l-Art 213 tal-Insolvency Act 1986 tal-Ingilterra.

L-**<u>Art 213 tal-Insolvency Act 1986</u>** jaqra hekk :-

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company`s assets as the court thinks proper.

Il-Qorti tinsisti li l-Art 213 tal-Insolvency Act 1986 kien *il-mudell*. Tghid fl-istess waqt illi l-legislatur taghna ma rriproduciex id-disposizzjoni Ingliza fl-intier taghha fil-ligi taghna.

<u>Principalment</u>, id-differenzi huma illi fil-kaz tal-ligi Ingliza d-dritt ta` azzjoni jispetta biss lill-istralcjarju, waqt li fil-kaz tal-ligi taghna, il-legislatur wessa` l-ghadd tal-persuni li jistghu jittentaw l-azzjoni civili.

Inoltre fil-kaz ta` sejbien ta` kummerc bi frodi, il-legislatur taghna wessa` l-effetti tas-sejbien, meta mqabbel mal-effett fil-ligi Ingliza.

Infatti waqt illi fil-kaz tal-Art 213 il-persuni responsabbli ghal kummerc bi frodi *are to be liable to make such contributions (if any) to the company`s assets as the court thinks proper* fil-kaz tal-Art 315(1), il-Qorti *may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid be personally responsible, without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.*

Dan premess, u qabel tghaddi ghall-konsiderazzjoni tal-gurisprudenza tal-Qrati taghna dwar l-Art 315(1), il-Qorti jidhrilha li jkun opportun jekk tirreferi ghall-mod kif id-dottrina u l-gurisprudenza Ingliza ttrattat l-effetti civili tal-kummerc bi frodi, safejn dan huwa rilevanti kemm ghall-istat tad-dritt taghna ghall-kaz in ezami.

2. Dottrina u Gurisprudenza fl-Ingilterra

Fil-ktieb **"Insolvency Law : Corporate and Personal"**, l-awturi **Andrew Keay u Peter Walton** (2003 : Pearson) ighidu fil-pag 533 et seq :-

Section 213(1) sets out the conduct that constitutes the action of fraudulent trading i.e. intent to defraud creditors or having a fraudulent purpose. Section 213(2) then states who is liable in civil action and for those who knowingly are parties to the carrying on of a busioness of a company with intent to defraud creditors. Such persons are liable to make such contributions to the company as the court thinks proper. Commonly the persons who will be the subject of such actions will be the company`s directors. But they are not the only ones who may, theoretically, be sued. In a recent decision Re BCCI Banque Arabe Internationale D`Investissment SA v. Morris [2002 – BCC – 407] *Neuberger J. held that section 213(2) was not limited to those who managed or controlled the company that had failed. The learned judge said that a company that was involved in and assisted and benefited from the business of the failed company and did no knowlingly could fall within section 213.*

… the notion of fraud is at the centre of section 213. The interpretation given to the meaning of `fraud` has benn of great importance. Themeaning of the word has been the main issue that courts have had to address over the years, for fraud is difficult to define at the best of times, as it has different meaning in different contexts. The meaning of `carrying on business with intent to defrad` a phrase found in section 213 has never been defined statutoriuly and certainly when one considers the case law, one can see that

there has not been a consistent approach adopted as far as the test that should be applied.

… the Court of Appeal in R v. Grantham [1984 – 2 WLR 815 ; 1984 – BCLC – 270] adopted a robust approach, either distinguishing or disapproving of earlier decisions and espousing the view that it was not necessary for the applicant to have established that there was no reasonable prospect of the creditors of the company ever receiving payment of what was owed to them for a claim to succeed. The court indicated that if persons have some hope or expectation that ultimately all debts would be paid, they may still be liable, if at the time of getting the credit they are aware that there is no reason for thinking that the debts will be able to be paid when they become due or shortly afterwards. Effectively the court was requiring some action that was close to recklessness. In Re L. Todd (Swanscombe) Ltd (1990 – BCC 125) the court said that there is a need for evidence of, in the words of Maugham J. "actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame" [Re Patrick and Lyon Ltd – 1933 – Ch 786 at 790].

We find in Bernasconi v. Nicholas Bennett & Co [2000 – BCC 921 ; 2000 – BPIR 8] an attempt at trying to reconcile things by saying that for fraudulent trading it was necessary to demonstrate that there was `intent to defraud or reckless indifference whether or not creditors were defrauded` but after making that comment Laddie J. stated that dishonesty was a critical element in the action …

The test for intent to defraud is subjective and not objective, in that the state of mind of the respondent at the time of the alleged fraudulent trading will be the deciding factor. But, having said that, objective considerations are not irrelevant. The circumstances surrounding alleged fraudulent trading must be taken into account and a respondent may have some difficulty extricating himself or herself from liability if the subjective view was not reasonable.

For a person to be liable there must be some positive action taken, so if an officer of, or adviser to, the company, such as the company secretary, neglects to inform the directors that the company is insolvent and what the consequences are in continuing to trade, that person is not liable criminally or civilly, as there is a need for some positive conduct for there to be fraud. A person is not liable merely because he or she nominated a person as a director who committed fraudulent trading, or because he or she had the opportunity of influencing the conduct of the affairs of the company. Company officers will not, necessarily, be liable for trading while the company is insolvent. In such a case there may well be no fraud involved against directors under the wrongful trading ground.

Carrying on business is critical to the action and this phrase is interpreted broadly by the courts …

The phrase `any fraudulent purpose` appears to provide a wide ambit for the provision …

and it has been said that it covers frauds committed against prospective creditors as well as current ones …

It has been suggested that those most likely to be protected by the phrase `any fraudulent purpose` are customers of the company.

Fil-ktieb **"<u>Company Law</u>"**, l-awturi **<u>Mayson, French & Ryan</u>** (26th Edition : 2009-2010 : OUP) ighidu fil-pag 690 et seq :-

… The phrases "intent to defraud" and "fraudulent purpose" used in IA 1986, s 213, imply that a person should be made responsible only for "actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame" in the carrying on of a business … that is only if there was conduct which was deliberately and actually dishonest according to the notions of ordinary decent business people …

Whether there has been intent to defraud is a question of fact to be determined in every case and a person`s intent usually has to be inferred from what the person did. The courts have said that some behaviour will usually give rise to an inference that there has been an intent to defraud. An example is inmducing people to give credit to a company knowing that they will not be paid when they expect to be paid … Similarly it can usually be inferred that there is intent to defraud if liability to "involuntary creditors" such as HM Revenue and Customs is incurred when there is no honest belief that the liability will be discharged when due, or shortly thereafter … However there is no rule that behaviour of a particular kind inevitably leads to a finding of intent of defraud. For example, there is no rule that continuing to trade while insolvent is fraudulent.

… incurring a contingent liability, such as a warranty, knowing that it might not be possible to meet that liability is not necessarily fraudulent … It is not necessarily fraudulent for a company to pay some of its creditors ahead of others, even if it is clear thatb this will mean that some creditors will not be paid in full …

The term "parties to the carrying on of the business" includes both the directors and so on who actively carried on the ccompany`s business for a fraudent purpose and persons such as financiers who encouraged the carryting on of the business for the fraudent purpose without carrying with the business themselves … It is essential to show that a person who actively

carried on the business did so with fraudulent intent before any other arty can be made liable …

What is required to prove that a defendant was a knowing party was examined by Patten J. in Re Bank of Credit and Commerce International SA (No 14) [2003] EWHC 1868 (Ch.) [2004] 2 BCLC 236 at 11 … His Lordship concluded that :

(a) There must have been knowledge that the business to which the defendant was a party was carried on in the fraudulent manner which has been proved.

(b) This must have been realized at the time the defendant was a party ; hindsight is not enough.

(c) A distinction must be drawn between a conscious appreciation of the true nature of the business being carried on and a failure, however, negligent, to appreciate that fraud was being perpetrated : the liability is for participating in fraud, not for negligently failing to recognize fraud.

(d) Knowledge includews so-called blind-eye knowledge, which exists when there is a deliberate decision to avoid obtaining confirmation of well-founded suspicions.

Fil-gurisprudenza anqas ricenti, il-Qrati Inglizi rrilevaw illi *fraudulent trading could be inferred when it results that at the moment in which the debt was incurred the directors were knowledgeable that there was no reasonable prospect of the creditor being paid.* ["**In Re William C Leitch Bros. Limited**" (1932) 2 Ch. 71).

In segwitu fil-kaz ta` "**In Re Patrick and Lyon Limited**" (1933) CJ 786 inghad illi rekwizit iehor ghall-azzjoni ta` kummerc bi frodi huwa illi l-attur ghandu jipprova *"actual dishonesty involving … real moral blame"*.

Ghalhekk inholqot linja ta` demarkazzjoni bejn "*actual dishonesty*" u "*mere blameworthiness*" fejn huwa biss fil-kaz ta` *actual dishonesty* li ghandha potenzjal li tissodisfa l-kriterju ta` "*dolo*" li huwa necessarju ghal dan it-tip ta` procediment.

Fil-kawza "**In Re London & Globe Finance Corporation Ltd** [1903] 1 Ch 728, frodi kien meqjus hekk :-

"*To deceive is to apprehend, to induce a man to believe that a thing is true when it is false and which the person practicing the deceit knows to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.*"

Fil-kawza ta` "**R vs Cox & Hidges**" (1982), il-Qorti ta` l-Appell Ingliza sostniet li :

"*The reported cases make it clear that in both the civil and the criminal jurisdiction the allegation of an intent to defraud contains the ingredient of dishonesty without which no jury would be entitled to convict a defendant of the offence charged, and no judge in the civil jurisdiction would be entitled to find for a person who fails to prove dishonesty on the part of him by whom he alleges he has been defrauded."*

3. Dottrina u gurisprudenza nostrana

Fir-rigward ta` l-intenzjoni specifika ta` *dolo,* issir riferenza ghas-sentenza li tat il-Qorti ta` l-Appell fil-31 ta` Marzu 1967 fil-kawza "**Rev. Sac. Don Francesco Zammit et vs Av. Dott. Anthony Farrugia et**" fejn inghad hekk :-

Illi ghal dik li hi definizzjoni ta` dolo ghadha tista` tigi utilment ripetuta anki llum dik ta` Labcone (fr. 1 :D.4.3) :- « dolum malum esse omnes camditatem fallaciam marbinationem ad circumverendum fallendum decipiendum alterum adhibitam ». Fi kliem iehor, id-dolo jikkonsisti fir-rieda hazina ta` wiehed mill-kontraenti li topera permezz ta` qerq (« raggiri ») biex tiddevja r-rieda tal-iehor billi tipprovaha zball (« errore »).

Infatti, ikkunsiderat min-naha tad- « deceptor », id-dolo hu raggir waqt li, ikkunsiderat min-naha tad-"deceptus", hu zball. Il-ligi li diga` tikkontempla li zball bhala vizzju tal-kunsens ghar-rasu, thares f`dan il-kaz aktar `il boghod lejn il-kawza tieghu u twassal ghall-annullamenti tal-kuntratt anki meta li zball ma jkunx guridikament sufficjenti biex wahdu jgib ghan-nullita`.

Illi l-gurisprudenza taghna bhal dik ta` legislazzjonijiet simili ghal-taghna irrilevat illi mhux kwalunkwe skaltrezza hi dolo u li fl-iskambi ekonomici (ghalkemm anke l-lealta` kommercjali ghandha l-esigenzi taghha) certu ftahir tal-haga offerta da parti tal-bejjiegh mhux illecitu fil-kamp guridiku, apparti naturalment il-kamp purament morali, sakemm ma jilhaqx dak il-grad ta` malvagita` li hu propju tad-dolo … Mid-diversi distinzjonijiet tad-dolo elaborati fid-dottrina wahda ghandha verament u partikolarment rilevanza in bazi ghal kodici taghna, jigifieri dik bejn id-dolo determinanti u

dak li ma jkunx tali. Jekk fir-ragjuni u l-logika iddistinzjoni hi cara, mhux dejjem tipprezenta ruha facli fl-applikazzjoni taghha.

Id-dottrina u l-gurisprudenza kontemporanei jidhru orjentati lejn apprezzament tad-dolo "in concreto" jigifieri b`referenza ghall"istato d`animo" tal-vittma specifika. Minn naha wahda l-gudikant irid jikkunsidera l-intenzjoni tal-vittma in relazzjoni ghar-ragjunijiet li ddeterminaw il-kunsens u minn naha l-ohra l-grad ta` inesperjenza jew inavvedutezza ta` l-istess vittma. (Marty et Renaut. Droit Civil, 1952, Tome II, 1er. Volume, p. 128)."

Tajjeb jinghad ukoll illi *"the condition in the provision that "any business of the company as been carried on with intent to defraud creditors" can be satisfied by a single transaction designed to defraud a single creditor. [**Re Gerald Cooper Chemicals Ltd** (1978) Ch 262, (1978) 2 All E.R. 49]* (ara Andrew Muscat : "**Principles of Maltese Company Law**")

Il-Qorti taghmel riferenza ghall-kawza fl-ismijiet "**Electronic Products Limited vs Emanuel Micallef et**".

Fl-ewwel istanza, din il-kawza kienet deciza fl-4 ta` Marzu 2010.

Fis-sentenza taghha, din il-Qorti diversament presjeduta qalet hekk :-

Il-Qorti kkunsidrat illi l-Kap. 386 tal-Ligijiet ta` Malta jipprovdi ghall-kummerc bi frodi da parti ta` diretturi ta` socjeta` fl-Art. 315 …]

Il-provvediment tal-ligi jimponi zewg kundizzjonijiet ghall-applikazzjoni tal-istess. L-ewwel minn dawn il-kundizzjonijiet hi li s-socjeta` trid tkun fi stadju ta` stralc; sitwazzjoni li fil-kaz li ghandha quddiemha, il-Qorti llum tezisti.

Imbaghad, sabiex tkun, tista` tasal ghall-konkluzjoni ta` kummerc bi frodi, il-Qorti trid tkun sodisfatta li jezistu provi ta` intenzjoni li jigu frodati kredituri.

F`dan il-kuntest, il-Professur Andrew Muscat fil-ktieb "Principles of Maltese Company Law" jghid :

"Another – and certainly more crucial – condition is that the applicant will have to discharge the burden of proving that the "business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose"

Professur Andrew Muscat ikompli :

"The test will however be satisfied where directors allow a company to incur credit when thay have no reason to think that the creditors will ever be paid. It can also be satisfied where the directors obtain credit at a time when they have no good reason to believe that funds will become available to pay the creditors when their debts become due or shortly thereafter"

Skond Charlesworth`s Company Law (Stevens 13th Edit. 1987) jinghad illi :

"In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter".

Sar appell minn din id-decizjoni.

Il-kawza kienet deciza fil-25 ta` Ottubru 2013.

Inter alia l-Qorti tal-Appell ghamlet dawn l-osservazzjonijiet :-

Trattat il-mertu, din il-Qorti tirrileva illi l-kuncett ta` kummerc bi frodi jinsab deskritt fl-Artikolu 315 tal-Kap. 386 tal-Ligijiet ta` Malta, cioe`, l-Att dwar il-Kumpaniji, waqt li l-kuncett ta` kummerc hazin huwa deskritt fl-Artikolu 316 tal-istess Kap. 386. Skont dawn l-artikoli, ikun hemm kummerc bi frodi meta jkun jirrizulta li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi ta` krediturі tal-kumpanija jew ta` krediturі ta` xi persuna ohra jew bil-ghan ta` frodi, filwaqt li jkun hemm kummerc hazin meta persuna li kienet direttur ta` kumpanija tkun agixxiet filwaqt li tkun taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghet tevita x-xoljiment minhabba l-insolvenza taghha. Dawn l-artikoli tal-ligi Maltija gew mehuda kelma b`kelma mil-ligi Ingliza li tirregola xxoljiment tal-kumpaniji (The Insolvency Act, 1986), u l-artikoli ekwivalenti fil-ligi Ingliza huma l-Artikolu 213 (`fraudulent trading`), u l-Artikolu 214 (`wrongful trading`).

Iz-zewg kuncetti ta` kummerc bi frodi u kummerc hazin jixxiebhu, bid-differenza tkun li f`kaz ta` kummerc bi frodi irid jirrizulta li kien hemm il-hsieb li jigu ppregjudikati l-krediturі tal-kumpanija. F`kaz li jirrizulta kummerc bi frodi jew hazin, il-ligi tkontempla it-tnehhija tar-responsabilita`limitata tad-diretturi, bir-responsabilita` personali taghhom tkun kompluta u ampia f`kaz li jirrizulta kummerc bi frodi.

Qabel l-introduzzjoni ta` dawn il-provedimenti, diretturi setghu dejjem jinstabu responsabbli ta` agir bi frodi, ghax il-principju ta` fraus omnia corrumpit ma kienx jippermetti li xi hadd jiehu vantagg mill-agir frawdolenti tieghu. L-awtur L.S. Sealy fil-ktieb "Cases and Materials in Company Law" (Butterworths, 7th Edit. 2004), jghid, f`pagna 616, li l-kuncett ta` `fraudulent trading` kif kien jigi enuncjat mill- Qrati inglizi jista` jigi adottat ghall-fini ta` interpretazzjoni tal-legislazzjoni l-gdida, "but the introduction of the concept of `wrongful trading`, which can lead to the same consequences with a much lighter burden of proof, will surely mean that s 213 will be very rarely invoked in the future".

Fil-kaz taghna, is-socjeta` attrici qed tinvoka l-kuncett ta` kummerc bi frodi.

Analizi taz-zewg kuncetti juru li, anke konsegwenza tal-izvilupp li sar fl-Ingilterra, id-differenza ta` bejnietom mhux dejjem kienet daqshekk netta. Kummerc bi frodi jehtieg, skont Sealy (ibid pagna 615) "actual dishonesty". L`istess jinghad fil-ktieb Farrar`s Company Law (Butterworths, 4th Edit. 2002) fejn jinghad, f`pagna 737, li "in cases of fraudulent trading, liabilityarises in respect of persons knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person, or for any fraudulent purpose. It should be noted therefore that the section is wider than simply defrauding creditors....The conduct must involve actual dishonesty, involving, according to current notions of fair trading among commercial man, real moral blame".

Din l-intenzjoni, pero`, tista` u ghandha tirrizulta mill-agir innifsu, u certu agir gie meqjus bhala kummerc bi frodi peress li, fih innifsu, juri hsieb li jigu frodati l-krediturі. Fil-fatt, fil-ktieb indikat, Farrar`s Company Law, jinghad li "this requirement can also be satisfied where the directors have no good reason to think funds will become available to pay the creditors when their debts become due or shortly thereafter". Dan il-principju huwa importanti ghall-fini ta` din il-kawza, ghax jekk jirrizulta li d-diretturi tal-kumpanija, fil-waqt li agixxew kif inhu allegat, kienu jafu li ma kienx hemm possibilita` li jsir il-hlas fiz-zmien miftiehem, allura dan l-agir jitqies bhala kummerc bi frodi.

L-istess veduta hija espressa fil-ktieb "Charlesworth`s Company Law" (Stevens, 13th Edit. 1987). Hu jaghti tifsira cara ta` kummerc bi frodi u, f`pagna 736, jghid :

"In general it may be properly inferred that there is an intent to defraud creditors if a company carries on business and incurs debts when, to the knowledge of the directors, there is no reasonable prospect of the company being able to pay them. It is not necessary to show that there is no prospect of

the creditors ever being paid. It is enough that there is no reason for thinking that they will be paid as the debts fall due or shortly thereafter".

L-awturi Mayson, French & Ryan fil-ktieb "Company Law" (Oxford, 22nd Edit. 2006), jikkonfermaw li "a person`s intent usually has to be inferred from what the person did", u li, allura, "it is almost inevitable that finding a defendant knowingly participated in dishonest activity implies that the defendant was dishonest". (pagna 773).

Bhala ezempju ta` kummerc bi frodi, dawn l-awturi isemmu sitwazzjoni fejn d-diretturi ikunu responsabbli ta` "inducing people to give credit to a company knowing that they will not be paid when they expect to be paid" (pagna 774).

Li d-disonesta` tista` u ghandha tigi desunta minn agir partikolari hu affermat ukoll minn ktieb ricenti ippubblikat mill-Professur Andrew Keay "Company Directors` Responsabilities to Creditors" (Cavendish, 2007), fejn, pagna 63, jghid hekk in konkluzzjoni tat-trattat tieghu fuq `fraudulent trading` :

"Whether, and if so when, Courts can infer intent to defraud with respect to to a respondent is not without some doubt, but it is submitted that Courts can do so either where respondents incur debts at a time when they know that there company will clearly not be able to make repayment, or where there is considerable risk in not being able to repay the creditor(s) when the debts are due or shortly thereafter"

...

F`artikolu fil-Modern Law Review, (Vol. 66 Settembru 2003, nru.5), bl-isem ta` "Directors` Duties to Creditors : Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors", il-gia` msemmi Professur Andrew Keay janalizza l-bzonn tad-diretturi li jipprotegu l-interessi tal-krediturí, u jiddefendi kull akkuza li saret kontra min jilmenta fuq dan id-dover tad-diretturi. Fil-konkluzjoni tieghu, hu jghid dan fuq il-htiega tad-dover :

"The article has accepted that efficiency is an important value to be considered in evaluating any law, but it has suggested that fairness is a value that also needs to be taken into account and that that value dictates that directors should consider creditor interests when their companies are in financial difficulty. This is based on the following: many creditors are in vulnerable positions when negotiating ex ante and are really unable to protect their interests; and creditors have legitimate expectations that their interests will be taken into account when the company is, or is potentially, in financial distress, as they have the residual claim over the company, and the company is trading with their money. An ex post adjustment, such as examining whether the directors acted in creditor nterests at a time when the company was in

financial difficulty, is fairer in that it eliminates the risks endemic in ex ante action, and it is based upon what actually occurred, not what everyone guesses might occur."

Analizi akkurata tal-Art 315 tal-Kap 386 saret ukoll fil-kors tal-kawza fl-ismijiet "**Dr Andrew Borg Cardona noe vs Victor Zammit et**" li kienet deciza mill-Qorti tal-Appell fl-14 ta` Mejju 2010.

Fid-decizjoni taghha l-Qorti tal-Appell qalet hekk :-

Skond dawn l-artikoli ghalhekk ikun hemm kummerc bi frodi jekk waqt l-istralc ta` kumpanija jkun jidher li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi ta` kredituri tal-kumpanija jew ta` kredituri ta` xi persuna ohrajew bil-ghan ta` frodi, waqt li jkun hemm kummerc hazin meta kumpanija tkun giet xolta u tkun insolventi u jkun jidher li persuna li kienet direttur tal-kumpanija kienet taf, jew kellha tkun taf qabel ix-xoljiment tal-kumpanija, li ma kienx hemm prospett xieraq li l-kumpanija setghat tevita x-xoljiment minhabba l-insolvenza taghha.

Dawn l-artikoli tal-Ligi Maltija gew mehuda mil-Ligi Ingliza. Ghalhekk il-kazijiet u awturi Inglizi huma ghajn importanti ta` interpretazzjonii ta` dawn iz-zewg artikoli.

*Fir-rigward ta` fraudulent trading, qabel il-kaz ta` **Grantham**, is-sentenzi kienu jghidu li "a proper inference of intent to defraud could be made if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment" (Re William C. Leitch Brothers Ltd (1932).*

F`kaz sussegwenti (Re Patrick & Lyon, Limited (1933) gie deciz li l-intenzjoni to defraud u fraudulent purpose jikkomprendi "actual dishonesty involving, according to the current notions of fair trading among commercial men, real moral blame".

Wara dawn il-kazijiet, fil-kaz ta` R. v. Grantham (1984) gew stabbiliti s-segwenti principji li :-

"A finding that a person was knowingly party to the business of a company having been carried on with intent to defraud creditors may be made if the following two conditions are satisfied :

(1) If that person realized at the time the debts were incurred that there was no good reason for thinking that funds would be available to pay the debt in question when it became due or shortly thereafter ; and

(2) There was actually dishonesty involving, according to current notions of fair trading among commercial men, real moral blame."

F`dak il-kaz il-Qorti Ingliza ghamlitha aktar facili biex wiehed jipprova l-intenzjoni frawdolenti billi "a proper inference of fraud could be made if there was no good reason to believe that payment would be made as aforesaid" u li "dishonesty could be inferred from a reckless disregard of the interests of creditors."

F`dan ir-rigward, wiehed irid izomm quddiem ghajnejh li, kif tghid l-awtrici Hanningan ("Company Law" (Butterworths, 2003) fol. 843) "proving that the company continued to trade while insolvent is not enough. The person bringing the action must prove that the respondent has carried on business with intent to defraud creditors or for any fraudulent purpose," u inoltre "For a person to be held knowingly party to carrying on a company`s business with intent to defraud creditors requires findings and inferences as to the facts known to that person at the relevant times. At those times the business might either have succeeded or failed."

Ghalhekk f`cirkostanzi simili l-ezami li trid taghmel il-Qorti huwa essenzjalment wiehed soggettiv izda fl-istess hin suggett ukoll ghal kunsiderazzjonijiet oggettivi u dan ghaliex ebda persuna m`hi ser tigi tghidlek bl-intenzjoni frawdolenti taghha, anzi taghmel kemm tista` biex izzomm kollox mistur. Huwa biss b`ezami akkurat ta` dawn iz-zewg elementi, fid-dawl tal-ligi, li l-Qorti tista` tasal ghal valutazzjoni u konkluzjoni korretta.

Il-ligi taghna, fl-Artikolu 315 tghid li jkun hemm kummerc bi frodi jekk waqt l-istralc ta` kumpanija jkun jidher li xi negozju tal-kumpanija jkun tmexxa bil-hsieb ta` frodi ta` krediturі tal-kumpanija jew ta` krediturі ta` xi persuna ohra jew bil-ghan ta` frodi, imma ma taghtix definizzjoni ta` xi tfisser il-kelma "frodi". Fis-sentenza G. Dalli v. M. Attard deciza fis-26 ta` Gunju 1961 minn din il-Qorti, saret referenza ghal Laurent (Vol XV para 253) fejn jinghad li "La frode assume come Proteo, mille ed una forma. E` una questione di fatto." (The term `fraud` has different meanings depending in which context it is used. (Farrar J. Fraudulent Trading 1980 pag 336 at 339).

Ghalhekk il-Qorti trid tiddeciedi minn kaz ghall-iehor jekk imgieba partikolari, attiva jew passiva tad-diretturi, fic-cirkostanzi tal-kaz li jkun, kienitx frawdolenti. Il-Qorti trid tezamina mhux biss jekk kienx hemm hsieb frawdolenti, imma wkoll jekk ittiehdux mizuri attwalment dizonesti biex tkun tista` tasal ghall-konkluzjoni li kien qed jigi ezercitat kummerc frawdolenti."

(ara wkoll is-sentenza ta` din il-Qorti tas-7 ta` April 2011 fil-kawza "**Albert Mizzi nomine vs Noel Agius et**" kif ukoll is-sentenza ta` din il-Qorti tal-31 ta` Ottubru 2017 fil-kawza **Galleria Management Limited vs Angele Calleja et)**

Rekwizit ghall-applikazzjoni ta` l-Art 315(1) huwa li jrid ikun hemm prova li n-negozju tal-kumpannija jkun gie kondott bil-hsieb ta` frodi tal-krediturі.

Tajjeb jinghad illi "*the condition in the provision that "any business of the company as been carried on with intent to defraud creditors" can be satisfied by a single transaction designed to defraud a single creditor.* [**Gerald Cooper Chemicals Ltd** (1978) Ch 262, (1978) 2 All E.R. 49 citata minn Andrew Muscat fil-Pag 258 tal-ktieb : "**Principles of Maltese Company Law**" (op. cit.].

Jekk jissodisfa l-grad tax-xjenza tal-frodi, kreditur jista` jagixxi kontra l-amministraturi ta` kumpannija b` mod personali, u ghalhekk jitlaq mill-principju tal-personalita` guridika distinta tas-socjeta`. Min-naha l-ohra, jekk ikun stabbilit illi l-konvenuti jew min minnhom ikun agixxew bi frodi, l-Art 315 tal-Kap 386 (bhal fil-kaz tal-Art 213 tal-Insolvency Act 1986 tal-Ingilterra) ma jinsistix fuq il-prova ta` *a pattern of behaviour*.

Jekk il-kreditur jipprova l-intenzjoni frawdolenti tal-konvenuti jew min minnhom, ikun bizzejjed li jipprova anke cirkostanza wahda biss fejn in-negozju jkun tmexxa b`mod frawdolenti u jinghata rimedju sabiex jikseb kumpens direttament minghandhom jew min minnhom fir-rigward tal-krediti li originarjament kienu nkorsi mill-kumpannija.

Chadwick L.J. fil-kawza **Morphitis vs Bernasconi** ([2003] EWCA 289) ighid :-

> *"For my part I would accept that a business may be found to have been carried on with intent to defraud creditors notwithstanding that only one creditor is shown to have been defrauded, and by a single transaction. The Cooper Chemicals case is an example of such case."*

Il-frazi "*business of the company*" ma tinkludix biss in-negozju ta` kuljum li ghalih tkun giet kostitwita l-kumpannija jew dak li ghalih tkun maghrufa, izda wkoll dak in-negozju ancillari jew relatat li jwassalha biex tilhaq il-milja tal-operat taghha.

Fi kliem l-awturi : **Arlidge & Parry on Fraud** (Sweet & Maxwell, Third Edition, 2007, Pag. 199) :

> *"A `business` includes activities necessary or incidental to the carrying on of the business. In Philppou (1989 – 5 BCC, 665) the company was a tour operator. It was an integral part of the company`s business to provide air travel for its customers, and it could not do so without a licence. It was held to be part of the company`s business to apply for the licence. Fraud in the application for the licence could therefore be fraudulent trading."*

L-istess fil-kawza **Re Sarflax** (1979, Ch 592, (1979) 1 All E R 529) Oliver J. spjega illi anke l-gbir, id-distribuzzjoni u t-trasferiment ta` assi ta` kumpannija jammontaw ghal "*business of the company*".

Ghalhekk it-trasferiment ta` proprjeta`, ix-xiri ta` assi, l-assenjazzjoni ta` krediti, in-nomina u l-ghazla ta` l-impjegati u ta` l-konsulenti li jsiru mill-kumpannija huma wkoll parti min-negozju taghha, anke ghall-fini tal-Art 315(1) tal-Kap 386.

Rekwizit iehor huwa li jkunu sehhew atti kommessi bil-hsieb ta` frodi.

L-Art 351(1) tal-Kap 386 johloq zewg tipi ta` kummerc bi frodi (a) kummerc bil-hsieb ta` frodi ta` krediturituri tal-kumpannija jew ta` krediturituri ta` xi persuna ohra ; u (b) bil-ghan ta` frodi generalment (ara dwar l-intenzjoni specifika ta` *dolo* : **Rev. Sac. Don Francesco Zammit et vs Av. Dott. Anthony Farrugia et** : op. cit.)

Il-Qorti taghmel ukoll riferenza ghall-kitba ta` **Cameron Scott** bl-isem **Fraudulent Trading Update** li deher fil-**Butterworths Journal of International Banking and Financial Law** ta` Lulju-Awissu 2013 :

> *However, things become less clear at the other end of the scale, when a company gets into financial difficulties. At what point does trying to keep the company going become fraudulent trading ?*
>
> *First, there must be dishonesty involved. Dishonesty is an essential ingredient of the offence (R v Cox*

(1982) 75 Cr App R 291). So making bad, even disastrous, business decisions will not be enough, of itself, to constitute fraudulent trading. Absent fraudulent intent or recklessness, directors who, in good faith, try but fail to trade out of a difficult financial position, will not be guilty of fraudulent trading. However, the carrying on of a company`s business and incurring debts at a time when the directors know that there is no reasonable prospect of the creditors being paid when the debt becomes due or shortly thereafter has been held to be fraudulent (R v Grantham [1984] 3 All ER 1669).

Carrying on the business does not necessarily mean continuing to trade. The collection of assets for the purpose of paying existing creditors falls within the definition. However, paying some creditors in preference to others is not, of itself, fraudulent (Re Sarflax Ltd [1979] Ch 592). Nor is keeping an existing creditor at bay with promises of future payment, even if those promises are misleading and cannot be honoured (Morphitis v Bernasconi [2003] Ch 552).

However, accepting payment or deposits for goods in circumstances where the directors know the goods cannot be supplied and the payments cannot be returned because the company is insolvent will constitute fraudulent trading, even if this involves only one customer (in re Gerald Cooper Chemicals [1978] Ch 262).

Secondly, the person must be "knowingly" a party to the carrying on of the business in a fraudulent manner. Knowledge includes "blind eye" knowledge (Bank of India v Morris).

Thirdly, he must also be shown to have played an active part in the carrying on of the business and exercising a controlling or management function. Mere knowledge of and concurrence in what was going on is not, of itself, enough (R v Grantham; Archbold Criminal Pleading Evidence and Practice 2013 edition 30.119). Thus, directors who were not actively involved in the management of that part of the company`s business, were not liable for fraudulent trading even though they had concerns

> *about certain transactions which the bank was entering into and expressed these concerns to the manager who was responsible and who gave misleading responses to the directors (Bank of India v Morris). Nor was a company secretary who was aware of the company`s financial position but failed to advise the directors to cease trading (Re Maidstone Building Provisions Ltd [1971] 1 WLR 1085).*

Jekk l-azzjoni tirnexxi, allura l-konvenuti jew min minnhom ikunu responsabbli personalment, minghajr l-ebda limitazzjoni ta` kwalsiasi natura ghal kull jew ghal xi dejn tal-kumpannija.

Andrew Muscat fil-**Principles of Maltese Company Law** (op. cit.) jittratta dwar "*a wrongdoer`s liability under the provision is a direct liability to the company`s creditors.*"

Ighid :-

> *"the wrongdoer effectively becomes personally and directly bound towards such creditors…By contrast, when an order is made under the fraudulent trading provision in English law, the wrongdoer will be ordered "to make contributions (if any) to the company`s assets as the court thinks proper. In its practical application, the provision in Maltese law would probably favour the creditors who have been the victims of the wrongdoing rather than the other creditors of the company – as a court is more likely to direct the wrongdoers to be personally liable vis a vis the victims*
>
> *…*
>
> *In English law, the whole body of creditors, rather than the defrauded creditors alone, stands to gain by an order under the fraudulent trading provision."*

Skont il-ligi Ingliza, minn kawza dwar *fraudulent trading,* jibbenefikaw il-krediturі kollha ghaliex huma jircievu l-ammont likwidat. Dan imbaghad jitqassam skont ma jsir waqt konkors ta` krediturі.

Fil-kaz tal-ligi taghna s-sitwazzjoni hija diversa.

Infatti l-Art 315(1) tal-Kap 386 jippermetti lill-qorti sabiex tordna rimedju partikolari direttament a favur ta` dak il-kreditur jew dawk il-krediturі li jirrizulta li jkunu gew defrawdati.

Fil-ligi taghna, il-Qorti mhijiex marbuta tordna kontribuzzjoni lejn il-gabra ta` l-assi tal-kumpannija sabiex jinqasmu bejn il-krediturі. Lanqas ma hemm distinzjoni fil-ligi taghna bejn krediturі privileggjati u dawk ordinarji. Ghalhekk kreditur ordinarju li jaghmel il-prova li kien defrawdat ghandu rimedju dirett u jista` jigi rizarcit direttament minn dawk li jirrizulta li jkunu ghamlu kummerc bi frodi.

(ara : PA : 7 ta` April 2011 : **Albert Mizzi noe vs Noel Agius et ;** u PA : 31 ta` Jannar 2017 : **Bowood Constructions Limited vs Greta Bugeja et)**

X. Rizultanzi

Dak li jrid jigi ppruvat ghas-sodisfazzjon ta` l-qorti huwa jekk l-imgieba attiva jew passiva ta` l-konvenuti jew min minnhom kenitx frawdolenti inkella le ghall-finijiet tal-Art 315(1) tal-Kap 386.

Il-Qorti sejra tqis il-posizzjoni ta` kull konvenut.

a) Danko Koncar

Skont l-attrici, kien perpetrat kummerc bi frodi minn Koncar peress li dan qieghed lil KDK fi stralc volontarju fil-31 ta` Dicembru 2013 meta allegatament kien jaf li s-socjeta` attrici kienet ser tistitwixxi proceduri kontra KDK sabiex tikseb titolu ezekuttiv ghal *credit note* li d-drittijiet fuqha kienu gew assenjati lilha.

Sar l-argument illi minkejja li KDK kienet giet formalment intimata sabiex thallas lis-socjeta` attrici l-ammont indikat fil-*credit note,* flimkien ma` l-imghaxijiet dekorsi, inkluz b` ittri legali tat-22 ta` Awissu 2013 u tal-14 ta` Ottubru 2013, KDK xorta wahda mexxiet ghal *voluntary winding up* billi

Koncar kien iddikjara li KDK ma kellhiex djun hlief ghal ftit mijiet ta` Ewro. Ghalhekk kellha bizzejjed assi mnejn thallas dawk id-djun.

Fil-Form B(2) esebita bhala Dok B mar-rikors guramentat (fol 18) Koncar ghamel din id-dikjarazzjoni :-

> "*I, Danko Koncar, being the director of KDK Limited hereby declare in accordance with section 268 of the Companies Act, 1995, that I have made a full inquiry into the affairs of the said company and have formed the opinion that the said company will be able to pay its debts in full within twelve months from the date of dissolution which shall take place on the 31st December 2013. A statement of the company`s assets and liabilities made up to the 31st December 2013 is being attached as part of this declaration."*

Is-socjeta` attrici tikkontendi li din kienet dikjarazzjoni falza intiza sabiex tiddefrawdaha u xxejjen id-drittijiet taghha naxxenti mill-*credit note.* Jinghad illi skont l-ahhar *accounts* ta` KDK, li tlestew qabel marret ghal *voluntary winding up* (fol 239 sa fol 268) ghas-sena li ghalqet fil-31 ta` Dicembru 2012, KDK kellha bizzejjed assi sabiex tkopri l-ammont pretiz mis-socjeta` attrici jew sabiex tinkorpora l-ammont fil-komputazzjoni tad-debiti ezistenti.

Is-socjeta` attrici tinsisti ukoll li prova ta` qerq tirrizulta mill-fatt li qabel marret ghal stralc, KDK kellha assi ta` madwar EUR 14 miljun (fol 239 sa 268), izda minkejja li kien konsapevoli tal-*credit note*, Koncar zvesta lil KDK mill-assi kollha qabel mar ghall-istralc.

Il-pretensjonijiet ta` Samchrome huma kontestati.

Din il-Qorti tirrileva illi mhuwiex il-kompitu taghha fil-kawza tal-lum illi tezamina l-validita` ommeno tal-*credit note* li abbazi taghha, Samchrome qeghda tippretendi li hija kreditrici ta` KDK.

Ezami ta` din ix-xorta qed isir b`azzjoni ad hoc u cioe` bil-kawza Rik. Gur. Nru. 55/2014 JZM.

Lanqas ma huwa kompitu ta` din il-Qorti fil-kawza tal-lum li tghaddi mill-gharbiel il-validita` ommeno tad-dikjarazzjoni ta` solvenza ta` Koncar.

Dak li huwa rilevanti ghall-fini tal-azzjoni tal-lum huwa li tistabilixxi jekk kenitx frawdolenti l-imgieba ta` Koncar.

Il-frodi trid tkun ippruvata sal-grad rikjest mil-ligi minn min jallegaha, fil-kaz tal-lum is-socjeta` attrici, u ma tista` qatt tkun prezunta.

Meta tqis l-assjem tal-provi, il-Qorti ma ssibx li kienet ippruvata l-frodi rikjesta mill-Art 315(1) tal-Kap 386.

Ir-ragunijiet huma dawn :-

Id-dikjarazzjoni ta` solvenza wahedha mhijiex bizzejjed biex tissoddisfa l-vot tal-Art 315(1).

Infatti l-fatt li kienet ipprezentata d-dikjarazzjoni ta` solvenza, flimkien ma` rendikont ta` l-assi u debiti ezistenti, ma jammontax ghal sitwazzjoni fejn ghandu jkun hemm *the lifting of the corporate veil.*

Ma jaghmel ebda sens – la fattwali u lanqas legali – illi bil-fatt wahdu – distakkat minn kull konsiderazzjoni ohra – li jkun hemm dikjarazzjoni ta` solvenza, direttur jew stralcjarji jkunu esposti ghal responsabilita` personali ghal hlas ta` dejn tal-kumpannija lejn terzi.

Dikjarazzjoni ta` solvenza li tkunx korraborata minn provi ta` qerq mhijiex bizzejjed biex taghti ragun lis-socjeta` attrici.

Il-Qorti ma sabitx fl-agir ta` Koncar dak il-komportament meqjus, metodiku u regolari xjentement intiz sabiex jaghmel hsara lis-socjeta` attrici.

Huwa minnu li fiz-zmien meta saret id-dikjarazzjoni rrizulta li Koncar kien jaf bil-pretensjoni ta` kreditu ta` s-socjeta` attrici.

Din il-Qorti qieset il-korrispondenza li kienet skambjata, partikolarment l-*email* ta` Kurt Maske lil Karl Landuydt ta` ArcelorMittal tal-10 ta` Settembru 2010 (fol 496 sa fol 497) u l-*email* tal-31 ta` Awissu 2010 li baghat Kurt Maske lil Koncar (fol 488) minn fejn jirrizulta li d-debitu kien rikonoxxut mid-diversi mittenti ta` dawn l-*emails* **ghalkemm ma kienx rikonoxxjut u ammess bhala dovut mill-istess Koncar.**

Hadet ukoll kont tal-fatt illi wara l-ittra li s-socjeta` attrici baghtet lil KDK fis-6 ta` Ottubru 2011 (fol 305 sa fol 306), KDK wiegbet fit-2 ta` Novembru 2011 (fol 462 sa 463) billi talbet spjegazzjoni dettaljata dwar il-kreditu pretiz mis-socjeta` rikorrenti u billi sostniet li KDK qatt ma rceviet talba ghal hlas minn ArcelorMittal.

Ikkunsidrat ukoll illi wara li b`ittra ohra tat-22 ta` Dicembru 2011 Samchrome baghtet l-informazzjoni (fol 458 sa fol 459), kizda KDK baqghet ma tatx twegiba.

Tat konsiderazzjoni ghall-*fax* mibghuta minn Karl Landuydt lil Koncar u ohra tas-6 ta` Dicembru 2011 (fol 464), kif ukoll l-ittri legali li baghat Bryan Cave fit-22 ta` Awissu 2013 (fol 19 sa fol 21) u fl-14 ta` Ottubru 2013 (fol 22 sa fol 23).

Madanakollu skont din il-korrispondenza jirrizulta li Koncar kien jaf bil-pretensjoni li kellha s-socjeta` attrici skont il-*credit note* (kif jaccetta huwa stess waqt id-deposizzjoni tieghu), Koncar ghamilha cara li huwa ma kienx konvint mill-pretensjoni, u kellu r-rizervi tieghu dwar il-validita` ta` l-*credit note* u dwar kif l-istess socjeta` attrici assumiet dik il-*credit note* favur taghha.

Koncar jikkontendi li skont il-*Business Sale Agreement* (fol 353 sa fol 380), KDK bhala l-venditrici ma kellhiex tibqa` responsabbli ghal kwalsiasi pretensjoni eventwali ta` s-socjeta` attrici bhala l-kumpratrici, wara d-dekors ta` sentejn mill-firma tal-kuntratt. Ghalhekk ladarba kienu ghaddew is-sentejn, Koncar deherlu li s-socjeta` rikorrenti ma kellhiex bazi fondata ghall-pretensjoni taghha.

Irrizulta wkoll li f`Awissu 2009, kien iffirmat *Cession and Assignment Agreement* (fol 399 sa fol 402 tal-process tal-kawza Rik. Gur. Nru. 55/2014 JZM), fejn KDK ittrasferiet in-negozju taghha b`effett mill-1 ta` Lulju 2009 lis-socjeta` attrici, flimkien ma` kull dejn li talvolta seta` kien dovut minn KDK. Koncar jikkontendi li l-kreditu pretiz minn Samchrome, u mertu tal-

credit note, ma kienx dovut minn KDK tant li lanqas deherlu li kien hemm ghalfejn jinkludi l-pretensjoni ta` Samchrome fid-dikjarazzjoni ta` solvenza.

Dan premess, din il-Qorti tqis illi Koncar *seta`* ghamel referenza ghall-fatt li kien hemm pretensjoni dwar dan l-allegat kreditu ta` s-socjeta` attrici fid-dikjarazzjoni ta` solvenza ta` KDK. Fl-istess waqt tghid illi din l-omissjoni ma tammontax ghall-prova ta` qerq li hija necessarja biex tirnexxi azzjoni ta` skont l-Art 315(1). Dan jinghad aktar u aktar tenut kont illi kien hemm is- *Cession and Assignment Agreement* li s-socjeta` attrici qatt ma attakkat il-validita` tieghu. Is-socjeta` attrici lanqas ma semmiet jew accennat ghal dan il-ftehim fir-rikors promotur jew allegat li l-firma ta` dak il-kuntratt kien jammonta ghall-evidenza ta` frodi da parti ta` Koncar. Ghazlet li tinjora l-ftehim li baqa` qatt ma dikjarat qatt bhala null jew invalid minn ebda awtorita` gudizzjarja.

Din il-Qorti lanqas ma tara li kien hemm qerq min-naha ta` Koncar meta dan ghamel id-dikjarazzjoni ftit zmien wara li kien gie intimat minn Samchrome biex KDK thallas. Koncar ha l-posizzjoni li KDK ma kellha thallas xejn lis-socjeta` attrici, u ghalhekk mar ghall-*voluntary winding up* tal-kumpannija. Ix-xoljiment u l-istralc ta` KDK kien intiz wara li KDK bieghet in-negozju lil Samchrome.

Din il-Qorti tghid illi Koncar il-kwistjoni ghalih bla ma nfortma lill-awditur David Marinelli. Infatti dan tal-ahhar xehed illi huwa sar jaf bil-kwistjoni wara li saret il-kawza Rik. Gur. Nru. 55/2014 JZM. Fil-fatt meta saru l-*audited accounts* ta` KDK ghall-2013 il-pretensjoni kienet inserita bhala *contingent liability* (ara Dok DM 1 a fol 235 sa fol 247 fil-process Rik. Gur. Nru. 55/2014 JZM).

Dan ifisser illi meta effettivament saret il-kawza, ghalkemm il-krreditu ma kienx ghadu kanonizzat, xorta tnizzel bhala *contingent liability* ta` KDK.

Din il-Qorti ma tqisx li kien hemm frodi ghaliex il-kreditu pretiz kien indikat bhala *contingent liability*.

Fil-Pag 134 sa 136 tar-Raba` Edizzjoni (2011) ta` **Principles of Corporate Insolvency Law** (Sweet & Maxwell) **Roy Goode** jittratta n-nozzjoni ta` *contingent liability* billi 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 …

Jirrizulta illi kien biss meta l-possibilita` li l-kreditu pretiz jigi kanonizzat bil-presentata tal-kawza illi qamet il-htiega li tali kreditu pretiz jitnizzel fid-dokumenti finanzjarji tal-kumpannija.

Fil-fehma tal-Qorti, ma kien hemm xejn irregolari li, tenut kont tac-cirkostanzi, il-pretensjoni ma tkunx indikata bhala *contingent liability* fl-istadju meta kienu ghadhom bdewx il-proceduri gudizzjarji halli l-kreditu jigi kanonizzat.

Dan huwa relevanti iktar u iktar meta jitqies it-trapass ta` zmien li Samchrome halliet ighaddi qabel hadet il-passi fil-qorti.

Sabiex tghid li kien hemm frodi da parti ta` Koncar is-socjeta` attrici tghid illi Koncar xjentement nehha l-assi kollha ta` KDK a detriment tas-socjeta` rikorrenti.

Fin-note 12 tal-*financial statements* ta` KDK ghas-sena 2012, tnizzel illi l-krediturі principali kollha ta` KDK kienu *related parties.*

Madanakollu fiz-zmien li saru dawk il-*financial statements,* is-socjeta` rikorrenti kienet ghadha ma hadet l-ebda passi biex tikkanonizza l-kreditu pretiz minnha.

Huwa relevanti li meta s-socjeta` rikorrenti hadet passi biex tipprova l-pretensjoni taghha, dik il-pretensjoni giet imnizzla bhala *contingent liability* fil-*financial statements* li saru wara.

Fiz-zmien meta effettivament saret id-dikjarazzjoni ta` solvenza, l-ebda procedure gudizzjarji ma kienu nizjati mis-socjeta` rikorrenti u ghalhekk, ghal darb` ohra, fiz-zmien li saret dik id-dikjarazzjoni, Koncar ma kien qed jaghmel l-ebda att frawdolenti minkejja li kien konsapevoli li jista` jkun li jittiehdu passi gudizzjarji fir-rigward ta` dan il-kreditu pretiz.

Din il-Qorti tqis relevanti hafna u li xxejjen kwalunkwe allegazzjoni ta` qerq perpetrat fl-agir ta` Danko Koncar il-fatt li wara li ttiehdu l-proceduri gudizzjarji mis-socjeta` rikorrenti sabiex dan il-kreditu jigi kanonizza li Koncar u KDK minkejja li kkontestaw l-azzjoni, xorta wahda inkludew il-pretensjoni ta` kreditu bhala *contingent liability*.

Inoltre huwa sinjifikattiv il-fatt li fil-mori tal-kawza Koncar ipprovda garanzija personali ghas-somma pretiza mis-socjeta` rikorrenti fil-kaz illi jkun hemm ezitu favorevoli gudizzjarju favur is-socjeta` rikorrenti (Dok RM1 a fol 385 sa 397 tal-process Rik. Gur. Nru. 501/2015 JZM).

Il-Qorti ssib konfort fil-konkluzjoni taghha billi taghmel riferenza ghad-decizjoni tad-19 ta` Frar 2013 moghti mill-Court of Appeal (Civil Division) Ingliza fil-kawza **Ricoh Europe Holdings BV (& Others) vs The Joint Liquidators of Danka Business Systems Plc** ([2013] EWCA Civ 92).

Saret analizi ta` din id-decizjoni minn **Daniel Moore** ta` CRS Charles Russell Speechlys LLP fil-kitba li dehret fl-internet intestata **UK : Treatment Of Contingent Claims In Voluntary Liquidation**.

Daniel Moore jikkummenta hekk :-

Facts

Danka Business Systems Plc ("Danka") was placed into members` voluntary liquidation ("MVL") on 19 February 2009.

Certain creditors of Danka ("the Creditors") applied to Court concerning the treatment of their contingent claims in the MVL.

Prior to the MVL, the Creditors purchased the issued share capital of a group of companies from Danka and others. As part of the sale and purchase agreement in relation to the shares, Danka agreed to indemnify the Creditors in respect of the tax liabilities of the acquired companies arising from periods prior to the completion of the share sale. The tax indemnities were given for a period of 7 years and Danka was placed into MVL before the 7 year period expired.
Within a month of the MVL, the liquidators gave notice under rule 4.182A of the Insolvency Rules 1986 ("IR86") setting a deadline for the submission of proofs of debt. The proof of debt lodged by the Creditors was comprised partly of crystallised liabilities and partly contingent tax liabilities. All of the tax liabilities arose from the tax indemnities provided by Danka.

The Creditors` claim

The Creditors` primary case was that the liquidators of Danka should not proceed to a final distribution of surplus cash to members without setting aside a ring-fenced fund to cover the Creditors` contingent tax claims in full (i.e. the claims arising under the 7 year tax indemnities).

The Creditors` position was that Danka had given a full tax indemnity and that the outcome of the

liquidation for the Creditors was that Danka was seeking to extricate itself from its contractual liabilities, whilst at the same time retaining the consideration paid by the Creditors for the issued share capital purchased.

Before reaching the Court of Appeal, the High Court held that once a contingent creditor had lodged a proof in the liquidation for its debts and they had been valued, the statutory regime did not provide for the liquidators to delay a distribution to members pending the crystallisation of contingent liabilities (i.e. providing a ring-fenced fund).

The Issues on Appeal

The Creditors` appeal focused on the following points :

The liquidators should provide for a reserve against future contingent liabilities arising in relation to the tax indemnities and that the value should be calculated on the maximum value of the tax indemnities prior to distributing any funds to members ; and

The liquidators should have based the valuation of the contingent liabilities on the worst case scenario basis (recognising the nature of the indemnity), in order to insure the Creditors against the relevant tax liabilities.

In dismissing the appeal, the Court of Appeal held that the liquidators were not obliged to set aside a fund to meet those contingent claims in full. Further, the contingent claims were to be dealt with in accordance with rule 4.86 IR86, which provides for liquidators to estimate the quantum of contingent claims. The Court of Appeal said the issue of fairness is not relevant to these proceedings and the question is how such claims are to be addressed within the statutory regime applicable to the liquidation (i.e. rule 4.86 IR86).

The Court of Appeal stated that any valuation of a contingent liability must be based on a genuine and fair assessment of the chances of the liability

occurring. The liquidators must make a current assessment of the risk of the contingent event occurring and the nature of an indemnity is relevant to the assessment of that outcome. The Court of Appeal stated that there is nothing in rule 4.86 that requires the liquidator to guarantee a 100% return on an indemnity by assuming a worst case scenario in favour of the Creditors.

Commentary

Although the Court of Appeal stated that the liquidators were not obliged to set aside a fund to meet contingent claims, the Court of Appeal did envisage a scenario whereby liquidators could justify postponing a distribution pending the crystallisation of a contingent liability. However, liquidators would need to be able to demonstrate the commercial advantage of taking such action (for example, obviating the need to expend time and resources on a valuation exercise).

The existence of contingent liabilities does not preclude a company being placed into MVL and is not a reason for a liquidator to legitimately delay a distribution to members.

Il-konkluzjoni tal-Court of Appeal kienet illi :

"*A liquidator does not have to wait for a contingent claim to crystalise before making a final distribution to members. Once a contingent claim has been admitted to proof as a debt under Rule 4.86(1) of the Insolvency Rules 1986 the liquidator is only obliged to value it, taking into account the likelihood of any contingency. Once he has done so then he can proceed to make a distribution of the company`s assets."*

Riferibbilment ghall-kaz tal-lum, in linea ma` din id-decizjoni, bl-inkluzjoni ta` l-kreditu pretiz bhala` *contingent liability* flimkien ma` l-garanzija li tkopri l-pretenzjoni fl-eventwalita` li l-pretensjoni tkun tigi kanonizzata mill-Qorti, ma hemm xejn irregolari li l-istralc jitkompla.

Fil-fehma ta` l-Qorti, is-sitwazzjoni kienet tkun ferm diversa li kieku d-dikjarazzjoni ta` solvenza saret wara li s-socjeta attrici bdiet proceduri ghall-kanonizzazzjoni tal-kreditu.

Fil-kawza citata mis-socjeta` rikorrenti in sostenn ta` l-argumenti taghha, ossija **Marex Financial Limited vs Carlos Sevilleja Garcia** [2017, EWHC 918 (Comm)], inghad illi kien delitt (*tort)* li wiehed jivvjola d-drittijiet ta` terzi kif kanonizzati b` sentenza.

F`dak il-kaz, l-agir abbuziv ta` *asset-stripping* fiz-zewg kumpanniji sabiex l-assi spiccaw ghand Sevilleja sehh wara li bdiet tigi cirkolata sentenza dwar kanonizzazzjoni tal-kreditu pretiz.

Fil-kaz tal-lum, meta saret id-dikjarazzjoni ta` solvenza u tnehhew l-assi ta` KDK kien fi zmien li meta s-socjeta` attrici kienet ghadha ma haditx passi gudizzjarji biex tikkanonizza l-pretensjoni taghha sabiex tiehu sentenza favur taghha.

Fil-fehma ta` l-Qorti, ma tirrizultax il-prova ta` qerq skont l-Art 315 tal-Kap 386.

b) Dr Renald Micallef (i) fl-isem tieghu propju u (ii) bhala stralcjarju ta` KDK

Dwar Dr Micallef, is-socjeta` attrici tilmenta minn ksur tal-Art 312 tal-Kap 386.

Samchrome tilmenta dwar Dr Micallef illi :-

i. Naqas milli jiehu passi sabiex jassigura ruhu x` gara mill-assi li kienu ta` KDK Limited u ma ha l-ebda passi biex jinvestiga kif KSK spiccat minghajr assi.

ii. Naqas li jindaga jekk id-*declaration of solvency* kinitx wahda veritiera jew le. Inghad mis-socjeta` attrici illi Dr Micallef iffirma jew kontrofirma id-dikjarazzjoni ta` solvenza li kienet saret minn Koncar, ghad illi kellu l-obbligu straordinarju li jassigura l-awtenticita` tad- dikjarazzjoni.

iii. Naqas li jaghmel indagni indipendenti dwar it-tmexxija ta` KDK u dwar il-validita` tal-credit note relattiva. Inghad illi Dr Micallef qieghed lilu nnifsud go konflitt ta` interess.

iv. Il-garanzija ta` Koncar wara li saret il-kawza odjerna hija ammissjoni ta` n-nuqqas ta` diligenza ta` Dr Micallef.

v. Meta jissottometti dokumenti lill-awtoritajiet, ghandu jaghmel dan in *bona fide*. Skont is-socjeta` attrici mhgux hekk sar fil-kaz tal-lum ghaliex meta kienet registrata d-*declaration of solvency*, l-istralcjarju kien konsapevoli tal-pretensjoni da parti ta` s-socjeta` attrici.

vi. Naqas li jsejjah laqgha tal-kredituri skont l-Art 272 tal-Kap 386 minkejja li skont is-socjeta` attrici kellu l-obbligu li jsejjah din il-laqgha minnufih jekk huwa kien tal-fehma li l-kumpannija ma kenitx ser tkun tista` thallas lill-kredituri taghha fiz-zmien indikat fid-dikjarazzjoni ta` solvenza.

vii. Naqas jzomm *proper books of account and administrative records*.

viii. Naqas milli jzomm laqgha generali kull sena.

ix. Issostni s-socjeta` attrici li minkejja r-rizenja ta` Donatella Bondin u minkejja li kien konsapevoli tad-dikjarazzjoni "falza" li ghamel Koncar, Dr Micallef accetta xorta wahda li jkun stralcjarju, u ma ghamel assolutament xejn biex jindaga dwar id-debitu allegatament dovut minn KDK lil Samchrome.

x. Minkejja li kien ilu mahtur stralcjarju ghal diversi snin, Dr Micallef qatt ma kkomunika mas-socjeta` rikorrenti, ghad illi kien jaf li kienet qeghda tivvanta kreditu kontra KDK.

xi. Skont Samchrome, dawn in-nuqqasijiet kollha da parti ta` Dr Micallef u ta` l-istralcjarju ta` qablu jammontaw ukoll ghal kummerc bi frodi skont l-Art 315 tal-Kap 386.

Premessi l-ilmenti, il-Qorti taghmel referenza ghall-**Art 312 tal-Kap 386** li jaqra hekk :-

1) Id-disposizzjonijiet ta` dan l-artikolu ghandhom japplikaw jekk waqt l-istralc ta` kumpannija sew jekk bil-qorti jew volontarjament ikun jidher li persuna li –

(a) tkun jew kienet ufficjal tal-kumpannija ;

(b) kienet tagixxi bhala stralcjarju tal-kumpannija ; jew

(c) ma tkunx persuna li taqa` taht il-paragrafi (a) u (b), ikollha jew kellha x`taqsam ma`, jew hadet sehem fil-promozzjoni, formazzjoni jew direzzjoni tal-kumpannija,

tkun uzat hazin jew zammet jew saret responsabbli ghal, xi flus jew proprjetà ohra tal-kumpannija jew kienet hatja ta` xi ezercizzju hazin tal-awtorità taghha jew ta` ksur ta` dmir dwar il-kumpannija.

(2) Il-qorti tista`, fuq rikors tar-ricevitur ufficjali jew tal-istralcjarju, jew ta` xi kreditur jew kontributorju, tezamina l-imgieba ta` xi persuna li taqa` that is-subartikolu (1) u ggieghel –
(a) thallas lura, taghti lura jew taghti kont tal-flus jew proprjetà jew xi parti minnha, b`imghax b`dik ir-rata li l-qorti jidhrilha gust ; jew

(b) li tikkontribwixxi dik is-somma lill-attiv tal-kumpannija bhala kumpens dwar l-ezercizzju hazin jew ksur ta` dmir kif il-qorti jidhrilha gust.

Fit-test bl-Ingliz ighid :-

(1) The provisions of this article shall apply if in the course of the winding up of a company, whether by the court or voluntarily, it appears that a person who -

(a) is or has been an officer of the company ;

(b) has acted as liquidator of the company ; or

(c) not being a person falling within paragraphs (a) and (b), is or has been concerned, or has taken part in the promotion, formation or management of the company,

has misapplied or retained or become accountable for, any money or other property of the company, or been guilty of any improper performance or breach of duty in relation to the company.

(2) The court may, on the application of the official receiver or the liquidator, or of any creditor or contributory, examine the conduct of any person referred to in subarticle (1) and may compel him -

(a) to repay, restore or account for the money or property or any part of it, with interest at such rate as the court thinks fit ; or

(b) to contribute such sum to the company`s assets by way of compensation in respect of the improper performance or breach of duty as the court thinks fit.

Jidher illi l-mudell ghall-Art 312 tal-Kap 386 kien l-Art 212 tal-Insolvency Act 1986 tal-Ingilterra li jghid :-

(1) This section applies if in the course of the winding up of a company, it appears that a person who –

(a) is or has been an officer of the company ;

(b) has acted as liquidator of the company ; or

(c) not being a person falling within paragraphs (a) or (b), is or has been concerned, or has taken part in the promotion, formation or management of the company,
has misapplied or retained or become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of any fiduciary ot other duty in relation to the company.

(2) The reference in subsection (1) to any misfeasance or breach of any fiduciary or other duty

in relation to the company includes, in the case of a person who has acted as a liquidator of the company any misfeasance or breach of any fiduciary ot other duty in connection with the carrying out of his functions as liquidator of the company.

(3) The court may on the application of the official receiver or the liquidator or of any creditor or contributory, examine into the conduct of the person falling within subsection (1) and compel him:-

(a) to repay, restore, or account for the money or property or any part of it, with interest at such rate as the court thinks just or

(b) to contribute such sum to the company`s assets by way of compensation in respect of misfeasance or breach of fiduciary or other duty as the court thinks just.

Fil-Pag.1413 ta` **Blackstone`s Civil Practice 2013 : The Commentary** (OUP) jinghad :-

"The Insolvency Act 1986 s 212 and Schedule B1 para 75 provide that some claims by a company which is being wound up may be pursued by an application in the winding up proceedings. Application under these provisions are known as misfeasance proceedings and they are an optional alternative to an ordinary claim. There are limits on which defendants and which causes of action may be pursued in misfeasance proceedings.

By S 212(1) the only person whom misfeasance proceedings may be taken under S 212 are persons who :

(a) are or have been officers of the company ;
or

(b) have acted as a liquidator or administrative receiver of the company

or

(c) are or have been concerned or have taken part in the promotion, formation or management of the company.

The only causes of action which may be pursued in s 212 misfeasance proceedings are those who allege that the defendant has misapplied or retained,or become accountable for, any money or other property of the company or has been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. (s 212(1)). Where the defendant has acted as a liquidator of the company, this includes any misfeasance or breach of duty in connection with the carrying on of his or her functions as liquidator. (S. 212(2)).

Fl-istess sens, jesprimi ruhu **Lee Roach** fil-Pag 659 ta` **Card & James` Business Law** (Fourth Edition - OUP) :-

Section 212 of the Insolvency Act 1986 applies where during the course of a winding up, it appears that an officer of the company, a liquidator, an administrative receiver, or other person involved in the promotion, formation or management of the company has misapplied or retained or become accountable for, any money or other property of the company or has been guilty of any misfeasance (meaning improper or unlawful performance of a lawful act) or breach of any fiduciary or other duty in relation to the company. In such a case, the court may examine the conduct of the above persons, but only upon an application from the liquidator, the official receiver, a creditor or a contributory.

Fil-Pag 490 ta` **Company Law** (Ninth Edition – 2016 - OUP) **Alan Dignam & John Lowry** jikkummentaw dwar id-decizjoni Ingliza **Re Centralcast Engineering Ltd** (2000 – BCC 727) :-

"The Inland Revenue brought proceedings against the liquidator under s 212. The liquidator had allowed the company to continue to trade for 27 months after it had gone into compulsory liquidation. At the time of the liquidation the shortfall for creditors was £25000. Following the trading, the liquidator sold the company`s assets to

its directors for £ 6,500. As a result of the trading, £ 73,230 was left owing to the Inland Revenue. It was held that the liquidator`s misfeasance had two elements: first, allowing the company to continue to trade without the sanction of the court or liquidation committee; second allowing, the company to continue to trade when it was apparent that she should have realized its assets soon after her appointment. The liquidator was therefore liable to compensate the company for its losses of £ 120,826 incurred during the trading period."

Fil-Kummentarju : **Breach of duty claims against the Liquidator** : Mejju 2008 : kienet trattata d-decizjoni tal-Privy Council tal-2008 fil-kaz ta` "**Hague & Anor v Nam Tai Electronics**".

Jinghad :-

" … the Privy Council ruled that a creditor`s claim of breach of duty against the liquidator was misconceived because liquidators do not owe a duty of care to individual creditors. In the light of this decision, this briefing considers the other remedies that are open to individual creditors who wish to allege breach of duty by a liquidator. The conclusion is that individual creditors can bring misfeasance proceedings against the liquidator under s. 212 of the Insolvency Act 1986 (the 1986 Act) if the company has suffered loss as a result of a breach of duty by the liquidator. As such, proceedings are brought by the creditor on behalf of the company and any damages will be distributed among all creditors in the usual way according to the statutory priority of payments. Any junior creditor contemplating a claim under s212 is therefore advised to first secure agreement for an increased share of the proceeds of the claim from other creditors."

Kaz ricenti fl-Ingilterra li ttratta procediment skont l-Art 212 tal-Insolvency Act 1986 kien "**Top Brands Limited & Ors vs Sharma & Ors**" li kien deciz fl-4 ta` Awissu 2014 mill-High Court of Justice - Chancery Division – Birmingham.

Fil-kaz *the applicants, creditors of a company in creditors` voluntary liquidation (the "Company"), applied for an order pursuant to Section 212 of the Insolvency Act 1986 that, in breach of fiduciary duty, the former liquidator of the Company (the "Liquidator") negligently authorised a series of payments of Company monies amounting to £548,074.56 (the "Monies") to a third party.*

Il-pretensjoni kienet li l-kondotta tal-istralcjarju precedenti *had fallen well short of the standard to be expected and she had paid away substantial sums which would otherwise be available to creditors.*

Kien ritenut illi :-

> *The Liquidator had failed to properly consider the Company and its affairs before negligently authorising payment of the Monies: there was a clear lack of understanding and competence in her handling of the liquidation. The Court considered, obiter, that the Liquidator had shown such conscious disregard for the assets in her charge on a material scale that payment of the Monies amounted to breach of fiduciary duty.*
>
> *It was no defence that the Liquidator had obtained and acted on legal advice from an experienced insolvency lawyer in relation to the Monies, as the advice had been given in the context of incorrect and inadequate instructions.*

Dan premess, tajjeb jinghad illi fil-kaz tad-dritt taghna l-azzjoni skont l-Art 312 tal-Kap 386 hija procediment ta` gravita`. Tant hu hekk illi l-*margin note* tad-disposizzjoni fit-test Ingliz tal-ligi taghna tghid : *Remedy against <u>Delinquent</u> directors, liquidators etc.* (sottolinear ta` din il-qorti).

Ghalhekk sabiex tirnexxi azzjoni skont l-Art 312 tal-Kap 386, irid jigi ppruvat li kien hemm agir illegali tant gravi li jkun sewwa li jinghataw ir-rimedji li tahseb il-ligi ghalihom.

Mill-kazi Inglizi citati aktar kmieni, jidher illi l-Qrati Inglizi laqghu talbiet skont l-Art 212 ta` l-Insolvency Act 1986 biss fil-kaz ta` cirkostanzi palesement gravi.

Dwar *misfeasance proceedings in a winding up*, **Charlesworth & Cain** fil-ktieb **Company Law** (Twelfth Edition : 1983 : Stevens & Sons) ighidu :-

> *" … if in a winding up it appears that any promoter, past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or became liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the Official Receiver, the liquidator or any creditor or contributory, examine the conduct of such promoter, director, manager, liquidator or officer, and order him to repay or restore the money or property with interest, or to contribute to the assets of the company such sum as the court thinks just. ….*
>
> *Instances of misfeasance are the improper receipt by a director of his qualification shares from a promoter (which occurred in **Eden vs Ridsdales Railway Lamp Co Ltd** (1889) 23 Q B D 368 CA); or of an ex gratia payment in lieu of pension on the eve of liquidation (**Gibson`s Executor vs Gibson** 1978, SC 197 OH); the certifying by an auditor of erroneous accounts whereby dividends were paid out of capital (See **Re Kingston Cotton Mill Co** (No 2) 1896 2 Ch 279 C.A.), the receipt by the secretary of a secret profit from a person who sold a mine to the company (**Mc Kay`s case** 1875 2 Ch. D. 1 C. A), the acts of a director in procuring the company to buy shares in another company from himself at an over-value and making an unsecured loan to enable him and his co-directors to pay calls (**Re VGM Holdings Limited** 1942 Ch 235 CA) and failure by a liquidator to make proper provision for the equal ranking and payment of all preferential claims (**Lord Advocate v Liquidators of Purvis Industries Limited** 1958 SC 338 OH).*

Dwar l-istess procedura fil-**Pennington`s Company Law** (Eighth Edition – OUP – 2001) jinghad illi :-

"In the winding up of a company an application may be made to the court … for an order against any present or past officer of the company, any person who has acted as liquidator, administrator or administrative receiver of the company or any other person who has been concerned or taken part in the promotion, formation or management of the company and who has misapplied or retained or become accountable for any money or property of the company or has been guilty of any misfeasance or breach of any fiduciary or ther duty in relation to the company; the order of the court sought against the respondent will be either that he shall repay money for which he is accountable, or that he shall account for the value of property which he has misapplied or retained together in either case with interest at such rte as the court orders, or that he shall restore money or property which he has misapplied or retained or any part of it, or that he shall contribute such sum to the company`s assets by way of compensation for the misfeasance or breach of duty for which he is responsible as the court thinks just.

…

The only orders which the court may make in misfeasance proceedings are for the payment or return of money or property to the company or for the payment of compensation or damages for losses wrongfully inflicted on it. Consequently, the court cannot rescind a contract, or order payment of a debt owed to the company in misfeasance proceedings. Nor can the court order a director to make a payment to the company, unless he has misappropriated its property or has caused it loss by failing to perform a duty which he owed to it. Consequently, misfeasance proceedings cannot be brought against a director who failed to acquire his share qualificaton fixed by the articles, because he is under no obligation imposed by law to take them from the company and he may obtain them from other existing shareholders. On the other hand, such proceedings may be brought to recover a secret profit made by a director, even though the company has suffered no loss, because the profit belongs to the company and the director is accountable for it.

...

If a respondent in misfeasance proceedings is found to be guilty of a breach of duty to the company which has caused it loss, the court has a discretion in fixing the amount of compensation which he is ordered to pay to the company and it need not require him to make good the whole of the resulting loss."

Skont l-Art 312 tal-Kap 386, azzjoni ta` din xorta tista` titressaq waqt l-istralc ta` kumpannija, b`rikors tar-ricevitur ufficjali jew tal-istralcjarju jew ta` xi kreditur jew kontributorju.

Kif diga` nghad, fil-kaz tal-lum, is-socjeta` attrici tikkontendi li hija kreditur mhux kanonizzat ta` KDK.

Kif diga` nghad ukoll, ghalkemm ghadha mhijiex kreditur kanonizzat, Samchrome kellha *locus standi* li tmexxi bl-azzjoni odjerna.

Kif kien rilevat ukoll aktar kmieni, ghalkemm KDK kienet xjolta, il-procedura ta` stralc ghadha mhijiex konkluza. Propju ghalhekk setghet issir il-kawza tal-lum.

Tenut kont tal-premess, dak li trid tara din il-Qorti huwa jekk l-azzjoni skont l-Art 312(1) tal-Kap 386 tistax issir kontra stralcjarju li ghadu fil-kariga.

Fid-decizjoni li tat fil-31 ta` Ottubru 2016 fil-kawza fl-ismijiet "**Mizzi Associated Enterprises Limited vs Kenneth Dimech pro et noe et**" din il-Qorti kif presjeduta ghamlet dawn l-osservazzjonijiet :-

Fil-kaz tal-lum jirrizulta li l-konvenut Dimech ghadu l-istralcjarju ta` Triangle.

Il-konvenuti Agius igibu l-argument illi l-azzjoni kontra taghhom ma tistax tirnexxi stante li l-Art 312(1) tal-Kap 386 (supra) japplika fil-konfront ta` persuna li tkun agixxiet bhala stralcjarju ta`

kumpannija mhux kontra persuna li ghadha stralcjarju.

Minn analizi kemm tat-test Malti kif ukoll tat-test Ingliz tad-disposizzjoni de qua, jidher illi fil-kaz ta` persuni ohra li huma elenkati fil-paragrafi (a) jew (c) isir uzu kemm il-prezent (present tense) kif ukoll il-passat (past tense) biex b`hekk jiddenota persuna li kienet jew li ghadha fil-kariga), it-terminologija adoperata fil-kaz tal-paragrafu (b) hija l-passat (past tense), ossija persuna li "kienet tagixxi bhala stralcjarju".

Fil-kaz tal-ligi Ingliza, Stephen Downie mid-ditta Francis Wilks & Jones f`kitba li ghamel fil-11 ta` Dicembru 2015 bit-titolu : ***Can a Creditor sue a Liquidator or an Administrator for Misfeasance ?*** *: ighid –*

It is possible under the legislation for a creditor to take such action against a Liquidator or an Administrator where s/he considers that they have made decisions on behalf of the Company which have caused losses and for which is can be shown that such decisions caused them personal benefit or acted to misapply Company assets.

However, such proceedings are rare and can only occur subject to the following circumstances :

1. The Liquidator or Administrator has vacated their office ;

and

2. The Court has granted leave to bring such an application.

The purpose of the above is to ensure that creditors` interests overall are not interfered with by a perhaps irate creditor.

Accordingly there will be a two stage process where, once an Administrator or Liquidator has vacated their office, a creditor could issue an application for Misfeasance but firstly the Claimant would have to prove to the Court that they had a reasonable

prospect of success, rather than the application just being issued without good reason.

Din il-Qorti hija tal-fehma illi l-azzjoni, stante r-restrizzjonijiet taghha, setghet tittiehed kontra persuna li kienet tagixxi bhala stralcjarju izda mhux kontra persuna li ghadha fil-kariga ta` stralcjarju. Ghalhekk l-azzjoni ma setghetx tigi ezercitata fir-rigward kontra l-konvenut Dimech proprio et nomine in vista tal-parametri tal-Art 312 tal-Kap 386."

Din il-Qorti tibqa` tal-fehma illi azzjoni skont l-Art 312 tal-Kap 386 tista` tittiehed *biss* kontra persuna li *kienet* tokkupa l-kariga ta` stralcjarju u *mhux* kontra persuna li *tkun ghadha* stralcjarju.

Il-Qorti tirrimarka li l-azzjoni skont l-Art 312 tal-Kap 386 hija procediment ta` gravita`.

Billi s-socjeta` rikorrenti tirreferi ghal disposizzjonijiet ohra fosthom l-Art 272 et seq tal-Kap 386, il-Qorti sejra xorta wahda tkompli tqis l-ilmenti taghha kontra Dr Micallef.

Samchrome tallega li Dr Micallef ezegwixxa hazin l-awtorita` tieghu u kiser id-dmirijiet tieghu lejn KDK.

Il-Qorti qeghda tigbor l-ilmenti ta` Samchrome kif gej :-

i) <u>billi ma nvestigax</u>

Is-socjeta` rikorrenti tghid illi Dr Micallef naqas li jinvestiga (i) x` gara mill-assi ta` KDK ; (ii) jekk id-*declaration of solvency* kinitx veritiera jew le ; u (iii) l-validita` tal-*credit note*..

Din il-Qorti qieset ix-xiehda ta` Dr Micallef.

Ikkunsidrat li Dr Micallef ha l-passi necessarji meta sar jaf li saret il-kawza mis-socjeta` attrici ghall-kanonizzazzjoni tal-kreditu pretiz minnha,

tant illi nizzel il-pretensjoni bhala *contingent liability* fid-dokumenti finanzjarji ta` KDK u cioe` fl-*annual report and financial statements* tas-sena li ghalqet 31 ta` Dicembru 2013 (fol 432 sa fol 444). Ladarba kien hemm din il-pendenza fil-qorti, ma kienx hemm lok li Dr Micallef jinvestiga l-validita` ommeno ta` l-pretenzjoni u tal-*credit note* billi l-materja kienet issa quddiem il-qrati.

Inoltre, in linea ma` gurisprudenza Ingliza, stralcjarju mhuwiex prekluz milli jkompli bid-distribuzzjoni ta` l-assi fi stralc minkejja li jkun hemm *contingency liabilities*. Fil-kaz tal-lum, irrizulta li meta l-istralcjarju sar jaf bil-possibilita` li jkun hemm kreditu kanonizzat favur is-socjeta` rikorrenti, talab li jinghata garanzija finanzjarja minn Koncar, li kien id-direttur u l-beneficjarju ta` KDK, sabiex ikun hemm fondi bizzejjed sabiex jil-kaz ta` esitu gudizzjarju favur Samchrome tal-kawza dwar il-kreditu, dak il-passiv ikun jista` jithallas. Meta tqis ukoll il-gurisprudenza Ingliza, il-Qorti tqis illi lanqas ma kien hemm bzonn li l-istralcjarju jahseb ghal fondi ohra ladarba rrizulta li l-garanzija moghtija kienet tajba u sufficjenti, kif taccetta Samchrome stess.

Din il-Qorti ma taqbilx li l-fatt li Dr Micallef talab garanzija wara li kienet istitwita l-kawza kontra tieghu personalment tekwivali ghal ammissjoni ta` nuqqas ta` diligenza da parti tieghu. Ghal din il-Qorti, it-talba u l-kisba tal-garanzija kienet prova ta` kif fil-konkret l-istralcjarju kien haseb ghall-*contingent liability* lejn is-socjeta` attrici fil-pendenza tal-*money claim*.

ii) <u>billi ffirmar jew ikkontrofirma d-dikjarazzjoni ta` solvenza li ghamel Koncar u pprezentaha lill-awtoritajiet</u>

Din il-Qorti tqis li d-dikjarazzjoni ma gietx iffirmata jew kontrofirmata mill-istralcjarju. Dan jirrizulta minn ezami ta` l-istess dikjarazzjoni esebita a fol 111 tal-process.

Hija wkoll nfondata l-allegazzjoni li Dr Micallef issottometta dokumentazzjoni lill-awtoritajiet meta kien jaf li d-dikjarazzjoni ma kinitx veritiera. Mill-verifiki li ghamel Dr Micallef meta saret tali dikjarazzjoni ma kienx ghad hemm pendenzi gudizzjarji kontra KDK. Meta Samchrome mexxiet fil-qorti bil-*money claim* dan il-fatt kien rifless minn Dr Micallef fil-kotba finanzjarji tal-kumpannija.

Ma ssib ebda *mala fede* da parti ta` l-istralcjarju.

iii) <u>billi ma zammx *proper books of account and administrative records*</u>

Mhuwiex kontestat li KDK ma baqghetx topera. L-istralcjarju ha hsieb li jsiru l-*audits* kif ukoll l-istralc.

L-ilment tar-rikorrenti mhux ippruvat.

iv) <u>billi accetta l-inkarigu</u>

Skont l-attrici, wara r-rizenja ta` Donatella Bondin, Dr Micallef ma kienx messu accetta li jiehu postha ladarba Koncar kien iddikjara l-falz.

Din il-Qorti ma tara xejn x` ticcensura fil-fatt li Dr Micallef accetta l-inkarigu. Lanqas ma tara *mala fede* da parti tieghu fl-accettazzjoni tal-inkarigu.

v) <u>billi ma sejjahx laqgha tal-kredituri u laqgha generali annwali tal-kumpannija annwali</u>

Il-Qorti taghmel referenza ghad-decizjoni li tat fil-31 ta` Ottubru 2016 fil-kawza fl-ismijiet **<u>Mizzi Associated Enterprises Limited vs Kenneth Dimech pro et noe et</u>** (op. cit.) fejn wara li ccitat l-Art 272, 273 u 274 tal-Kap 386 qalet hekk :-

> *Il-Qorti taghmel riferenza ghad-decizjoni li tat fis-7 ta` Lulju 2011 fil-kawza "**<u>Lay Lay Co Limited vs Peter Paul Darmanin et</u>**" fejn irrimarkat illi specjalment meta l-istralc ikun volontarju, il-kawtela, l-attenzjoni u l-vigilanza ghandhom ikunu filmassimu taghhom. Leggerenza l-aktar meta tkun evidenti jew grossolana tammonta ghal agir illegali.*
>
> *Il-Qorti kompliet tfisser hekk :-*
>
> *Meta kumpannija tigi xjolta volontarjament, l-ewwel iridu jithallsu d-debiti jew jigu onorati l-obbligazzjonijiet taghha. U meta dan isir, li*

jibqa`jinqasam bejn l-azzjonisti skond l-ishma rispettivi taghhom. Kumpannija ma tistax taghlaq il-kotba taghha meta jkun hemm debiti jew obbligazzjonijiet pendenti versu terzi. Multo magis meta l-krediti jew l-obbligazzjonijiet ta` terzi ma jieqfux fil-livell ta` semplici pretensjoni izda jkunu qabdu l-iter gudizzjarju kif gara fil-kaz tal-lum.

Fid-decizjoni li tat fis-7 ta` Lulju 2015 fl-atti tal-istralc tal-kumpannija ***Il-Palma Agricultural Supplies Co Ltd*** *(C-10770) din il-Qorti qalet :-*

Wara li kumpannija tigi xjolta, ma tibqax tezercita l-kummerc. Sakemm kumpannija tigi stralcjata, tkun trid issir ir-realizzazzjoni ta` l-assi u l-hlas tal-passivita`, segwita minn distribuzzjoni bejn l-azzjonisti ta` dak li jkun baqa`, jekk ikun il-kaz. Socjeta` tigi estinta jew meta tigi konkluza d-distribuzzjoni, jew meta ma jkun hemm xejn x`jitqassam bejn l-azzjonisti. F`dan il-kuntest, il-funzjoni tal-stralcjarju ta` kumpannija dixxjolta huwa li inter alia jikkustodixxi l-patrimonju tas-socjeta`, jinvestiga l-pretizi kollha avvanzati kontra s-socjeta` mill-krediturи taghha, jiddeciedi l-kwistjonijiet ta` gradwazzjoni li jinqalghu, jaghmel pjan ta` distribuzzjoni ta` l-attiv, u jahseb ghat-tqassim meta l-pjan ikun approvat.

...
Fil-kaz odjern, dak li rrizulta mill-provi prodotti huwa li l-istralcjarju baqa` ma ghamel xejn b`inizjattiva tieghu izda dejjem stenna minghand l-ahwa Agius jew l-avukati taghhom. Jidher li dan kien interpella lill-ahwa Agius biex tinstab soluzzjoni u anke saru laqghat ma` l-istess diretturi u avukati taghhom.

Il-Qorti tirrimarka li stralcjarju ma jistax joqghod passiv u ma jiehux azzjoni konkreta u decisiva biex jaghlaq il-pendenzi kollha halli l-kumpannija tkun tista` tigi finalment stralcjata, u wara titnehha mir-Registru tal-Kumpanniji.

Madanakollu l-fatt li l-istralcjarju naqas li jiehu azzjoni effettiva biex isib soluzzjoni ghall-kwistjoni mal-attrici Mizzi bhala kreditur izda rrassenja ruhu li joqghod fuq li kienu jaghmlu jew ma

jaghmlux il-konvenuti Agius jew ir-rapprezentanti taghhom ma jammontax ghac-cirkostanzi li huma censurati bl-applikazzjoni tal-Art 312 tal-Kap 386.

Tajjeb jinghad illi Mizzi taghmel riferenza ghall-Art 272, 273 u 274 tal-Kap 386, li huma disposizzjonijiet ighidu x`jigri jekk ma jkunux osservati jew sodisfatti. Is-sanzjoni prevista hija l-hlas ta` penali lir-Registratur tal-Kumpaniji. Din il-Qorti tghid illi, anke li kieku kellha tiddetermina li dawk id-disposizzjonijiet kienu vvjolati mill-istralcjarju, xorta tali vjolazzjoni ma tammontax ghall-agir li huwa punit bl-applikazzjoni ta` l-Art 312 tal-Kap 386.

Il-Qorti tqis illi fil-kaz tal-lum Dr Micallef sejjah laqgha ma` Koncar li kien direttur, kif ukoll laqgha ma` l-awditur ta` KDK. Mill-ezitu ta` dawn il-laqghat, huwa ma hassx il-htiega li jipprocedi oltre billi jikkomunika direttament ma` s-socjeta` attrici jew li jsejjah laqgha tal-krediturи u/jew laqgha generali annwali. Ghazel li joqghod lura jistenna l-ezitu tal-pendenza gudizzjarja. Din l-imgieba ma tammontax ghal cirkostanzi li huma censurati mill-Art 312 tal-Kap 386.

Tajjeb li jkompli jinghad illi l-Art 272 tal-Kap 386 jistipola dak li ghandu jigri jekk id-disposizzjoni ma tkunx osservata jew sodisfatta. Is-sanzjoni prevista hija l-hlas ta` penali lir-Registratur tal-Kumpaniji. Ghalhekk anke li kieku kellha tiddetermina li dik id-disposizzjoni giet vjolata mill-istralcjarju, il-vjolazzjoni ma tammontax ghall-agir li huwa punit bl-applikazzjoni ta` l-Art 312 tal-Kap 386 jew bil-mod kif qed jintalab li jigi punit l-istralcjarju, ossija billi jinstab responsabbli personalment u billi jitnehha minn stralcjarju.

Meqjusa l-ilmenti kollha tar-rikorrenti, ma ssib ebda mgieba frawdolenti da parti ta` Dr Micallef skont l-Art 315 tal-Kap 386.

Ma ssibx li kien ippruvat kif trid il-ligi fil-konfront ta` Dr Micallef xi agir jew nuqqas da parti tieghu li bih ikun espost ghal responsabbilita` personali jew ghal ordni ta` tnehhija minn stralcjarju.

c) <u>Donatella Bondin (i) fl-isem taghha propju u (ii) bhala stralcjarja antecedenti ta` KDK</u>

Skont l-attrici, hadet azzjoni kontra Donatella Bondin peress li din irrizenjat wara li kienet rinfaccjata bid-dikjarazzjoni falza ta` Koncar meta ddikjara li ma kien jezisti l-ebda dejn kontra KDK meta fil-fatt Samchrome kellha kreditu kontra KDK.

Jinghad mir-rikorrenti illi malli ndunat li d-dikjarazzjoni ma kinitx veritiera, Donatella Bondin kien messha tindaga hi stess halli tara kif setghet tipprotegi l-interessi tal-kumpannija u tal-krediturі.

Inghad ukoll li Bondin iffirmat jew kontrofirmat id-dikjarazzjoni ta` solvenza li ghamel Koncar minkejja li kellha l-obbligu straordinarju li tassigura l-awtenticita` ta` d-dikjarazzjoni.

Il-Qorti taghmel referenza ghal dak li diga` sostniet f`dan ir-rigward meta ttrattat il-posizzjoni ta` Dr Micallef. Dak li qalet qabel ighodd ghall-kaz ta` Donatella Bondin.

Il-fatt illi Donatella Bondin tat ir-rizenja taghha minn stralcjarju ma tikkostitwixxix prova ta` frodi da parti taghha.

Ma hemm xejn straordinarju jew irregolari illi stralcjarja li tkun ghadha kif giet appuntata, taghti r-rizenja taghha, tenut kont tal-obbligi ta` kull xorta li l-hatra ggorr maghha. Bondin stqarret bla tlaqlieq illi kif indunat li kienet saret il-kawza ghall-kanonizzazzjoni tal-kreditu ma riditx tkompli. Fil-bidu li accettat l-inkariku b`mizata baxxa hasbet li kollox kien ser ikun ward u zahar, mentri bil-kawza, ghaliha dak kien ser ifisser inkonvenjent. U ghaliha dak ma kienx accettabbli. Ir-raguni tar-rizenja ta` Bondin mhijiex kontradetta.

Tenut kont tal-fatti u cirkostanzi ta` dan il-kaz, il-Qorti ma tqisx li l-fatt li Donatella Bondin qaghdet fuq id-dikjarazzjoni ta` solvenza kien jammonta ghal frode da parti taghha. Hija rat ir-rendikont ta` l-assi u tal-passiv tal-kumpannija u kkunsidrat dik id-dikjarazzjoni ta` solvenza *in bona fide*. Inoltre damet biss fl-inkariku ghal ftit gimghat biss. Ghaz-zmien li damet stralcjarju ma tressqux provi dwar atti jew ommissjonijiet da parti taghha li huma mtebba` b`intenzjoni frawdolenti.

<u>Decide</u>

Ghar-ragunijiet kollha premessi, il-Qorti qeghda taqta` u tiddeciedi din il-kawza billi :

Tichad l-ewwel (1), it-tieni (2), ir-raba` (4), il-hames (5), is-sitt (6) u s-seba` (7) eccezzjonijiet preliminari.

Tilqa` t-tielet (3) eccezzjoni preliminari.

Tilqa` l-eccezzjonijiet fil-mertu.

Tichad it-talbiet kollha.

Tordna li l-ispejjez tad-decizjoni taghha tat-30 ta` April 2015 ghandhom jithallsu mill-konvenut Dottor Renald Micallef f`ismu propju.

Tordna li ghar-rigward tal-ispejjez kollha l-ohra, kull parti ghandha tbati l-ispejjez taghha, u dan bl-applikazzjnoni tal-Art 223(3) tal-Kap 12 tal-Ligijiet ta` Malta.

Onor. Joseph Zammit McKeon
Imhallef

Amanda Cassar
Deputat Registratur